Autonomy, Criminal Responsibility, and Competence

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Recently, Juth and Lorentzon proposed to replace the concept of free will, as considered relevant in criminal responsibility, with the concept of autonomy. In addition, they conceived of the assessment of criminal responsibility in terms of a decision-making process. In this article, I suggest that, based on these characterizations, there is an essential similarity between assessments of criminal responsibility and assessments of competent decision-making within the context of informed consent. In both assessments, autonomy and decision-making would be central factors. If one accepts this basic similarity, I argue, interesting opportunities are opened up in the sense that research on criminal responsibility could be directly informed by research on competent decision-making.

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There is still disagreement about how forensic assessments of criminal responsibility should be understood and implemented.[1–3] Recently, Juth and Lorentzon[3] proposed to conceive of such assessments and of their underlying justification in terms of (diminished) autonomy. In this article, I discuss their proposal and explain why it presents an interesting opportunity for forensic psychiatry. In fact, I argue that conceiving of these assessments in terms of autonomy and decision-making, as Juth and Lorentzon propose, opens up the possibility of linking this type of assessment to another assessment, that of competence to decide about treatment options within the context of informed consent. The main point of this contribution is not whether criminal responsibility can be conceived of in terms of autonomy, but the opportunity that opens up if we perceive of it in terms of autonomous decision-making and action.

I first discuss the proposal by Juth and Lorentzon, explaining to what extent I agree with their line of reasoning and at what points I am not convinced by their argument. Then, I explore the possibilities that are created by their proposal. I suggest that research on the patient's competence to consent to treatment may directly inform research on assessments of criminal responsibility.

A Proposal: Autonomy and Decision-Making Competence

In 2010, Juth and Lorentzon[3] put forward an argument on the relationship between free will and criminal responsibility. To avoid problems associated with the concept of free will, they propose to replace free will with the concept of autonomy. They state:

> Fortunately, however, psychiatry and law can manage without any reference to any position in the debate on free will. One can pose the question of responsibility and accountability in terms of control and control in terms of a conception of autonomy that is neutral on the traditional metaphysical question of free will [Ref. 3, p 5].

In addition, they point to an essential aspect of autonomy thus understood: "Another factor determining the autonomy of an individual is the capacity to make decisions from one's desires: decision competence" (Ref. 3, p 5). What they have said in these quotations comes down to reformulating and understanding assessments of criminal responsibility in terms of autonomy and competence in decision-making.

Juth and Lorentzon not only propose to conceive of forensic assessment of criminal responsibility in terms of autonomy and decision-making, but they also claim that autonomy is neutral to the matter of

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free will. On this point, I am not convinced.[4] For instance, the philosopher Alfred Mele says in *Autonomous Agents*: "Autonomy, as I understand it, is associated with a family of freedom-concepts: free will, free choice, free action and the like" (Ref. 5, p 4). In other words, the concept of autonomy may very well be directly related to the metaphysical concept of free will. Another argument against their claim that autonomy would be neutral to free will concerns their concept of autonomy in terms of control. In fact, control is a central concept in the philosophy of free will: *The Stanford Encyclopedia of Philosophy* (entry "free will") reads: "Our survey of several themes in philosophical accounts of free will suggests that a—perhaps *the*—root issue is that of control" (Ref. 6; emphasis in the original). Therefore, I do not think that replacing free will with autonomy provides a watertight distinction between the assessment of criminal responsibility and the concept of free will.[7] Meanwhile, it is undeniable that in practice, the concept of autonomy is perceived of as less problematic than free will. Therefore, although Juth and Lorentzon are not completely successful in abolishing free will, they may well have succeeded in putting it at some distance.

Yet, the more important point is that they have been able to rephrase the assessments in terms that suggest a kinship with another assessment, that of competent decision-making. Autonomy is considered to be a central concept with respect to competent decision-making in medicine. We want people to be able to make autonomous, well-informed decisions about treatment options. As Beauchamp and Childress state in a section on the capacity of autonomous choice: "Although *autonomy* and *competence* differ in meaning . . . , the criteria of the autonomous person and of the competent person are strikingly similar. . . . Standards of competence feature mental skills or capacities closely connected to the attributes of autonomous persons, such as cognitive skills and independence of judgment" (Ref. 8, pp 113–14; emphasis in original). As long as people are capable of autonomous decision-making, their decisions have to be respected. According to Owen *et al.*, we want, "an individual's autonomous decisions relating to the acceptance and refusal of medical treatment [to] be respected" (Ref. 9, p 40). What opportunities are opened up by reframing the assessment of criminal responsibility in terms usually connected with assessments of competence?

Opportunities

Reframing the nature of criminal responsibility in this way opens up the possibility of linking the forensic assessment with research and discussions on competent decision-making.[9,10] In fact, unlike assessments of criminal responsibility, assessments of competence have been studied extensively.[10] There continue to be major disagreements on how competence should be approached,[11–14] but much research has been done and views have crystallized.[15] Given the basic similarity, as suggested by Juth and Lorentzon (in addition to other resemblances[10,16]), forensic psychiatry may well be in a position to learn something about criminal responsibility directly from research on a patient's competence.

Let us consider this possibility in more detail. Often, four abilities or skills are considered to be necessary for (autonomous) decision-making: to express a choice, to understand the relevant information, to appreciate one's situation and its consequences, and to reason about treatment options.[15,17] These four abilities were in part derived from extensive study of legal cases of competence to make treatment decisions.[18] There is some flexibility with respect to the interpretation and usage of these criteria in the actual assessments of competence, at least in practice. Often, the abilities are considered to be separate potential thresholds on a sliding scale of competency, with usage dependent, for example, on statute or case law. If used as a sliding scale, only the first ability may be necessary for very simple, nonrisky decisions, but for life-saving or threatening decisions, the fourth ability may be needed.[19] The four criteria have been used to develop a widely applied assessment tool, the MacCAT (MacArthur Competence Assessment Tool). This conceptual approach (in particular, the MacCAT-T) has generated much research worldwide on competence to consent to treatment, resulting in at least some consensus on how to view and assess a patient's competence.[9,15] Moreover, the MacCAT-T has become a helpful tool used in clinical practice by health care professionals in many countries.[16]

Given the profound similarity suggested (indirectly) by Juth and Lorentzon between assessments of a patient's competence and criminal responsibility, both the four criteria and the MacCAT may provide a valuable starting point for clarifying and standardizing assessments of criminal responsibility.[20] (The MacCAT has been applied to a forensic setting, but

in connection with competence to stand trial,[21] not criminal responsibility, as such.)

Let us look at the possibility of applying the four criteria in the forensic context. In assessments of criminal responsibility, a defendant should understand the situation, its consequences at the time of the crime, and the options open to him at that moment. He not only should have been able to perceive his options, but also should have the mental capacity to reason about them, and he should be able to understand any information relevant to that particular situation. In fact, given the differences between the forensic setting and the setting in which competence to consent to treatment is needed, in my view at least two specific adjustments have to be made regarding these criteria. The ability to express a choice (used in assessments of competence to consent to treatment) should be replaced by the ability to put one's decisions into action or to control one's actions. This ability may appear to be similar to the phrase used in the insanity defense: "The ability to conform one's behavior to the (requirements of the) law." However, the meaning intended here is more general, because it refers to the entire process of decision-making and behavior generation, not merely to the phase of putting a decision into action. (In practice, it certainly may be difficult to determine whether the actor was incapable of conforming or just did not want to conform to the law).

Second, understanding the relevant information in the context of informed consent refers to the specific medical understanding of the condition of the patient. In forensic assessments it is less about the medical view of the situation and more about legal and moral understanding of the situation, like not knowing that what one is doing is wrong (*M'Naughten*).[20] Therefore, this component could be adjusted by understanding the situation from the relevant legal and moral viewpoint. (I realize that there is some lack of clarity about the relationship between moral and legal responsibility. Yet, in line with Elliott,[22] for example, I consider moral responsibility relevant to criminal responsibility. These factors would have to be elaborated.)

For example, in the case of a paranoid delusion, the defendant's information or knowledge about the situation may have been extremely distorted. The defendant may have believed that his neighbor was the devil, on the verge of attacking him. The paranoid delusion (distorted knowledge or information about the situation) then results, via an intact decision-making process in itself, in an act of self-defense. However, since the relevant knowledge or information was completely wrong (the neighbor was not attacking the accused at all), this act of self-defense in fact constitutes a criminal act. Alternatively, consider a very different kind of neuropsychiatric disorder, Tourette's syndrome. Notably, the tics in the syndrome can be relevant within the context of criminal responsibility.[23] For example, because of a tic, a patient with Tourette's may hit another person. In such a case, there is no problem in understanding the relevant information about the situation, appreciating the situation, and reasoning about the behavioral options, but the generated action itself is out of control: the relevant motor act (tic) is not the result of a decision-making process. So, if we exculpated the patient, it would be on very different grounds than in the case of the defendant with the paranoid delusion. Still, the two have something in common: neither of the acts is the result of an autonomous decision-making process. These are examples showing that different mental disorders can undermine different abilities needed for autonomous decision-making and action. Of course, mental disorder may affect several of the four abilities at the same time—for example, in cases of delirium, dementia, or paranoia combined with incoherence.

A scale that applies the four elements within the forensic setting might be helpful. There are already three versions of the MacCAT: the MacCAT-T (which is used in treatment settings), the MacCAT-CR (for clinical research settings), and the MacCAT-CA (for competence to stand trial assessments).[21] A "MacCAT-R" for criminal responsibility settings could be developed.

Objections

There are several objections that may be raised. One can argue that the Juth and Lorentzon argument is not conclusive with respect to autonomy and decision-making. I have taken their proposed conception of criminal responsibility as a starting point for my argument. Although, to my knowledge, they were the first to conceive of criminal responsibility in these terms, they have not been the only ones to articulate the link between autonomy and criminal responsibility. For instance, Shuman and Gold wrote:

> Of particular interest are those who display impulsive aggression. Impulsive aggression implicates two fundamental concerns of the criminal justice system—autonomy and dangerousness. Autonomy, [as] used in this text, refers to the capacity of individuals to choose how to act and, consequentially, whom the criminal law should hold accountable (i.e., the impact of age, illness, and intelligence on choice and consequentially criminal responsibility) [Ref. 24, p 725].

Victoroff, in a recent paper on criminal responsibility, aggression, and brain science, says that "the idea of moral responsibility is rooted in a belief in the Kantian imperatives of both rationality and autonomy, a.k.a., free will . . ." (Ref. 25, p 190). In addition, in moral philosophy, autonomy is often linked to responsibility. For instance, according to Buss, "to be autonomous is to be a law to oneself; autonomous agents are self-governing agents. Most of us want to be autonomous because we want to be accountable for what we do."[26] So, although it is true that Juth and Lorentzon may be misguided, a strong case can be made for the relevance of autonomy and autonomous decision-making within the context of responsibility in general and criminal responsibility in particular.

Meanwhile, there are differences between the assessment of criminal responsibility and of autonomy and decision-making.[10] The most important stems from the circumstance of an illegal act (for which the defendant is being prosecuted) versus a legal choice (about treatment options). According to Simon, assessment of criminal responsibility is about establishing whether there is "a lack of knowledge of the nature or wrongfulness of the act" (Ref. 17, p 3984). So, it appears to be sensible that whatever MacCAT-like questionnaire might be developed to operationalize the aspect of understanding, the specific normative nature of this understanding has to be taken into account. I proposed earlier that this could be dealt with via an adjusted use of the item of "understanding," applied as legal and moral understanding of the situation (instead of understanding its medical aspects).

One can argue that it is good to keep these assessments separate, because of the intimate relationship between the law and these particular assessments and because in the legal system the assessments of criminal responsibility and competence in making treatment decisions function in very different domains. Why then should we not stick to the legal divisions and continue using the same concepts, instead of looking for ways to capture them under overarching concepts? One reason is that research on competence assessments has shown that an international discussion that does not merely focus on legal aspects and regulations, but is intended to grasp the central point in both a legally and clinically relevant manner, can be successful.[10] In other words, if Juth and Lorentzon are right and if I am right about the implication, then it may be good for forensic psychiatry to transcend the strict legal context and seek to clarify the basic phenomena and criteria, while still paying close attention to the legal matters.

Case Illustration

The case of a patient whom we will call Mr. Jones illustrates that the law makes certain subdivisions, which in nature or in normal life are much related. He suffers from a paranoid delusion. He is convinced that the FBI is after him, and most of his daily activities are dominated by actions to avoid having the FBI find out about him. For instance, he has gone to his bank and made financial transactions that have caused him to lose all his money. A financial guardian is now being considered for him. He has also visited his attorney and disinherited his children, because he believes that they are participating in the conspiracy. Furthermore, he has diabetes, but he no longer trusts his general practitioner or the pills he prescribes. The doctor proposed an operation, but he refused. Mr. Jones' competence was assessed, and he was deemed incompetent to make a decision about the surgery. Finally, he became certain that his neighbor, being an informant to the FBI, was on the verge of attacking him. When Mr. Jones saw his neighbor coming along the walkway to his second-floor apartment, he was sure the neighbor would murder him. Because he saw no other option, he decided to act, and he threw his neighbor off the walkway, killing him.

Mr. Jones has a mental disorder that severely influences his decision-making processes and therefore his actions. Some of the tragic decisions Mr. Jones has made will be understood primarily in terms of autonomy and competence (or incompetence), and others will be primarily approached using concepts such as criminal responsibility or criminal accountability. Yet, every part of the story seems to show problems with what we could consider in broad terms to be the agent's autonomous decision-making. I certainly realize that this is not a completely

convincing argument, but those may be rare in this kind of discussion. The point is that to approach cases of criminal responsibility with a concept of autonomy that is usually applied in very different legal settings, may not be a strange thing to do when looking at how a daily life like that of Mr. Jones proceeds.

We should note that it is not just the case that responsibility can be approached from the perspective of competence; the other way around also seems to be possible.[10] For instance, Welie and Welie say that:

> . . . it is generally believed that patients . . . carry final responsibility for their own health care (or at least the acceptance or refusal thereof). If a patient refuses much needed medical care, no one but the patient is responsible for that decision. Patients have a right to be left alone. We can only hold persons responsible if they could have made a different decision and if they were free and able to reach a different decision. Competence is the patient's ability to make a choice about the various medical interventions offered to him by the caregiver, and to bear accountability for that choice" [Ref. 27, p 129].

In fact, Elliott proposed to understand competence as accountability.[28] In his view, what matters is that patients who make decisions about their treatment can justifiably be held accountable for what they choose. This means that the concepts of accountability and responsibility, concepts from the domain of forensic psychiatry, are applied to the domain of competence to make treatment decisions. So, competence, apparently, can be understood in terms of responsibility and accountability, as well.[10]

Conclusions

Juth and Lorentzon proposed to conceive of criminal responsibility, and assessments thereof, in terms of autonomy and competence in decision-making. On the basis of this characterization of criminal responsibility, I propose that the four criteria often used with respect to competent decision-making may provide a valuable starting point for clarifying and applying assessments of criminal responsibility. Furthermore, just as in research on competence, forensic psychiatry should aim at internationally oriented research on criminal responsibility, based on a conceptual rather than a strictly legal approach. The development of a MacCAT adapted for these assessments could facilitate such research and the exchange of data and ideas, because it enables researchers to use the same criteria in various groups of defendants in different countries and jurisdictions. The four abilities may in this way function as a heuristic tool for the development of widely acceptable and applicable criteria for assessments of criminal responsibility.

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