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Regulating Criminal Unaccountability

From Concepts to Defensible Legal Standards

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Abstract

Modern criminal law is based on the premise that individuals possess the ability to take the responsibility to act in permissible ways and in accordance with the norms communicated by the penal code, and thus can be held accountable for their acts. There are, however, exceptions when this presumption is overridden. Young age and immaturity, severe mental disorder and disabilities, and consciousness disorders are across jurisdictions considered candidates to impair these capacities. The key legal doctrine of criminal insanity here concerns a defendant's lack of capacity for responsible action and provides an excuse from criminal responsibility. In current criminal justice systems, this doctrine has been linked to concepts about mental disorder. The specific legal criteria vary across countries, but the reasons and justifications for this variation have not been sufficiently discussed. This article takes as a starting point that the law must transform concepts into concrete and applicable legal rules and standards. Thus, any system's definitions and judgements about who is criminally unaccountable, must rely on proxies such as 'mental disorder'. From this starting point, this paper discusses the transformation from concepts to possible alternatives of legal rules, with special attention to mental disorder as an excuse from criminal accountability and punishment.

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1. Introduction

The criteria for criminal accountability, and who should be considered as unaccountable, has been subject to much discussion.[1] The core idea of criminal law is that individuals possess the ability to act in responsible ways and in accordance with legal norms, and thus can be held accountable when they do not. However, criminal law does not typically provide any definition of what criminal accountability amounts to. Instead, criminal law in most countries provides criteria that define which mental conditions *negate* the defendant's criminal accountability. The legal doctrine of criminal insanity here identifies those defendants who, because of their mental state at the time of the act, should not be accountable for their actions. This doctrine has in contemporary criminal justice systems been associated with psychiatric notions of mental disorders. Previous studies indicate that a significant number of those acquitted by reason of insanity are diagnosed with schizophrenia[2] and that psychosis symptoms such as delusions[3] serve as evidence for insanity.

At the same time, it is well known that there are different legal accounts of criminal insanity. Different countries have different regulative approaches to unaccountability and mental disorders, and the need for legal reform is often emphasised in this context.[4] There has, however, been little discussion about the premises that underlie different regulative approaches and the relative strength of these premises. This paper will therefore address how criminal law's concepts about criminal accountability can be transformed into legal rules. The discussion will be centered on the relevance of mental disorder[5] for criminal unaccountability, or criminal insanity, and is based on the premise that the criminal law should recognise its relevance. Moreover, the discussion is carried out from a civil law, Nordic perspective that emphasises codified rules about criminal accountability.

The paper will be structured as follows. First, I will clarify my view on criminal accountability as the key concept of criminal law. I will here also discuss what criminal accountability presupposes, in terms of individual functional abilities or capacities. Thereafter, I will turn to criminal unaccountability as the exception and discuss why mental disorder is relevant in this regard. On this background, I will address the question of how these concepts can be transformed into rules.

1 See for an overview, Adjorlolo, Chan and DeLisi (2019), Gröning *et al.* (2022).

2 *E.g.* Crocker *et al.* (2015), Tsimploulis *et al.* (2018).

3 *E.g.* Skeie and Rasmussen (2015), Bloch (2022).

4 See for a comparative interview, *e.g* Mackay and Brookbanks (2022).

5 Unless otherwise specified, 'mental disorder' is used in the paper as a general label for pathologic mental phenomena at different levels of abstraction (e.g., disorders, syndromes, symptoms, and mental functional impairments).

2. Criminal accountability

2.1 An idea about human acts and culpability

As a normative and socially constructed system, I propose that criminal law must be conceptually understood as centered around the principle of fault. In essence, this principle states that only those who could and should have acted differently should be blamed and held criminally responsible, and then only in proportion to the blameworthiness of the act. It thus tells us that criminal law is focused on *acts and culpability*, which also finds support in the rule of law.[6]

The principle of fault holds significance for several situations in the criminal justice system, such as at the level of legislation, by accentuating the blameworthiness of actions as an argument for criminalisation and at the judiciary level, through requirements of proportionality between the severity of the crime and the harshness of the punishment. It is of particular significance for the general criteria for liability that concern the perpetrator's mental status and attitude towards their own act, *i.e.*, the conditions on *mens rea* (intent, negligence, and recklessness) and accountability.[7]

Through the principle of fault, criminal accountability is ultimately preconditioned on the individual's moral responsibility for their act. Criminal law stands out, compared to most other legal frameworks, due to its particular ethical and moral approach. Those acts that are defined as violations are normally considered to be either immoral or at least ethically problematic acts that for this reason are deserving of blame and punishment. *Accountability* here concerns the individual's ability to understand and respect the norms and reasons that inform the penal code, and in turn to use these insights as a guide for action. In this sense, accountability is a matter of the individual's ability to take the responsibility to act in accordance with the norms communicated by the penal code. That individuals normally possess this capacity is a core premise for modern criminal law. It justifies why individuals can be held accountable for their acts.

2.2 The core capacities for freedom and reason

The criminal law's precondition of individuals as responsible agents is informed by a range of assumptions that ultimately boil down to a metaphysical – but, I argue, also a constitutional – rationale stating that humans have the capacity for freedom and reason in action.[8] This rationale is at the core of criminal law's conceptualisation of the person.[9] It is reinforced in the concept of criminal (un)accountability and as

6 Cf. Gröning (2015) p. 177.

7 Gröning, Husabø and Jacobsen (2023) pp. 48-49.

8 Gröning, Husabø and Jacobsen (2023) pp. 40-43.

9 For various ideas about this conceptualisation see Lernestedt and Matravers (2022).

such reflected in paradigmatic Anglo-American standards for criminal insanity that emphasise the inability to understand and/or control one's actions.[10]

I consider criminal law's preconditions of freedom and reason to be closely interconnected. Accountability presupposes freedom in the fundamental sense that the individual is in control of their body and can act in accordance with their intentions. An accountable individual is necessarily someone who has acted voluntarily in this sense. That the individual was able to intentionally control their acts is, however, not particular to the concept of accountability, but rather is a general precondition for criminal law's conceptualisation of acts. To be considered accountable, the ability to make one's acts correspond to one's intentions is not sufficient. The ability to assess these intentions' appropriateness for informing acts must also be in place. Criminal accountability is above all a matter of the individual's ability to understand and assess their acts in a given situation.[11] It is, in other words, practical rationality that is primarily relevant to criminal accountability, and specifically capacities for recognising and responding to reasons for actions provided by legal norms.[12]

2.3 Further concretisation of the mental preconditions for accountability

A certain degree of concretisation of the mental preconditions for accountability is necessary to distinguish those functional impairments that may be relevant to *un*accountability. Such a concretisation of a metaphysical rationale is fundamental to criminal law. Criminal law's concept of freedom of action is for instance concretised in the requirement that a perpetrator may not be held accountable for reflex movements or spasms. As a starting point for such a concretisation of accountability, it is helpful to emphasise some general and closely connected mental (psychological and biological) characteristics. There may well be differences of opinion about how to best understand their meaning. However, I propose that these basic features can, within the normative context of criminal law, be understood as preconditions for the individual's accountability.

First, it is a fundamental premise that the individual must have the ability to correctly perceive and apprehend reality. This means that the individual may, through their sensory system, perceive the world in the way that people normally do, or are expected to do, within the boundaries of a given interhuman frame of reference.[13] This means, simply put, to see, hear or smell those things that (in other people's view) exist, and to not experience unreal impressions of visions, voices, or smells. Experiencing the world relies on the activation of certain signals in the nervous system from different physical stimuli

10 See for the standards in English law, *e.g.* Mackay (2022).

11 Cf. Morse (2011) pp. 892-896.

12 See for different accounts, Morse (2000), Brink (2013), Duff (2005).

13 Cf. a phenomenological concept of psychosis, Parnas (2008), Parnas and Norgaard (2010).

affecting the sensory system, such as lights or sounds.[14] On a basic level, the ability to perceive the world correctly is contingent upon a functioning sensory system, which the majority of people have. But all impairments are not of significance here. Those who are blind or deaf will have deficiencies that mean that they, compared to those who do not have these disabilities, lack access to an (equally) comprehensive perception of the world. But these persons are not exposed to an incorrect perception of the world; rather, their perception of reality is different – incomplete, as seen from the perspective of one who possesses these abilities. Such persons will normally have insight about their disabilities and understand how to compensate for this deficiency.

Our more competent perception of the world is furthermore based on how we (collectively) organise, identify and interpret information from our sensory systems and on how we reflect on what is real. The perception of reality is thus not considered to be based on pure reactions to sensory impressions, but also on how our conceptual apparatus, experiences and expectations affect our understanding of the world. Our perception of reality, in other words, requires complex abilities to systematise or organise different sensory impressions through concepts and language. Through such abilities, the individual may provide sensory expressions with meaning by apprehending them or 'putting them into words and categories'. In this way, we 'see' *people*, *trees* and *dogs* – and understand their place in the world – rather than simply processing the world through unintelligible sensory impressions as infants do before they develop language. This ability can be said to encompass an understanding of society's moral norms, in terms of the interhuman notions and concepts that express assessments about the nature of the world – such as about what is 'good', 'evil', 'right' and 'wrong'. Criminal law recognises a cumulative development of this ability in the individual and expects it to be fully developed upon reaching the age of (legal) majority.

It is, however, not sufficient for criminal accountability merely to be able to apprehend reality correctly. A further requirement is the ability to apply one's understanding of reality to make correct choices about *how one should act*.[15] The capacity for reason that preconditions accountability may more precisely be considered to require the individual to have been able to identify and create a basis – a motive – informing action. The capacity for reason can thus be considered to presuppose a certain capacity for consistent thinking by comparing, and above all *generalising*, various basic premises. This furthermore includes the ability to construct and apply general moral rules, such as that is it not only wrong for people to be cruel to me, it is wrong to be cruel to people in general. It makes sense to say that such an ability enables the

14 *E.g.* Andreassen *et al.* (2018) pp. 97-118.

15 For senses of practical rationality, see Moore (1984) and Moore (2010).

individual to correct their own immoral impulses and denounce immoral acts. At least, it would, for most people in most countries, be difficult to provide a convincing legal justification for *e.g.*, killing another human for personal gain.

These different dispositions are obviously closely interconnected, and it seems to be hard to distinguish between them as factors that impact the individual's accountability. The ability to assess whether sensory impressions are correct or not is contingent upon the application of certain basic concepts. Likewise, the ability to perform correct assessments seems to impact the remaining abilities. Finally, it seems that a complex interplay between these capacities constitutes the individual's ability to establish, apprehend, assess and prioritise between their motives for acting – and thus be considered accountable for the acts that result from this interplay. Although these dispositions are closely interconnected, a distinction between them may however be used to point to those impairments that should result in unaccountability.[16]

3. Criminal unaccountability

3.1 Starting points

Criminal law starts, as explained above, from the premise that individuals normally possess the capacities needed for accountability. Blame and punishment in criminal law can then take place when defendants *have not used* (or have under-utilised) these capacities, because they are understood to have them. This legal starting point also seems to be fundamental for human self-understanding and for human interaction. It is commonplace to assume that people who have acted unreasonably, stupidly or in a blameworthy manner could have acted differently. A typical response to immoral behaviour will normally not be to assume that the culprit is unaccountable, but to point to a lack of tenability in their motive and to blame them for the act. In this way, one appeals to the person as a participant in a moral community.[17] To be considered accountable is thus to a great extent a precondition for being acknowledged as an autonomous citizen, equal to anyone else before the law, *i.e.*, a precondition for the realisation of fundamental constitutional values.

It is therefore a serious issue to state that a defendant is unaccountable, because doing so carries with it a disenfranchisement of that person. It is a claim that the standard model of criminal law, the rationale of the free and reasonable individual, is an inadequate model of explanation for this particular perpetrator.[18] Here, the basic

16 While there are many philosophical accounts that can illuminate criminal accountability, the theory of criminal law has recognised the inherent challenge in concretising the capacities that constitute accountability. Perhaps for this reason, one has in criminal law tended rather to discuss and concretise conditions that provide the grounds for establishing *un*accountability.

17 Cf. Duff (2010), Duff (2011).

18 Eastman (1992) p. 162.

assumption of criminal law – the individual's accountability – can be argued to fill a function of protecting citizens against such disenfranchisement. At the same time, it follows from basic constitutional values that it is deeply unfair to blame and punish those who cannot be understood to be criminally accountable for their acts.[19]

It is, in this regard, essential that unaccountability as a criminal law construct is always concerned with *an act*, *i.e.*, with some aspect of an agent's behaviour that constitutes one or several violations of the criminal law. Criminal unaccountability must also be present *at the time of the commission of this act.* As the negation of criminal responsibility, unaccountability should obtain only when such a violation cannot be attributed to the individual as a rational, responsible agent.

From this proposed fault-based perspective, conditions that imply criminal unaccountability are most typically considered *excuses* in the doctrinal structure of the criminal law. An acquittal by reason of criminal insanity requires, for instance, first that someone has committed a criminalised act, *i.e.*, has acted in violation of the criminal law (*actus reus*) with the prescribed *mens rea*; and second, that there is no justification that should make the act lawful (such as necessity). The perpetrator is, in other words, exempted from culpability although their act is wrongful.[20] Starting out from the principle of fault, it here makes sense to say that 'it wasn't their fault, they couldn't help it'. It is important to note that it is the *non-blameworthy* unaccountability that has the effect of excusing, such as unaccountability caused by mental disorder. By contrast, many jurisdictions punish individuals who act under self-induced conditions of unaccountability, such as related to intoxication.[21]

Another question in this context is whether one might talk about different *degrees* of accountability, *i.e.*, that a perpetrator may have reduced or diminished accountability without being (completely) unaccountable. Based on the principle of fault, one must consider that the perpetrator's reduced accountability means that they may not be held completely to blame for the violation. Another matter is how this should be dealt with in the dichotomic system of the criminal law, where an acquittal typically requires 'complete unaccountability' for a specified act. Different countries have different solutions to this matter.[22] Many civil law countries, such as Norway, allow for considerations of reduced accountability only in sentencing.[23]

Moreover, constructing unaccountability as an excuse has implications for how the unaccountability doctrines are demarcated from *mens rea*. Although unaccountability may involve a lack of *mens rea*, the requirement of accountability does not target the

19 Cf. Morse (2022) pp. 640-645.

20 Gröning, Husabø and Jacobsen (2023) p. 484.

21 Gröning and Myklebust (2018), Glancy *et al.* (2023)

22 Johnston *et al.* (2023).

23 The Penal Code section 78 and 80.

perpetrator's consciousness, awareness or understanding of the actual circumstances of an act. Rather, the requirement of accountability, as we have seen above, revolves around the perpetrator's ability to understand, assess and control their acts in a given situation. An unaccountable perpetrator may, in this regard, be completely aware of their killing a person, and this may also be their stated intent. But if the perpetrator suffers from, for instance, psychotic delusions and is convinced that the murder will save the world from certain destruction, accountability may be lacking. What excuses the perpetrator in such a situation is, then, not the lack of intent, but that the perpetrator at the time of acting did not possess the capacity to understand and consider (to refrain from) the act. The perpetrator could not identify any other alternatives for action, and could, in this regard, not respond to the reasons provided by legal (and moral) norms. Another matter is that the same condition in some situations may render one unaccountable *and* lead to an act that lacks *mens rea*. The standard (but not very practical) example is a perpetrator who in a psychotic state is convinced that the one whose life they took was an alien. In such a case, there are grounds to consider the lack of *mens rea* as primary, as it is necessary in order to consider an act a crime in the first place.[24]

3.2 Notes on the justifications for considering someone as unaccountable

The idea that certain individuals should not be held accountable and criminally liable for their actions has roots back to ancient humanistic, Roman and Judeo-Christian traditions.[25] Also from this historical perspective, criminal law's condition of accountability can be seen as resting on a premise that punishing certain individuals, such as children or the severely mentally disordered, is unjust or unreasonable. Hence, the justification for the condition of accountability, at a general level, rests on the premise that there are certain moral limitations for the public authorities' use of punishment.[26] In the modern discussion there are, however, different justifications for not punishing some offenders. These different justifications may be broadly categorised as *arguments of culpability*, *arguments of crime prevention* and *humanitarian considerations with regard to the detrimental potential of the punishment*.[27]

Arguments of culpability are based on premises that accountability, as explained, is contingent upon whether a person may justifiably be held to blame as culpable for the act. From this perspective, some conditions may produce functional impairments

24 Gröning, Husabø and Jacobsen (2023) pp. 495-496.

25 For a historical perspective on Norwegian law, see *e.g.* Gran (2014).

26 Ross (1974) p. 290.

27 Gröning, Husabø and Jacobsen (2023) pp. 489-490.

relevant to the individual's ability to 'have acted differently', *i.e*., to understand and critically evaluate one's reasons for actions. Here, we ultimately find the justification for not to hold some perpetrators accountable in the principle of fault.[28]

It is common to include arguments on crime prevention in the justification for rules about unaccountability, as such arguments are central to the more general justifications for the State's use of punishment. Arguments on crime prevention traditionally revolve around *general or individual deterrence*.[29] A classical argument of general deterrence is that certain persons, such as those suffering from mental illness, should be exempted from punishment if the threat of punishment would not have any norm-creating or behaviour-directing effects.[30]

The argument of individual deterrence also often rests on a presumption that punishment would not fulfill its purpose for certain categories of persons, as these groups would not respond (in a normal manner) to threats of punishment. The deterrent and preventive effects of punishment are not considered achievable in such cases, so the harsh treatment the offender endures is not outweighed by other positive outcomes of the punishment. When the argument of individual preventive effects is emphasised in the context of accountability, it will normally take the shape of an argument of treatment. Within the Norwegian context, this argument typically goes along the lines that punishment (in prison) is not the right treatment of the mentally ill, as it will not have the intended effect.[31] However, the opposite argument has been put forth in the Swedish context: that punishment and claim of liability is important from a treatment perspective.[32]

Moreover, the argument of individual deterrence has within the Nordic context certain links to arguments of humanitarianism. Such arguments build on a perception that it is unreasonable to hold certain persons to account and punish them due to the strain of criminal procedure, and above all, the strain of punishment itself.[33] As does the argument of individual deterrence, the argument of humanitarianism indicates that the consequences of the punishment for the individual may be relevant for the justification of the condition of accountability. Here, however, the claim is not, as it is in the argument of prevention, that the punishment will not be effective. It is the suffering and negative consequences caused by the punishment that are seen as problematic regardless of the other outcomes that may result from it.

28 Gröning, Husabø and Jacobsen (2023) pp. 48-49, 489-490.

29 Gröning, Husabø and Jacobsen (2023) pp. 33, 50-54.

30 Cf. Bentham (1970) ch. XIII p. 9, Hart (1968) p. 19.

31 *E.g*. Andenæs, Matningsdal and Rieber-Mohn (2004).

32 SOU 2012: 17 p. 540.

33 Cf. Waaben (1997) p. 14.

I argue that only considerations of culpability constitute independent justifications for unaccountability. Neither arguments of prevention nor arguments of humanitarianism can provide comprehensive explanations for why some offenders should not be held accountable at all, they are only able to explain freedom from *punishment*. As such, these arguments may equally well inform rules on exemption from punishment at the point of sanctioning or sentencing, or at the level of implementation, *e.g.*, through requirements of care and treatment in prison. Another issue concerns how an individual's ability to respond to threats of punishment is arguably connected to unaccountability. To the extent that a perpetrator does not have the capacity to respond to threats of punishment, some would claim that the capacities that form accountability are absent. In addition, while arguments about prevention and humanitarianism are not relevant to define unaccountability, they may, as I will return to, have relevance for rule construction.

3.3 The relevance of mental disorder for unaccountability

The so-called doctrine of criminal insanity provides an excuse for defendants with mental disorders in many jurisdictions.[34] Within current criminal justice systems, this doctrine is associated with psychiatric constructs and categorisations of mental disorders – with forensic psychiatry as a key premise provider for its practical legal meaning.[35] As explained in the introduction, psychiatric diagnoses and symptoms of severe mental disorders are commonly utilised by judges and jurors as premises for judgements about who is criminally accountable and who is not.

However, from the proposed conceptual approach to unaccountability, there is no evident connection between legal concepts of criminal unaccountability and insanity and psychiatric notions of mental disorder. As discussed, the concept of unaccountability is based on a *normative* fault-based rationale and not medical representations and categorisations of mental illness. Having a psychiatric diagnosis is thus not sufficient for criminal unaccountability and, as a matter of principle, neither is it necessary. It is always the defendant's mental *state* at the time of the act that matters, and 'mental disorder' is relevant only in terms of *legally relevant functional impairments*. The decisive factor is, as discussed, the impact of the mental state on the individual's practical reason in a given context and moment of action.

Disorders that affect perception and apprehension of reality, as in the condition of being psychotic, have, in this regard, become a core focus for rules and doctrines on unaccountability. This can make sense as such a state affects the basic capacities for perceiving and apprehending the world, needed to assess one's actions. Incorrect perceptions of reality can be said to give rise to wrongful motives for action, and thus make the individual unable to identify or establish motives for alternative actions.

34 See for an overview, Mackay and Brookbanks (2022).

35 See for a comparative discussion about Bulgaria and Norway, Gröning and Dimitrova (2023).

In a state of impaired reality understanding, an individual may also be considered to have an impaired ability of self-regulation and in this sense be unfree.[36] There are also other conditions which, in the same vein as a psychotic state, may be considered to severely impede the individual's reality understanding and self-regulation in this way, with such conditions characterised by severe cognitive deficits.[37] It is, however, important to specify exactly which impairments make a psychotic condition or to identify other conditions that are legally relevant. It is also important to consider whether conditions that may *potentially* constitute grounds for unaccountability will *always* do so – such that the individual who is, for instance, psychotic at a given point in time must be considered unaccountable in relation to all actions they perform at that time. As I will return to below, these issues are central to the choice of regulation approach for a rule on unaccountability.

In this context, there is controversy about whether mental disorder is independently relevant to the ability to *control* actions, where imperative hallucinations (commanding voices) is a standard example. Several jurisdictions also have rules on unaccountability with criteria for the perpetrator's possibility of controlling their actions. Here, I agree with Stephen Morse that mental disorder as an excuse is not primarily characterised by lack of control.[38] Criminal law also operates with great expectations on behalf of the individual to be able to 'take control' and conform their behaviour to the demands of the criminal law, even in situations characterised by great emotional and mental stress. There are several kinds of perceived 'force' that may not function as a ground for exemption in criminal law, such as withdrawal symptoms or sexual urges. This poses challenges for justifying why specifically mental illness should exempt the perpetrator from liability. It is hardly feasible to distinguish between legal justification on the basis of whether a perceived control impairment is caused by psychological, biological or environmental factors. The central issue should then rather be the *severity* of the impairment and at what point it becomes unreasonable to hold the perpetrator accountable – regardless of the cause.

Another controversial issue is the extent to which mental disorders that are primarily characterised by a lack of empathy should constitute grounds for unaccountability. This discussion has mainly revolved around the phenomenon of psychopathy, which in turn is often related to psychiatric constructs of personality disorders.[39] Impeded capacities for empathy may be understood to impact the ability to identify and construct moral questions, *e.g.*, when it comes to the wrongfulness of violating others.[40] Criminal law's principles of blameworthiness ultimately rest on the premise

36 Cf. Parnas (2008).

37 Gröning and Melle (2022) pp. 430-433.

38 Morse (2002) pp. 1054-1075.

39 See *e.g.* Morse (2008), Malatesti and McMilliam (2010).

40 Cf. Vetlesen and Nortvedt (1996) ch. 2.

that the individual possesses a capacity for moral reason and may identify and respond to moral issues. It may thus be argued that mental disorders that are characterised by impeded capacities for empathy should constitute grounds for unaccountability.[41] On the other hand, the interplay between empathy and cognitive capacities as a basis for the individual's actions is a complex one. There is no consensus on the philosophical issue of whether the individual's capacity for moral reason is at all contingent on the presence of certain emotions. One may also argue that a person who does not possess the ability to identify and construct moral issues, and who is not able to experience moral dilemmas, may still be expected to understand and organise their actions in accordance with the norms of criminal law.

One should in my view be cautious of letting medical models of human behaviour take precedence over criminal law's normative models for criminal unaccountability. Criminal law does typically only prohibit certain particularly reprehensible acts – and these societal norms are communicated to the public through legislation. Without clear grounds for ascertaining that a perpetrator lacks the ability to understand and subject themselves to these fundamental norms, unaccountability should in my view not be an issue. This view also involves the argument that the psychiatric diagnoses of a defendant should not be decisive for the issue of criminal accountability.

4. Intermediate conclusions

In summary, criminal law rests on the core assumption that individuals are accountable, and thus they are held to blame when they have acted wrongfully. Accountability mainly relates to a fault-based rationale of individuals as capable of reasoning about their actions, and impairments in this capacity may constitute grounds for unaccountability. Mental disorder is only relevant in terms of the severe functional impairment it may produce, and such impairments must obtain at the time of action. The doctrine of criminal insanity has on this point revolved around those mental disorders that are so severe as to entail (or potentially entail) a distorted perception and apprehension of reality on behalf of the individual – meaning that they are unable to think and act in the reasonable way presupposed by the rationale for accountability and liability. Based on these intermediate conclusions, I will now take a closer look at the formulation of the rules of unaccountability. Criminal law must always transform its key concepts into concrete and applicable rules and standards, and the question is then how this could and should be done.

41 Cf. Morse (2008) pp. 205-212.

5. From concepts to rules: Key considerations

5.1 A balancing of different arguments

The paradigmatic starting point for the rules and doctrines of criminal insanity – underlying law reform work in different countries – is that they should reflect the underlying societal concepts of unaccountability. This means that these rules should be sufficiently targeted so as to ensure that the scope of freedom from liability is neither too narrow nor too broad. At the same time, the rules must be applicable in practice for legal actors and appropriate with regard to their consequences inside and outside of the criminal justice system, where it is particularly important to assess the consequences for individuals' status and rights. Thus, the translation from concepts to rules makes room for a broad range of arguments other than those addressing the meaning of accountability as such. As will be elaborated below, these arguments largely revolve around the function of the criminal law system as a system of rules and as a societal institution.

There are certain tensions between these objectives of targeted rules, applicability and appropriateness that follow from law's character as an institutionalised system of norms. The penal system is characterised by its mandate at all times to take a stand in actual normative conflicts by reaching final conclusions about what is (in the legal sense) right – *e.g.*, whether it is right to excuse someone who has committed a criminalised act. The rules postulated by criminal law must be practically apt for informing and facilitating such decisions.

In a state governed by the rule of law, these rules must moreover apply at a general level, not target individuals and ensure predictability in court practice by making sure that equal cases are treated alike. The requirement of predictability also entails a requirement for rules to be as clear and precise as possible. This ultimately means that the rules of criminal law must reduce the world's actual and value-based complexity and controversies to general, predictable and applicable rules.[42] The issue of criminal accountability here relates to issues of immense complexity and a broad range of controversies within different disciplines.[43] Yet, one must, in formulating rules within criminal law, draw boundary lines and establish that certain conditions, capacities or impediments qualify as grounds for unaccountability. Therefore, we must keep in mind for the further discussion that there is an inherent problem in formulating a rule for unaccountability that is simultaneously optimally targeted, appropriate and applicable in practice.

42 Cf. Jacobsen (2012).

43 Gröning *et al.* (2022).

5.2 Central regulative models

A legal doctrine of criminal unaccountability may be labelled, formulated and implemented in different ways in rules,[44] which is also reflected in the fact that different states have different regulative approaches.[45] A first delimitation emerges already in the question of whether rules of unaccountability should be codified, typically then in the *penal code*. Alternatively, conditions of unaccountability could be developed through and anchored in legal practice. In civil European criminal law, there is a long tradition for including the rules about criminal unaccountability in the penal code. Most common law countries today also operate with codified criminal insanity defences, although England provides an exception in this regard.[46] This tradition of codified rules can, from a perspective of legality, be considered appropriate, and it will form the basis for the following discussion.

A next question is, then, how to formulate the rules and legal criteria for (un)accountability. Historical and comparative studies have shed light on certain basic structures and regulative models, where a key distinction is connected to the *medical or biological principle*, versus the *mixed principle*.[47]

Rules building on the medical principle define unaccountability only in terms of a specified medical or biological condition. According to this kind of rule formulation, it is sufficient for this condition to be present at the time of action for the perpetrator to be considered unaccountable. Such a regulative approach is rare. Norwegian law has, however, traditionally operated with a clear medical model approach.[48] Until a law reform in 2020, unaccountability was in Norway equated with being 'psychotic' at the time of the act. After that reform, the criterion of being psychotic was removed and replaced by criteria allowing for more judicial discretion. This new rule makes it clear that criminal unaccountability is not a matter of the defendant's diagnosed mental disorder as such, but of certain legally relevant functional impairments present at the time of the act. Still, according to this new rule, there should be no consideration of how this state of mental disorder influenced the crime.[49]

A rule that builds on a mixed principle requires, as the medical model does, that the defendant was in a specified condition at the time of the act. In addition, however, a mixed-model rule stipulates requirements for establishing a connection between

44 Here I find the label criminal 'insanity', although commonly utilised in the international discourse, to be a stigmatising label in view of how it is increasingly associated with psychiatric notions of mental disorders, i.e., with diagnoses and symptoms.

45 *E.g.* Gröning and Dimitrova (2023), Mackay and Brookbanks (2022).

46 Mackay (2022).

47 Cf. Moore (2015), who speaks about the weak and strong relevance of mental disorder in this context.

48 See further Gröning (2021).

49 See further Gröning (2022).

the impeding condition and the act. In accordance with the underlying concept of accountability, such an approach typically employs cognitive criteria about the perpetrator's impeded ability for insight into the act's (moral and legal) significance and to control their own actions. The M'Naughten Rules from 1843, which have informed the legal framework of many states, are an example of an application of a mixed principle that operates solely with cognitive criteria.[50] A lesser-known example is the Bulgarian rule that uses both cognitive and control criteria.[51]

Another option, of course, is a rule that operates only with criteria about functional impairments, allowing for anyone who has the relevant impairments to be understood as unaccountable. A rule building on such a principle would thus more directly reflect the meaning of unaccountability, without using mental disorder as a (weak relevance or strong relevance) proxy. At the same time, such a rule may be difficult to manage in practice, as it does not delimit unaccountability cases for criminal proceedings. If it does not clarify the relevant impairments sufficiently, then it may also allow for 'misuse' of forensic examinations and compulsory measures. To my knowledge, there is no country that uses such a rule construction. There are, however, examples of civil law jurisdictions that utilise rule constructions that most of all are meant to define space for judicial discretion. Examples of such open rule constructions are found in Dutch law,[52] Danish law[53] and to a certain extent in Norwegian law after the law reform in 2020.[54]

The overarching choice between these different regulative models is of the utmost importance in guiding different rule formulations. However, a rule based on a medical principle may be justified from the exact same base as would a definition based on a mixed principle – and may provide similar delimitation of unaccountability. For example, in the previous medical model in Norway, the justification of 'psychosis' as a proxy for criminal insanity was that such a condition was considered to involve an impediment to apprehending and controlling actions.[55] The choice between different regulatory approaches must therefore also be understood as a technical choice of rule formulation, and not necessarily (only) as an expression of different perspectives on unaccountability. As I will now elaborate further, the quality of an unaccountability rule does not necessarily depend on this choice.

50 See further about these rules, Mackay (2022).

51 See Gröning and Dimitrova (2023).

52 See further Meynen (2022).

53 See further Kamber (2013), Baumbach and Elholm (2022) p. 129.

54 See further Gröning (2022).

55 Ot.prp. nr. 87 (1993–94) p. 22.

5.3 The basic condition of targeted rules

As explained, a rule of criminal unaccountability must draw an appropriate dividing line between those who should and those who should not be blamed. In this regard, a mixed model rule seemingly incorporates the meaning of unaccountability in a more direct fashion, as it connects the perpetrator's mental disorder to the commission of the crime. As such, a mixed model rule can be understood as more targeted compared to a rule that defines unaccountability solely through the criterion of mental condition.

However, a mixed model rule can be challenged, as what criteria should inform such a rule is far from obvious. A key issue is that of the *relation* between the rule's criteria about the relevant mental conditions on the one hand, and the criteria about the relevant functional impairments (that defines the condition's required influence on the crime) on the other. With reference to the criteria that are applied in many countries' legislation, one might often question whether the presence of a given mental disorder is decisive for the effects that the criteria indicate to be at work.[56] In the case that other conditions apart from the one that is stated in a rule are considered to have the effects indicated by this rule, the question would be why these conditions have not also been included. The complex connection between nature, nurture, society and crime makes it difficult to isolate such criteria to apply only to certain categories of mentally impeded persons. Ultimately, this issue seems to force rule formulations back to the notion of a general rule of unaccountability that may include anyone who fulfils certain functional criteria. Or it may provide an argument for a medical model rule in which the defendant's mental disorder is all that matters. Given that the mixed model is the paradigmatic solution, it is intriguing if it is possible, and maybe even better, to define unaccountability solely by means of criteria having to do with the mental condition.

In this regard, a medical model may stipulate mental disorder criteria that approximate criminal law's understanding of unaccountability. A person in a severe psychotic state at the time of the crime may, for instance, lack self-regulating capacity to such a degree that it does not make sense to say that the person could rationally respond to reasons for (alternative) actions. However, a medical model rule still does not connect the perpetrator's mental disorder to the commission of the crime. The question is then whether mental conditions exist which at any given point in time should always exempt the perpetrator from culpability for *any* act they have committed. Should a person who is in a severe state of psychosis, for example, be considered unaccountable and free from liability for all types of criminal actions carried out in such a state?

56 See for a futher discussion on this matter, Moore (2015).

It is obviously problematic to define unaccountability solely in terms of psychiatric constructs, *i.e.*, diagnoses and symptoms of severe mental disorders. Those diagnoses and symptoms which turn out to be legally relevant impair different individuals' mental functioning in different ways.[57] From a clinical perspective, *states* of serious mental disorder, such as a psychotic state, may also be more or less severe. Thus, without further legal qualifications, 'being psychotic' alone is not aqequate as a definition for unaccountability. Here lies a further challenge. We largely lack unequivocal and clear (medical) criteria that indicate what is required to *be* psychotic or to have an impaired reality understanding.[58]

These problems may, however, be mitigated by carefully specifying criteria that clarify what functional impairments matter to the law. A rule that specifies functional impairments that must exist at the time of the act may go a long way towards a mixed-model rule – although it does not require that the defendant's condition influenced the crime. It may even be argued that a rule based more on the medical model is preferable because it suggests that the epistemic (and evidential) uncertainty about whether the defendant's mental disorder influenced the crime should weigh 'in favor of the accused'.

More specifically, such a rule is based on an assumption that sufficiently serious and legally relevant disorders, when present, *generally* impair practical reasoning. As such, a medical-model rule recognises that there will always be epistemic insecurity in determining whether and how a mental disorder influenced a crime. It is, in other words, not epistemically possible to isolate one aspect of irrationality (*i.e.*, a particular action) from a person's general mental status (which can then be rational). One can argue that a medical model approach has some principled advantages over the mixed-model approach, as it may better hinder disparate legal treatment of two equally functionally impaired defendants who commit similar types of crimes, but have different manifestations of their symptoms.

In the end, the assessment of targeted rules does not appear to provide decisive arguments for the choice of principle upon which to base the rule formulation. Each alternative seems to be affected by the general problems inherent in the exercise of formulating a legal rule that is neither too broad nor too narrow. How targeted a rule is depends on what criteria for defining unaccountability it involves. From a rule of law perspective, it is imperative that these criteria provide legal certainty and secure equal treatment. On this basis, I will now elaborate on the arguments that concern the practical functions and consequences of a rule.

57 Fioravanti, Bianchi and Cinti (2012), Vöhringer *et al.* (2013), Sheffield *et al.* (2018).

58 Cf. Gröning, Haukvik and Melle (2019) pp. 46-48.

6. Practical legal functions and consequences

6.1 Considering the internal function of the criminal justice system

The penal code's rules of unaccountability must not only be justifiable as targeted: the rules must also be justifiable with regard to how they work in the criminal justice system and what consequences they have in practice. This means that the rules must be able to function in, and be justifiable on the basis of, the legal context that a given criminal justice system constitutes as a system of legal norms, institutions and actors. The rules must be compatible with the system's established organisation, traditions and frameworks pertaining to cost of procedures. In this regard, existing systemic structures will often limit the possibilities for extensive law reform changes.[59]

At the level of norms, the rules of unaccountability must be able to function on the established premises posed by the system's existing regulations and principal structures, such as those concerning procedural safeguards and evidential standards. At the institutional level, it is necessary to consider the consequences that the rule formulations will have for the tasks of the legal agents – or even for the division of their functions – and for the way they will prioritise resources. In this context, it is important to consider the systemic conditions for the practical implementation of a rule of accountability. Most importantly, preventive dispositional responses can in most countries be imposed upon a person who has been acquitted by reason of criminal insanity.[60] In this way, the rules of criminal unaccountability also – implicitly – provide a basis for forced interventions other than punishment, which have grave consequences for the individual. The rules may also have consequences for the cost of procedures by impacting judgements about refraining from prosecution or about closing investigations in cases where there is reason to suspect unaccountability and where a basis for special sanctions is lacking.

In the following, I will briefly outline some central arguments in the discussion about the criminal law's formulation of the rules of unaccountability and which concern the above-mentioned systemic considerations.

6.2 Considerations pertaining to evidence and the functional division of legal agents

Perhaps the most prominent issue in this discussion concerns the division of functions between legal expertise and forensic experts in making judgements about accountability.[61] This issue also involves considerations of evidence as it concerns the question of who should assess and make the final judgement on a perpetrator's

59 Cf. Gröning (2021).

60 For the European context see Jehle *et al.* (2021).

61 See for different perspectives to this matter, *e.g.* Gröning *et al.* (2020), Meynen and Bijlsma (2022), Parmigiani *et al.* (2023).

accountability, and on what grounds. This matter is particularly relevant for the degree of legal assessments in relation to expert witnesses' conclusions about the mental condition of the perpetrator.

The issue of the division of functions between legal agents is closely connected to the choice between different regulative models. Here the different medical and mixed models are typically seen as differing in terms of the provisions they make for the respective legal assessments and the assessments of the experts. The medical model is often considered to grant the experts the greater influence.

It is, however, always the court's or the jury's task to decide whether the standard for accountability has been met. Judges (or jurors) must assess the evidence that has been presented on the perpetrator's mental condition at the time of act, and the experts' statements will here hold a central position in most states – regardless of what regulation they operate with. There is, however, no doubt that a rule that builds on a medical principle does, to a great extent, transfer the decision on the question of accountability to the medical sphere. This was certainly the case in Norwegian law when it defined criminal unaccountability as being 'psychotic': if a perpetrator was considered psychotic according to the experts' assessment, the perpetrator was generally considered psychotic and thus unaccountable also by the court.[62] Such an approach was also problematic. As unequivocal criteria for defining psychosis do not exist, the question of whether a person is psychotic was subject to different answers from different experts. A model rule that does not apply a terminology with strict medical references but employs a more general terminology would invite more independent legal assessments. Terminology that is not so closely connected to the medical conceptual apparatus may also be seen as having a more appropriate function as a connector between diagnostic and legal assessments.

A rule that builds upon a mixed principle, or an open rule construction like the Dutch one, would seemingly grant the court's assessment a greater influence than a medical-model rule. In this way, a mixed-model rule more clearly emphasises the normative dimension of accountability – and seemingly downplays the focus on disorders and diagnoses.

However, as also discussed above, the rule construction is not necessarily decisive. Of greater significance is what the mandate of the experts is, *i.e.*, what they are asked to evaluate and inform the court about. A central issue in this regard is whether the experts only offer conclusions on strictly clinical aspects, or whether they also draw conclusions about the fulfilment of legal criteria. In Norway, before the reform in 2020, experts were not only asked to make a clinical evaluation, but also to evaluate whether the *legal* criterion and threshold of 'psychotic' was fulfilled.[63] To a certain

62 Gröning, Haukvik and Melle (2019) pp. 37-39.

63 See further Gröning (2021).

extent, having the experts play such a role was logical, considering the strong medical reference within the legal criterion. However, this practice also allowed for a spill-over effect, so that the diagnostic and the legal assessment could permeate each other, and the expert witness could reach a diagnostic conclusion of psychosis in those cases where they felt the defendant was unaccountable. This may have led to defendants being acquitted in cases where the mental disorder was not so severe as to properly justify an acquittal – and the opposite – so that some defendants were unjustly punished. This possibility provides support in favor of the argument that the expert witness should not be asked to draw conclusions with regard to legal standards, but simply inform the court about their diagnostic assessments and conclusions. This means that the judge must question the expert witness on their assessments of, *e.g.*, impaired functionality, severity of symptoms and mental disorders at the time of action, but then the judge alone must assess whether the perpetrator's condition is so severe as to fulfil the legal standard for unaccountability.

It is in this regard noteworthy that also many countries that operate with mixed model rules allow the experts to evaluate legal issues, *i.e.*, to a disorder's effects on an act in terms of lack of insight in or control over the act. In my view, these are issues that are difficult to prove from a clinical perspective and thus should be left entirely up to the legal discretion of the court.

This challenge, however, also touches upon a more basic issue. Mental disorders are typically considered easier to prove, for legal actors as well, than are metaphysical phenomena, at least without conceptual clarifications. What does it mean to apprehend and control an act? And what is required in order to do so? The application of such criteria in a rule of accountability implies that each decision on unaccountability must be based on more uncertain assumptions about an individual's capacities. This raises the question: what makes the judge more competent to reach such a conclusion than an expert?

This concern represents a significant objection to mixed model rules as they are paradigmatically formulated, which also has relevance for rules that allow for large discretion on the issue of unaccountability. The objection is ultimately a matter of the individual's legal certainty when it comes to the grounds upon which to ascertain unaccountability. A rule built upon a medical model may, after all, have the benefit of being able to predictably delimit the domain of freedom from liability – provided of course that it involves clear definitions of the relevant mental conditions and impairments.

As discussed above, the medical model approach is also a matter of dealing with epistemic insecurity 'in favor of the accused'. Such an approach also implies giving the legislator a key role, on the level of the discretion of judges, jurors and experts – as when unaccountability on the grounds of young age is decided on the basis of

a pre-established age limit. A medical model can in this regard function to 'solve' the causality problem, at the legislative level, that a mixed model leaves to judicial discretion. With such a model, one could argue that the legislator frees judges and experts from the very difficult task of evaluating causality, by deciding on appropriate proxies for conditions that can be assumed to influence a crime if present at the time the crime is committed.

6.3 Consequences for the system of sanctions

The argument that the mentally ill should not be in jail cannot explain criminal law's premise of accountability, as it is not able to explain why a perpetrator should be excused as unaccountable. Notwithstanding, it is important to consider these arguments with regard to the issue of what consequences a given rule will lead to. The distinction between unaccountable and accountable delineates between acquittal and punishment: the narrower the definition of unaccountability, the higher the number of mentally ill persons who will probably serve a sentence in prison. And conversely, the broader the definition, the more people who are not in need of compulsory treatment (any longer) will receive it – although an unaccountable perpetrator does not necessarily receive such a response.[64]

A person with a severe mental disorder, such as psychosis, should not serve time in prison – regardless of whether the person was accountable at the time of the act and has therefore been convicted. This may also be seen as a general principle of compassion, which has become the norm in most states governed by the rule of law, as well as in international law. The European Prison Rules, *e.g.*, state: 'Persons who are suffering from mental illness and whose state of mental health is incompatible with detention in a prison should be detained in an establishment specially designed for the purpose and if such persons are nevertheless exceptionally held in prison, there shall be special regulations that take account of their status and needs'.[65]

It is, however, important to distinguish between the level of rules about criminal accountability and that of rules about sentences for those considered accountable for their acts. The concern for the strain that detention in prison may put on severely mentally ill persons cannot inform the scope of the rules of unaccountability. It is, and probably should be, the case that many of those who are (to be) considered accountable and who are sentenced to prison may suffer from a mental disorder that eventually requires treatment. Instead, concern for perpetrators who suffer from mental disorders in prison should inform other types of rules, such as on deferral of the execution of a sentence or transfer of a person from prison to a hospital if treatment necessitates it.

64 See also Gröning (2013) about institutional implications.

65 Council of Europe (2020) 12.1 – 12.2.

What should be emphasised, however, is the access to appropriate care as a general right of the individual – and this should be on the agenda regardless of legal distinctions. The interests of responding with punishment *vis à vis* responding with treatment are thus not mutually exclusive. A general requirement of appropriate care will apply regardless of whether a perpetrator is to serve time in prison, receive treatment, be placed in preventive detention in a psychiatric legal institution or be exempt from punishment. The discussion should furthermore go beyond criminal law and accentuate preventive measures. The formulation of – and the resources allocated to – administrative law's systems for care of those with mental disorders probably have significance for these individuals who commit crimes – and for the extent to which criminal law even comes into play.

6.4 Considerations pertaining to the cost of procedures

The system of criminal law has limited resources. This necessitates prioritising, *e.g.*, between the kinds of crime that are to be investigated. The issue of resources also directs the actors within the system when it comes to the realisation of general objectives such as a sufficiently high detection rate, throughput in courts, or access to appropriate care in detention institutions.

In this sense, the system of criminal law is faced with a certain overload, which is to a certain extent driven by overcriminalisation.[66] In the choice between different principally acceptable approaches to a rule of unaccountability, capacity issues provide arguments in favour of avoiding costly changes that would put a further strain on the system in terms of financial resources and that would require training and time-consuming adaption. In this regard, it seems particularly important in reform work to assess the way in which a rule of accountability may affect the established practice of expert witnesses and the potential costs of establishing revised standards. The issue of evidence and material truth in individual cases appears central also in this context, as do aspects pertaining to legal certainty and equality before the law. Considering the cost of procedure, the importance of simplifying a rule's practical application should not be underestimated. The dilemma is that a more conceptually targeted rule, which to a lesser degree reduces the complexity of the concept of accountability, may involve greater complications in legal practice. For instance, one may think of a rule that specify with large detail the relevant functional impairments that qualify for criminal unaccountability that would be difficult to implement with regard to expert evaluation and legal evidence assessments.

66 See for a discussion on this matter, *e.g.* Husak (2009).

7. The rule from a societal perspective

The practical consequences on the criminal law system are not the only factors relevant to the formulation of a rule of unaccountability. Such a rule must also be assessed in relation to the societal function attributed to the criminal law system and, as a central aspect of this, its status in public opinion. The criminal law system, and the legal system more generally, holds in this regard the function of communicating, establishing and consolidating certain perceptions in society – such as the perception of the distinction between normality and deviation, or between the healthy and the pathological.[67] The system should to the greatest extent possible avoid communicating messages that result in the creation, consolidation or reinforcement of unfounded negative attitudes towards particular groups in society.

Here, one may point to the significance of the criminal law by minutely specifying the difference between diagnostic constructs of mental disorders and legal notions of criminal unaccountability. A rule of unaccountability should not – wrongfully – communicate that people with mental disorders lack the capacity to reason and the ability to act in an accountable manner. This supports the argument that one should not apply medical terms, such as 'psychotic', in the penal code – and that we should leave the stigmatising label of the 'insanity' defence behind.

At a more general level, the criminal justice system holds an important function when it comes to communicating and consolidating attitudes towards crimes as blameworthy acts that may lead to punishment. The criminal justice system, through the function of attributing liability, more specifically takes a stand in social conflicts. The public's trust in the system, then, is central, and the fundamental attitudes towards crime, punishment and blameworthiness are also important when it comes to determining when defendants with mental disorders should be excused. In this regard, one may also refer to arguments of general deterrence: The fact that crimes are prosecuted and punished is understood to contribute to societal safety and peace, and thus to prevent further crimes. Such arguments also carry perspectives related to the 'general sense of justice' and to the public's – and, in particular, to the victims' – perceptions about how the system should respond to crimes. And at least some part of public opinion often holds that (sufficiently) severe crimes should be punished, regardless of the perpetrator's mental condition at the time. From a victim-perspective, it may also be questioned whether a perpetrator who has committed severe offences should be exempted from liability and punishment.

In general, one should in my view be cautious of basing rules on arguments about what (one imagines) is required by the public sense of justice or the victim perspective: society is simply too complex for these kinds of considerations to be representative.[68]

67 Cf. Berger (2012) pp. 117-139.

68 Cf. Ryberg (2006).

Rather, the assessment should be done with an awareness of the more over-arching function of the criminal justice system to ensure the autonomy and rights of the individual. To optimise the protection of individuals, the system must ensure a reasonable balance of effective control of crime on the one hand, and the limitation of the use of state power on the other. Through crime control, the system protects individuals from violations by other individuals, and through the limitation of the use of state power, the system protects individuals from offensive intervention from the authorities.[69] From a (societal) system perspective, it is thus important that one consideration never completely disregards the other in a way that ultimately weakens the individual's right to freedom and protection.

Such a perspective also includes the issue of the concrete delimitation of unaccountability and its consequences. Arguments about protecting individuals who could not have acted otherwise from blame and punishment must be balanced against arguments about protecting the individual against being declared as lacking the capacity to reason and for liability on a normative basis. These arguments must also be weighed against arguments about responding to offences, and about fulfilling the victim's as well as the public's expectations about sufficient crime control and the use of punishment. In this way, the argument from social peace may be seen to support – but not justify – a rather narrow delimitation of unaccountability. The argument concerning social peace should, however, not lead to an individualised criminal justice system where the public's perceptions are allowed to influence the decision on whether or not a perpetrator is unaccountable. Here, criminal law's fundamental premises of fault should be decisive, regardless of the severity of the act in question.

On this point, it is therefore important to regard criminal law from a greater systemic perspective, not least in order to take the victim's perspective seriously. Current law already includes mechanisms extending the sphere of criminal law that consider the victim's interests. A perpetrator who is considered legally unaccountable may, *e.g.*, still be considered liable for tort in civil law. A victim's interests may thus be considered even in cases where the judgement must be acquittal because the perpetrator did not fulfil criminal law's requirement of accountability. This may seem illogical, but it is justified by how the different rules in the law of tort vis à vis criminal law have different purposes and thus different underlying concepts of acountability.

69 Gröning, Husabø and Jacobsen (2023) pp. 45-50, 723.

8. Closing remarks

This article has proposed an account of criminal law's concepts of accountability and unaccountability and has emphasised that a range of considerations must be attended to in the transformation from these concepts to rules. We are left with it being difficult to establish rules that fully encompass criminal law's concepts which *at the same time* are applicable in practice and legally justifiable. Different rules have different strengths and weaknesses.

Yet, we may discern some basic premises. A core issue for criminal law's concept of (un)accountability is to what extent it is reasonable to blame those persons who commit wrongs. The idea of the individual's accountability is here central to criminal law, and more generally a cornerstone in the value base of the rule of law. It should thus not be a straightforward matter to deprive a person with a mental disorder of the capacity for accountability, and criminal law should have a narrow definition of unaccountability. A definition that is directed at the absence of an individual's ability to rightly perceive and apprehend reality seems appropriate. Criminal law's narrow delimitation of unaccountability, however, means that it is important to pay heed to issues pertaining to the organisation of the system of sanctions, and particularly the right to appropriate care.

This article has furthermore addressed how different arrangements with respect to the practical consequences of a rule of unaccountability affect the negotiation of different alternatives which may in principle be equally acceptable. The choice between a medical and a mixed model has been accounted for, and benefits and drawbacks of each of these constructions have been discussed. The choice of the proper rule construction is far from an obvious one.

In the author's view, considerations pertaining to predictability and the right to legal protection particularly support arguments in favour of a construction consisting solely of criteria of condition. If this is to be implemented, however, the conditions that are to be included in a rule of unaccountability must specify the required type and degree of the relevant functional impairment – and make it clear that a specific medical diagnosis is neither necessary nor sufficient. A rule of unaccountability should exempt from punishment those persons who at the time of the act are in such a severe condition that it does not make sense to hold them to blame, regardless of diagnostic conclusions.

It is probably important to acknowledge that although there is still a range of different ways in which a rule of unaccountability may be formulated, the practical effects of these variations may not differ to any great extent. There is reason to assume that legal tradition will have a certain guiding effect on the assessment of who will be considered unaccountable. The practical function of the rule within the system and

those societal considerations to which it pertains will in all likelihood also have an effect on whether the rule is accepted or whether it becomes an object of criticism and reform proposals.

Finally, it is of utmost importance not to confuse problems relating to the systemic consequences of the doctrine of criminal insanity, with the doctrine as such. Abolishing this doctrine would probably not change much for the mistreatment of mentally ill offenders in current criminal justice systems. I argue for keeping this doctrine (although under a less stigmatising label than the one in use today, and clearly demarcated from psychiatric diagnoses) because I consider it fundamental for criminal justice. However, criminal justice also urgently requires reform of the current reactions to accountable as well as unaccountable mentally ill offenders.

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