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From being unaccountable to suffering from severe mental disorder and (possibly) back once again to being unaccountable

CHRISTER SVENNERLIND

University of Gothenburg, Stora Levene (Sweden)

From 1965, the Swedish penal law does not require accountability as a condition for criminal responsibility. Instead, severely mentally disordered offenders are sentenced to forensic psychiatric care. The process that led to the present legislation had its origins in a critique of the concept of accountability that was first launched 50 years earlier by the founding father of Swedish forensic psychiatry, Olof Kinberg. The concept severe mental disorder is part of the Criminal Code as well as the Compulsory Mental Act. The medical conditions for being sentenced to forensic psychiatric care are supposed to be the same as those for being admitted to involuntary psychiatric care. What these conditions are is not regulated in any law. For the guidance of the courts and others, there is a collection of examples in the government bill drafting the legislation in question. On the basis of these examples the content of the concept of severe mental disorder is chiselled out. However, the purposes of imposing penal law sanction and admitting someone to psychiatric care are not the same, and therefore the content of the concept severe mental disorder is bound to differ accordingly.

Severe mental disorder is a legal concept that masks as a psychiatric one. In its applications in penal law, the court determines its content. But for the forensic psychiatrist it is more natural to interpret the term as a medical one. This creates a tension that has led to several controversies in recent criminal cases in Sweden. The best way to alleviate the situation is to discard the concept of severe mental disorder from criminal law. This will allow for a better separation of the roles of the psychiatrist and the court.

Keywords: Swedish penal law, criminal liability, accountability, severe mental disorder, prison prohibition.

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INTRODUCTION

The Swedish Criminal Code does not allow the insanity defence. In this it resembles the Penal Codes of a few states of the United States – Idaho, Kansas, Montana, and Utah. As for Sweden, the insanity defence was discarded in 1965, when its Penal Code, gaining legal force in 1865, was replaced with the Criminal Code. The year 1965 can be seen as the terminal point of a long campaign for penal law reform, part of it being the rejection of the insanity defence. In the Swedish context, this rejection meant that accountability was discarded as a condition for legal responsibility. "Accountability" is here used as the English equivalent to the Swedish "tillräknelighet". Since the latter has few medical connotations, the translation "accountability" seems preferable to "sanity". Another possible term is "imputability". A synonym to "tillräknelighet" that is however used less often is "ansvarsförmåga". A literal translation of it would be "capability of being responsible". Thus, the term "accountability", as it is used here, refers to a condition on part of the criminal offender that in most penal law system is required for legal responsibility. In the Swedish penal law system this requirement is not present though.

Among the advocates for a penal law reform two personages in particular can be mentioned. Olof Kinberg (1873–1960), Sweden's first professor in forensic psychiatry, is the first. From about the turn of the century he pertinaciously argued against accountability being part of the penal law. According to Kinberg, accountability is a pseudo concept. This is due to it being essentially related to that of an indeterministic free will (Kinberg, 1917, 1935, 1941). In this, as in much else, he is in agreement with the Italian School of Positivist Criminology. The other prominent advocate for a penal law reform is Karl Schlyter (1879–1959); among other things, cabinet member of every Social Democratic government between 1921 and 1936, member of the Swedish Parliament 1919–1920 and 1926–1949, president of the Court of Appeal of Southern

Sweden 1929–1949, and 1938–1956 chairman of one of the two governmental committees that during some twenty years prepared the Criminal Code to be. Schlyter's committee prepared the part concerned with legal sanctions, while the other committee prepared the list of crimes. Two of the most important changes proposed by Schlyter's committee, and a few years later enacted by the Swedish Parliament, were (i) the rejection of accountability as a condition for legal responsibility, and (ii) the introduction of forensic psychiatric care as a penal law sanction (SOU 1956:55). These novelties made it possible to convict persons who before 1965 would have been acquitted by reason of unaccountability. From 1965, while a conviction continued to require intent, or, in some cases, negligence, it did no longer require accountability. It is still so.

After its introduction in 1965, the Criminal Code has been revised twice with regard to the regulation concerning mentally disordered offenders. The first of these revisions was made in 1992 and the second in 2008. The first introduced a new concept, to be part of the Criminal Code as well as of the Compulsory Mental Care Act: the concept of *severe mental disorder*. The second revision consisted in a narrowing of the conditions for being sentenced to psychiatric care. In a way it prepared the way for a reintroduction of accountability as a condition for criminal responsibility.

The Swedish case gives rise to quite a few issues of legal and philosophical interest. In what follows, some of these are discussed. First, part of the Swedish penal law history is reviewed from a philosophical perspective (Sections 1-2). Part of the review is a comparison of a problematic Swedish legal institute to that of a similar Italian one. Section 3 then focuses on the key concepts of severe mental disorder and accountability. Kinberg's view on the relation between the concepts of accountability and free will is presented. Presented are also two typical cases of unaccountability together with two possible interpretations of the cases.

A main conclusion will be that underlying and to a large degree implicit systems of values (ideologies) not only help determine the role of psychiatric considerations in the legal decision process. They also influence the meaning of key terms, both in the regulations *and* as used in the on-going discussion about these regulations. The term "severe mental disorder" is a medico-legal term, not a medical one. As used in the legal context its meaning can vary fairly independently of its medical connotations. It may then be influenced by normative intuitions pertaining to the importance of accountability. It is argued that this was what happened to a large extent after 1965, contrary to the intentions of the originators of the Criminal Code. Neither did the change in the legal consequence of fulfilling the medico-legal condition, from being exempted from criminal responsibility to being exempted from imprisonment, mean that thinking in terms of accountability was really abandoned. Hence, the 2008 reform should be seen not as a break with the prevailing system, but rather as partly making overt what had been there all the time, although temporarily hidden to view.

The paper will end with some reflexions on the roles of psychiatrists and the courts, respectively, in the decisions about mentally disordered criminal offenders.

1. A CONDITION FOR LEGAL RESPONSIBILITY TURNED INTO A CONDITION FOR BEING LIABLE TO IMPRISONMENT

1.1 The Penal Code

From 1865 to 1965, Ch. 5 § 5 of the Penal Code contained the main regulation regarding what to do, within the scope of Swedish penal law, with mentally disordered offenders.

After 1946. With some revisions having been made in 1946, the two paragraphs of the section read as follows:

> "No one shall be held responsible for an act he commits under the influence of mental disease, mental deficiency or other mental abnormality of such a deep-going nature that it must be considered to be equivalent to mental disease.
>
> He who, through no fault of his own, temporarily has got into such a state that he was not in the possession of his senses shall not be punished."

The first paragraph stipulates a three-part, disjunctive condition. Its first part refers to mental disease, the second to mental retardation. The third part came to be called "the equivalence condition". In a Ministry of Justice memo, commenting on the third part, four main sub-condi-

tions are listed. The first refers to certain exceptional cases of constitutional psychopathy; the second, to certain mental deficiencies of a severe nature, caused by brain damage or disease; the third, to certain severe neurotic conditions or severe neuroses of an *idée fixé* nature; the fourth, to certain changes due to age and bordering to actual senile dementia (Ju 1946:1; cf. Belfrage, 1989, p.125).

The use of the term "mental disease" in the first paragraph leads thought to the *medical model*, according to which the concept of legal insanity is a medical one (cf. Moore, 2014, 1984, p.22ff.). However, it is important to understand the role that the three-part condition was meant to play. The causal criterion – "under the influence of" – is a prerequisite as much as the rest. If a person who is suffering from a mental disease commits an illegal act, but not under the influence of that or any other disease, the provision of the section does not apply. Owing to this causal criterion, none of the three sorts of mental condition in Ch. 5 § 5 of the Penal Code could be used in a so-called *status defence* (Moore, 2014). Before 1965, being under age constituted a status defence though. Thus, children were exempted from criminal responsibility, even when having knowingly committed illegal acts.

Now there are several other rules for insanity defences, *not* of the status defence kind, that tend to formulate excuses in terms of certain states allegedly caused by mental disease or defect. Quite commonly either ignorance or compulsion, or both, is the crucial state. Compare the M'Naghten rules, that focus on ignorance due to disease or defect:

> "[F]irst, the accused, at the time of his act, must have suffered from a defect of reason; secondly, this must have arisen from disease of the mind; thirdly, the result of it must have been that the accused did not know the nature of his act or that it was illegal." (Hart, 1968, p.189)

The ALI test is another set of insanity rules:

> "A person is not responsible for criminal conduct if at the time of such conduct as the result of mental disease or defect he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law". (American Law Institute, Model Penal Code §4.01, Proposed Official Draft, 1962)

The ALI set of rules has in view ignorance as well as compulsion due to disease or defect.

A slightly different way in which mental diseases or defects are sometimes considered relevant is by their causing want of *mens rea* or *actus reus*. This is the so-called *elements approach*; *mens rea* and *actus reus* being regarded as essential elements of any crime (Moore, 2014).

There are no traces of either of these two approaches in the first paragraph of Ch. 5 § 5 of the Penal Code. The provision there is simply that persons who commit criminal acts that are products of any of the three conditions are to be exempted from punishment. However, in the second paragraph of the section, dealing with temporary derangements, it is stated *which* such derangements excuse: they must involve that the offender is not in possession of his or her senses. This might suggest that these temporary deranged persons act without intent; i.e., they lack *mens rea*. Such an interpretation would make the second paragraph superfluous though, since what it regulates is then already covered by the general regulation of intent. Still, this interpretation has had its advocates in Swedish legal doctrine (SOU 2002:3, p.157). However, it is not obvious why temporary deranged persons would lack intent while persons who are deranged more permanently would not. As will be seen below, it is essential to the regulation in force from 1965 onwards that the permanently or temporarily deranged persons that it concerns act *with* intent.

Before 1946. In the original version of Ch. 5 § 5 of the Penal Code, in force before 1946, there was no explicit provision regarding a causal connection between abnormal mental state and criminal act. What motivated the change? According to a government official report in 1942, the interpretation of the original fifth section had over time altered due to changed views on what kinds of mental disease and deficiency constitute unaccountability. In short, the extension of the concept of accountability had over time expanded, and some of the mental conditions that had become recognized as giving rise to unaccountability involved less than the whole psyche. This was considered to warrant a causal condition (SOU 1942:59, p.81ff.). Hence from 1946, a causal connection is required between on the one hand mental disease, mental deficiency or

other mental abnormality equivalent to mental disease, and on the other the criminal act.

In comparison it can be mentioned that the Norwegian Penal Code of today does not require a causal relation between mental state and criminal act. The first paragraph of its § 44 runs, in my translation:

> "A person who at the time of the act was psychotic or unconscious shall not be liable to a penalty."

1.2 The Criminal Code

The nearest counterpart in the Criminal Code of 1965 to Ch. 5 § 5 of the Penal Code is Ch. 33 §§ 2-3 of the former. The two latter sections can be translated, the last paragraph of the quote being the third section of Ch. 33:

> "For a crime that someone has committed under the influence of mental disease, mental deficiency or other mental abnormality of such a deep-going nature that it must be considered to be equivalent to mental disease, no other sanction should be applied than being turned over to special care or, in cases specified in the second paragraph, fine or probation. A fine should be imposed, if it is found suitable for preventing the defendant from committing further crimes. Probation should be imposed, in case such a sanction in view of the circumstances is found to be more suitable than special care […].
> If a sanction mentioned here ought not to be imposed, the defendant shall be exempted from sanction."

In the first paragraph of Ch. 33 § 2, the same phrase is used as in the first paragraph of Ch. 5 § 5 of the Penal Code, i.e.,

> "under the influence of mental disease, mental deficiency or other mental abnormality of such a deep-going nature that it must be considered to be equivalent to mental disease".

When deciphering the content of the equivalence condition, the Ministry of Justice memo (Ju 1946:1) continued to furnish the key. The interpretations of the two other parts were also intended to be the same as before. However, note that in the Criminal Code the three-part, disjunctive condition no longer expresses a condition exempting from legal responsibility; *ipso facto* neither does it exempt from penal law sanction. As part of the Criminal Code it is a condition for being exempted from imprisonment. While other sanctions may be imposed, imprisonment is excluded. According to the main rule of the provision, special care is the sanction to be imposed.

Why does this change mean that accountability was discarded? Because the only sense of "responsibility" that remained was the liability to be the subject of legal sanctions, and that liability had now been extended to all offenders irrespectively of their being accountable or not. I would say that discarding accountability is the most evident influence on Swedish penal law of the Italian School of Positivist Criminology. Another tenet of that school is that measures aiming at individual prevention should be used. Traces of this can be found in the two quoted sections of Ch. 33. I hasten to add though that general prevention was the overall aim of the penal law sanctions of the Criminal Code of 1965. This is evident from its Ch. 1 § 7, later rescinded:

> "When making a choice between sanctions, the court shall, observing what is necessary for upholding general law-abidingness, take particular notice of whether the sanction is suitable for supporting the adaption of the convicted to society."

In the first paragraph of Ch. 33 § 2 the so-called *prison prohibition*, in its original version, is stipulated. (The version in force today is the third.) Note that the causal condition is unaltered compared to that in the Penal Code. In other words, at least part of the cause of the act must be a mental state that in principle requires special care. Evidently, this is not in line with the view of the Italian School, according to which the need of special care at the time of the judicial decision is what should be of primary relevance; the need of special care at the time of the criminal act is only, if at all, of secondary importance. The original government bill gave expression to a more positivist ideology than did the final bill and the actual law. The Minister for Justice in office reintroduced the causal condition in the final bill, his stated reason being the risk of malingering:

> "One cannot ignore the risk of mental illness being induced in the defendants by the hope that they will avoid admission to prison." (Prop. 1962:10, p.C354)

2. REVISIONS MADE TO THE CRIMINAL CODE

2.1 Revisions made in 1992

In 1992, the regulation in the Criminal Code concerning mentally disordered offenders was revised. Two changes were (i) the replacement

of the three-part, disjunctive condition by the single criterion *severe mental disorder*, and (ii) the replacement of *under the influence of* ["under inflytande av"] by *caused by*. "Caused by" is used here to translate "under påverkan av", which in Swedish everyday language has approximately the same meaning as "under inflytande av" and the English "under the influence of", but in the Criminal Code is intended to have a narrower sense than the latter (cf. below).

From 1992, the central regulation is to be found in Ch. 30 § 6 of the Criminal Code. In my translation:

> "A person who has committed a crime caused by a severe mental disorder may not be sentenced to imprisonment. If the Court in such a case finds that no other sanction should be imposed, the accused shall be free from sanction."

In the first sentence the revised, second version of the prison prohibition is stipulated. The condensed term "severe mental disorder" is intended to express a narrower concept than the long corresponding formula in the old Ch. 33 § 2.

Furthermore, to be relevant an instance of a severe mental disorder must exert a decisive influence on the offender's way of acting. The phrase "under the influence of" supposedly did not express this (Prop. 1990/90:58, p.458). These two changes both act to make the extension of the predicate "has committed a crime caused by a severe mental disorder" a proper subset of the extension of "has committed a crime under the influence of mental disease, mental deficiency or other mental abnormality of such a deep-going nature that it must be considered to be equivalent to mental disease".

The term "severe mental disorder", introduced here, is used in two branches of law. One of these is the penal law regulation, the other the regulation of compulsory psychiatric care. The term is intended to express the same concept in both contexts; this in spite of the fact that forensic psychiatric care is a penal law sanction while compulsory psychiatric care is not.

Conditions for committing someone to forensic psychiatric care are stipulated in the first paragraph of Ch. 31 § 3 of the Criminal Code. My squiggly translation of the equally squiggly Swedish of the first paragraph of Ch. 31 § 3 is:

> "If a person who has committed a crime, for which the sanction cannot be just a fine, is suffering from a severe mental disorder, the court may commit him to forensic psychiatric care, if, considering his mental condition and personal circumstances, it is required that he be admitted to a healthcare facility for psychiatric care involving deprivation of liberty and other coercion."

This paragraph supplies the legal permission to impose forensic psychiatric care, and also, to some extent, stipulates the conditions for imposing it. What is lacking is a definition of the key concept, severe mental disorder. Nowhere in either the Criminal Code or in any other legislation is a definition of that concept to be found. For the guidance of the courts and the forensic psychiatrists there is only a collection of examples in the government bill drafting the legislation. In section 3 below, more is said about the concept of severe mental disorder.

The regulation of forensic psychiatric care is found in the Forensic Mental Care Act, as well as in the Health and Care Act. (For some information about the content of the forensic psychiatric care, see Svennerlind et al., 2010). In 1992, along with the concept of severe mental disorder, the legal institute *special court supervision* was introduced. This is done in the second paragraph of Ch. 31 § 3 of the Criminal Code, where it is stipulated that in cases where there is risk, due to severe mental disorder, of relapse into serious criminality the court may decide that special court supervision shall take place in connection with the forensic psychiatric treatment. The special court supervision, which is a complementary sanction, means that the administrative court decides about changes in safety measures, such as ground privileges, outpatient treatment, conditional leaves, etc. Every six month, the court also decides on the continuation or absolute discharge of the psychiatric treatment. The discharge decision is made after consultation with an independent psychiatric expert and the prosecutor. Though informed by a medical recommendation, the discharge decision is a legal one. In cases where the imposed sanction is forensic psychiatric care *without* special court supervision, it is the chief psychiatrist who makes the discharge decision, which then is of a purely

medical nature.

Unfortunately, special court supervision contains the seed of an ethical dilemma. The administrative court may decide not to follow the medical discharge recommendation. The psychiatric treatment is then continued. Apparently, this is in conflict with the Hawaii Declaration of the World Psychiatric Association, which forbids psychiatrists to take part in psychiatric treatment of anyone not in need of such (the Declaration can be found at: http://www.codex.vr.se/texts/hawaii.html). What is the psychiatrist to do, abide by the Declaration or abide by the Swedish law?

The Swedish special court supervision has similarities with a certain institute in the Italian legal system. In the latter, a person who is found to have committed an illegal act but is exempted from punishment due to unaccountability, though still being considered potentially socially dangerous, may be subjected to protective measures. The regulation regarding these measures is stipulated in Articles 204 and 215 of the Italian Penal Code. As in the Swedish system, the person is considered socially dangerous if, as a consequence of (severe) mental disorder, it is probable that he or she will commit new crimes. Evidently, a principal difference between the Italian and Swedish systems is the accountability requisite of the former. While the Italian regulation concerns persons exempted from penal law sanctions, due to a verdict of unaccountability, the Swedish regulation concerns persons sentenced to forensic psychiatric care. The Italian institute is not supposed to serve any therapeutic purpose; it is exclusively a social defence measure (Ferracuti and Roma, 2008-9). The occurrence of the phrase "due to severe mental disorder", in the second paragraph of Ch. 31 § 3 of the Swedish Criminal Code, indicates that the purpose of the special court supervision is not intended to be exclusively protective. This since severe mental disorder (by definition) gives cause for psychiatric care.

2.2 Revisions made in 2008

In the early hours of June 11th 1994, second lieutenant Mattias Flink shot dead seven persons and almost killed three more. That massacre is the closest Sweden comes to Anders Behring Breivik's massacre of 77 persons seventeen years later in Norway. However, Flink had no political motive for his deed. In contrast to some well-known cases, such as Hadfield, M'Naghten, and Hinkley, but like Breivik, the Flink case (NJA 1995 s. 48) did not end in a verdict of acquittal. Flink was sentenced to life imprisonment.

Flink got the life sentence in spite of the fact that the Supreme Court found him to have satisfied the criteria for being admitted to compulsory psychiatric care, and therefore to have fulfilled the condition for being severely mentally disordered, when committing the crimes. Supposedly he also acted with intent, and (here the Supreme Court misleadingly uses an obsolete term instead of "caused by") under the influence of severe mental disorder. From all this it would seem to follow that the prison prohibition should have precluded a life sentence. It did not, owing to Flink having self-induced his severe mental disorder by means of alcohol intoxication.

This is at least how most legal scholars have interpreted the findings of the Supreme Court. It is in line with the second paragraph of Ch. 5 § 5 of the old Penal Code: "He who, through no fault of his own, temporarily has got into such a state that he was not in the possession of his senses shall not be punished." Supposing that this reasoning could be transposed to the new Criminal Code, and that it could be interpreted *e contrario*, the implication would be that a person who by his own fault is severely mentally disordered is not exempted from being sentenced to imprisonment. Now, judging from a statement made by a former Minister for Justice, the content of the old Penal Code paragraph in question is still today part of the Swedish penal law in force, but now as an unwritten rule (Prop. 1964:10, p.107; cf. Asp et al., 2010, p.400ff.). However, the Supreme Court does not refer to this rule. Instead it says that Ch. 30 § 6 of the Criminal Code was never intended to apply to transitory states of intoxication, and that Flink was in such a state.

In the aftermath of the Flink case, revisions were made to Ch. 30 § 6 of the Criminal Code. These revisions to some extent reflect an undercurrent that had existed since a few years after the introduction of the Criminal Code: namely, to explicitly reintroduce accountability as a cri-

terion for deciding the proper legal sanction. At the same time the revisions reflect what some would describe as lessons to be learnt from the Flink case.

The revised version of Ch. 30 § 6, gaining legal force at mid-year 2008, can be translated:

> "A person who has committed a crime caused by a severe mental disorder shall primarily be sentenced to another sanction than imprisonment. The court may sentence to imprisonment only if there are special reasons. When judging whether there are such reasons the court shall pay regard to
> 1. whether the crime is highly culpable,
> 2. whether the defendant lacks or has a limited need for psychiatric care,
> 3. whether the defendant has in connection with the crime himself caused his condition by intoxication or by any other similar means, and
> 4. the other prevailing circumstances.
> The court may not sentence to imprisonment, if the defendant as a consequence of the severe mental disorder has had no ability to understand the meaning of the act or to adjust his acting in accordance with such an understanding. This does not apply though if the defendant has himself caused his inability in the way described in the first paragraph.
> If the court in cases referred to in the first or second paragraph finds that no other sanction ought to be imposed, the defendant shall be free from sanction."

It is the provisions of the first paragraph that seem to have been inspired by the Flink case. Flink was found guilty of having committed a highly culpable crime, and, according to the majority view of the psychiatric experts as well as of the Supreme Court, his need of psychiatric care at the time of the judicial decision was limited, if not insignificant. These two in combination, or even separately, settle the matter. If he is found to have self-induced his severe mental disorder, that settles it even more so.

In the second paragraph a disjunctive condition is found that is somewhat similar to the ALI test. However, there is an obvious and essential difference between the two. The provision of the quoted paragraph in the Criminal Code is not a condition for criminal responsibility. Instead, it constitutes the third version of the prison prohibition. It is presupposed in it (among other things) that the ability to understand the meaning of the act and to adjust acting in accordance with such an understanding are intact. If either of these abilities is lost, due to severe mental disorder, some other sanction than imprisonment is to be imposed. According to the main rule, which is not explicitly expressed in Ch. 30 § 6, that sanction is forensic psychiatric care.

3. REMARKS ON THE KEY CONCEPTS: ACCOUNTABILITY AND SEVERE MENTAL DISORDER

3.1 Accountability

The term, translated here "accountability", or its equivalents, e.g. "imputability", is rarely used in Swedish legal texts. An exception is in the title of a law from 1927 concerning preventive detention. The term is however regularly used in discussions about criminal law. It then encompasses a family of related ideas expressed in regulations such as, among others, the M'Naghten and the ALI tests. It is very difficult or even impossible to give a general definition of the concept as it is used in this standard way, although it is clear that it is closely connected to basic normative intuitions about fairness, justice and (especially) guilt. I have used the term in this standard, inclusive and rather vague sense here. It has over time been given a host of different connotations, forming a spectrum from those presupposing indeterminism and a metaphysically free will to those that do not presuppose any concept of guilt or justice at all. The Danish legal scholar Carl Torp and the Swedish philosopher Axel Hägerström suggest a meaning of the latter kind: "[accountability is] that psychic state which renders the application of punishment to those who have committed criminal actions defensible and rational" (Torp, 1906; here quoted from Kinberg, 1941, p.131), and " [...] if by accountability is meant a state of mind at the time of the crime, which excludes the fitness for being punished if considered from a societal point of view" (Hägerström, 1939, p.158), respectively. These suggestions can be said to give a teleological meaning to the term "accountability".

As mentioned above, during his entire career Olof Kinberg argued against accountability requisites being parts of the penal law. Considering his indisputable influence on the development of Swedish penal code, there are good reasons to dwell for a moment upon his main argument. He mentions formulations similar to those of the M'Naghten and ALI rules (Kinberg, 1917, p.3f.&57). However, what they seemingly ex-

press is not at the centre of his interest. His argumentation is instead aiming at a notion of free will, which he considers essentially related to, or even identical with, that of accountability. According to Kinberg, it is impossible for such a will to exist. Therefore the distinction, traditionally taken for granted by the penal law, between on the one hand mentally disordered offenders and on the other mentally normal offenders is unfounded. Instead, all offenders should be regarded as, using a notion he borrows from Eugène Dally (1863), equally "socially responsible" (Kinberg, 1917, p.23&81).

There is a multitude of definitions and distinctions to be made when discussing free will (cf. van Inwagen, 1983; Strawson, 1986; Mele, 1995; Kane, 1996; Fischer and Ravizza, 1998; Pereboom, 2001; Honderich, 2002). Just a few of these will be mentioned here. Free will is valued for various reasons. One reason is its relation to responsibility. Peter van Inwagen nicely expresses this in the following words:

> " [...] we care about free will because we care about moral responsibility, and we are persuaded that we cannot make ascriptions of moral responsibility to agents who lack free will." (van Inwagen, 1986, p.153)

Kinberg's view on free will seems to be that of *hard determinism*, according to which free will is incompatible with determinism (a view generally referred to as "incompatibilism"). The opposite to hard determinism is *libertarianism*, according to which free will is still incompatible with determinism but, since determinism does not necessarily hold, there is also room for free will to exist. Though hard determinists and libertarians disagree on whether determinism is holding or not, they tend to agree on what free will is. This being said, it should be noted that chance (indeterminism) has been argued to be as incompatible with free will as necessity (determinism) is (Pereboom, 2001, p.xxf.).

The specific notion of free will Kinberg has in mind can be described in terms of *origination* (cf. Honderich, 2002). A free will is an original cause; in other words, an uncaused cause, or, with an Aristotelian phrase (though Aristotle himself does not reckon with any will of this sort), a prime mover (Kinberg, 1917, p.11; Kinberg, 1935, Ch. III). Now, there cannot be a will like that in a deterministic universe. According to Kinberg, determinism is essential to all scientific thought (Kinberg, 1935, p.38). For him, that settles the matter. I am not sure what he would say about a randomly operating will. In a certain sense it has the appearance of an original cause, a prime mover, has it not?

Another way of describing hard determinism is to say that it denies any relevant moral difference between being determined by a manipulator and being determined by natural factors. A person who is in the hands of a manipulator is not free, and therefore not responsible for the consequences of the behaviour of her body. The same would seem to be true for a person who is "in the hands" of nature (cf. Pereboom, 2001).

Thus, given that determinism holds, agents cannot be morally responsible for their actions. Kinberg shares this view with quite a few distinguished philosophers (cf. Spinoza, 1677/2000; Broad, 1934; Strawson, 1994; Pereboom, 2001; Honderich, 2002). That agents cannot be responsible has implications for the justification of punishment. Kinberg agrees with the Italian School of Positivist Criminology that mentally disordered offenders should be treated differently when it comes to penal law sanctions. However, this is so solely for forward-looking reasons (Kinberg, 1917, p.73). While the sanctions applied to disordered offenders should aim at individual prevention, the sanctions applied to mentally normal offenders should also aim at general prevention (Kinberg, 1917, p.81). Retributivist justifications for punishment are ruled out.

That free will, of the sort referred to by Kinberg and others, is essential for responsibility is not everyone's view. This is illustrated by the following pithy quotation from Stephen Morse.

> "[N]one of the law's general criteria for responsibility or excuse refer to free will or its absence. Lack of action, lack of rationality, and compulsion all excuse, but none of these conditions has anything to do with free will. There may be problems conceptualizing and evaluating the lack of rational capacity or compulsion. These are real problems for law and for forensic psychiatry and psychology, but they are not free will problems. Lawyers and forensic practitioners often speak and write as if these are "free will" problems, as if lack of free will were a synonym for lack of action, irrationality, or compulsion. Nevertheless, free will is doing no work whatsoever independent of these genuine excusing conditions and it thus threatens to confuse these issues." (Morse, 2007, p.207)

If Morse is right, arguments like the ones hinted at above and including those of Kinberg would seem to misfire. However, to the extent that Morse is contemplating any concept of freewill it is not that of hard determinism, or any other version of incompatibilism. Although not evident from the quotation, it is reasonable to believe, from what is said in the rest of the same article, that he takes for granted that another concept of free will is sufficient for morality and law, and that furthermore it is compatible with determinism (Morse, 2007, p.216; cf. Moore, 2014a). Thus, there is fundamental disagreement on how the concept of free will is to be determined. Perhaps it is incontestable to say that it is essentially contested (cf. Gallie, 1956).

In part 2.2 above, Ch. 30 § 6 of the Criminal Code now in force was quoted. It was said that the provision of its second paragraph could be seen as a preamble to a reintroduction of accountability as a criterion for criminal responsibility. In the government official report SOU 2002:3 a very similar condition is proposed to be exactly such a criterion. The text expressing the proposed condition can be translated:

> "A person, who as a consequence of a severe mental disorder, a temporary insanity, a severe mental retardation or a severe dementia has lacked the ability to understand the meaning of the act or to adapt his acting according to such an understanding, shall not be held responsible." (SOU 2002:3, p.37).

In the latest government official report on the subject, SOU 2012:17, more or less the same text as the one just quoted is proposed to become law. As will be seen below, the fourth condition, dementia, was listed as an example of what can be a severe mental disorder when that concept was introduced in 1992; in the just quoted draft it has an independent status though. The four conditions are called "ground conditions", and it is the mental effects of any of these four that are supposed to constitute criteria for unaccountability. Apart from the enumeration of ground conditions other than severe mental disorder, the same formulation is used in Ch. 30 § 6 of the Criminal Code now in force.

A few words will now be said concerning two ways of interpreting the accountability requisite that is more or less explicitly the focus of the two government official reports, SOU 2002:3 and SOU 2012:17. Two typical case scenarios are presented there. I name them "The Winter Warrior" and "The Exorcist" respectively, and use these designations also as names of the main characters.

The Winter Warrior:

> "[A] person believed that he was fighting in the Finnish Winter War. The perpetrator was aware that he shot at people and therefore had intent to do just that, but thought […] it was in a war situation, an imagination that lacked any basis in reality." (SOU 2002:3, p.232)

The Exorcist:

> "Someone is attacking another person in the belief that the person is possessed by the devil. In such a situation, there is of course an intent to attack another human being, but the offender's own conception of the act and the situation in which it is committed differs so markedly from what actually is the case that it hardly seems reasonable to impose a punishment." (SOU 2002:3, p.233)

In the accountability requisite, ability to understand the meaning of one's act as well as ability to adapt one's acting according to such an understanding are stipulated as prerequisites. The Winter Warrior and the Exorcist being presented as perpetrators who would be acquitted on reason of unaccountability, they supposedly lack either of these abilities.

What would happen if the scenarios were slightly changed? The Winter Warrior now believes he is fighting racially inferior humans. The Exorcist believes he is attacking a person who is under the inspiration of the Holy Spirit. Would they still be considered unaccountable? In the alternative scenarios, the normative backgrounds are reversed. Presumably, while it is all right to participate in a war against a Soviet invader, it is not all right to participate in a racial war, on the wrong side. Presumably, it would be all right to attack a person possessed by the Devil, but not if the Holy Spirit was doing the possessing. These variations make explicit differences with regard to normativity and possible basis in reality. Are they relevant when judging accountability?

In the literature on insanity defences, two different views on these matters can be found. It is not evident which one of these, if any, the authors of government official reports SOU 2002:3 and SOU 2012:17 presuppose. An advocate of the first view is Lawrie Reznek. According to his way of reasoning, the Winter Warrior and the Exorcist should, or at least could, be found unac-

countable in the original versions of the cases. It is more doubtful that they should be so found in the alternative cases. The basis for this is the role *character* ought to be given in insanity defences. A comprehensive statement of this view is to be found near the end of his excellent book, Reznek (1997).

> "The notion of an evil character is central to the idea of excuses. Ignorance, compulsion and automatism are all excuses because they are ways in which a good person comes to do something bad. We want to punish evil characters, and want our excuses to exempt good ones. Hence these are excuses. This hypothesis is tested (and in fact suggested) by cases of insanity. There are dramatic cases where a disorder changes the person's character, and where he deserves to be excused on this basis. In addition, ignorance, compulsion, and automatism frequently fail to excuse deserving cases of insanity. The only way to justify why they excuse is to accept the idea that a change in moral character excuses. This enables us to excuse deserving cases of insanity as well as to support the idea that excuses are designed to exempt good characters from punishment." (Reznek, 1997, p.307)

Given that character is central to the idea of excuse, a rule that Reznek calls "the As-if rule" plays an important role when deciding whether an offender should be excused or not. Whether an act, e.g., shooting at alleged Soviet soldiers in what the marksman believes is the Finnish Winter War, is to be excused or not depends on whether the act would be all right if his understanding of the situation were correct. Evidently, the As-if rule is related to the legal concept of putative self-defence.

The Winter Warrior has similarities with the Flink case. As far as I know, the Supreme Court did not contemplate the idea that Flink might have believed himself to be in a war situation, where the people he shot at were enemy soldiers. According to the view now described, what verdict would have been appropriate is, at least partly, dependent on what war Flink believed he was fighting in.

An advocate of the second view presented here is Michael S. Moore; others are Herbert Fingarette (1972, 1972a) and Stephen Morse (2011). According to Moore, insanity should be a status defence.

> "Being a status defense like infancy, legal insanity not only does not require that there be a causal connection between mental disease and the particular criminal act charged […]. Such character of the defense as a status defense also rules out there being *any* connection between mental disease and the particular act charged. In particular, it need not be true that a seriously mentally ill offender not have done other than he did, that he was *disabled* by his disease from doing otherwise. Being seriously mentally ill removes the moral agency of human beings so that their capacity or incapacity to have chosen or acted other than they did when they performed their criminal acts, is not morally relevant." (Moore, 2014)

According to this view, *rationality* is the key concept. Put concisely, and therefore a bit misleading, insane human beings are non-rational, rather than irrational, and therefore not full-fledged moral agents. Now it so happens, according to Moore, that the medically invented term "psychosis" is a good proxy for the legal concept *legal insanity*, which signifies non-responsibility. But, it is no more than a proxy, since the medical concept mental disease is not the same as that of legal insanity.

I dare say that, of the two typical cases, the Exorcist is the one that this view intuitively more easily applies to. It seems reasonable to say that a person who believes a fellow human being to be possessed by the Devil has lost his mind. However, this judgment might to some extent be culture-bound, and rationality would therefore also be culture-bound.

Anyhow, due to the taciturnity of the two government official reports, it is an open question how (more exactly) the proposed accountability requisite is to be interpreted. I suspect that not even the authors are completely clear about that.

3.2 Severe mental disorder

As mentioned above, there is no definition of the concept of severe mental disorder either in the Criminal Code or in any other legislation. In the government bill drafting the legislation, there is however a collection of examples given for the guidance of the courts and others. Translated into English, part of what is stated there is the following.

> "As severe mental disorders should primarily be accepted conditions of psychotic character, consequently conditions involving deranged reality evaluation and with such kinds of symptoms as delusions, hallucinations and confusion. Moreover, following a brain lesion, a mental impairment of severe kind (dementia) with deranged reality evaluation and in-

ability to orientate in life may result.

Severe depressions involving contemplation of suicide should also be accepted as severe mental disorders. Furthermore, grave personality disorders with impulse breakthroughs (character disorders) should also be accepted as severe mental disorders, for example certain disabling neuroses and personality disorders with impulse breakthroughs of a psychotic character.

Compulsory care should furthermore be actualized when a crisis reaction is of such a nature that the effect on the psychological functional level becomes so marked that it is of a psychotic kind.

As severe mental disorder should also be classified the alcohol psychoses, such as delirium tremens, alcoholic hallucinoses and evident conditions of dementia. The same holds for the psychoses that drug addicts can contract. Also in other situations when a drug addict is in a state of severe confusion and it is evident that his physical health or his life is in danger, compulsory care should be an option. In certain cases a state of abstinence can also be so grave that it during a short time must be described as a severe mental disorder. It goes without saying that a severe addiction that only has grave physical complications should not lead to compulsory psychiatric care."

(Prop. 1990/91:58, p.86)

In the same government bill, a distinction is made between the kind and degree respectively of a mental disorder. According to the bill, both kind and degree need to be weighted together in an assessment of a mental disorder as severe. It is also stated that certain mental disorders are always severe with regard to kind. Schizophrenia is mentioned as an example; dementia seems to be another one, judging from the first paragraph above. A certain instance of schizophrenia need not be severe with regard to degree though. Depressions are mentioned as examples of disorders that need not be severe with regard to kind but which can be so with regard to degree (Prop. 1990/91:58, p.87). Evidently, *kind* relates to the type of disorder suffered. Less obviously, *degree* relates to the psychosocial level of functioning and the severity of the symptoms in the specific instance of the disorder (SOSFS 2000:12, p.5). However, this talk of disorders being either severe or not severe with regard to kind is a bit bewildering. For instance, is depression ever severe with regard to kind? Perhaps it is, or can be, severe with regard to kind when involving contemplation of suicide. Anyhow, depression is on the list of examples of what can be severe mental disorders.

As is evident from the quotation, psychoses are considered to be special when elucidating what is aimed at with the term "severe mental disorder". According to the governmental bill, the paradigmatic way for a mental disorder to be a severe mental disorder is to involve a deranged reality evaluation, manifested as delusions, hallucinations, or confusion. The trend in Swedish legal practice to consider psychoses to be severe mental disorders is in line with this. In forensic psychiatric examinations schizophrenia is most often, if not always, declared to be a severe mental disorder (RMV-Rapport 2013:1; Borgeke, 2012, p.304).

Psychosis seems, more or less universally, to be looked upon as a paradigm of legal insanity. The Norwegian Penal Code, which in its § 44 even uses the term "psychotic", is a case in point. In the Breivik case, a key issue was whether he was psychotic or not at the time of his criminal acts. According to one of the psychiatric teams examining him, Breivik was psychotic since he suffered from paranoid schizophrenia. Being psychotic he was legally insane, and therefore not criminally responsible. However, according to the other psychiatric team, he did not suffer from any psychosis. Instead, his main diagnosis should be dissocial (or antisocial) personality disorder (Moore, 2014). The court assumed that in most cases "the psychiatric diagnostic system holds a central position in the assessment of criminal sanity" (Oslo District Court Judgment, TOSLO-2011-188627-24E (August 24), 2012, p.54). Breivik's was regarded as such a case, presumably. In the end, he was declared to have not been psychotic and sentenced to 21 years' imprisonment.

In Sweden, a psychotic offender is not exempted from criminal responsibility on the plea of having been psychotic when committing the criminal act. As seen from the quoted now in force version of Ch. 30 § 6 of the Criminal Code, this is so even when as a consequence of the psychosis the offender has had no ability to understand the meaning of his or her act or adjust the acting in accordance with such an understanding. Instead, a psychosis at the time of the crime that leads to such a lack of ability makes the prison prohibition applicable to the offender.

A most natural comment here, I dare say, is

that this is a very peculiar order. Since the Swedish penal law does not recognize accountability, the official reason for why psychosis is a paradigm of severe mental disorder cannot be that psychosis compromises accountability (cf. Malmgren et al., 2010). Nevertheless, it seems that some of the intuitions forming the basis of the concept of severe mental disorder do concern conditions for responsibility. Within the ideological framework of the Criminal Code in force these intuitions can only operate through the prison prohibition. The most visible result is the peculiar regulation in the second paragraph of Ch. 30 § 6 of the Criminal Code.

Offenders today whose acts are caused by severe mental disorders would before 1965 have been exempted from criminal responsibility. This follows logically from the fact that the first prison prohibition condition of the first version of the Criminal Code was intended to have the same extension as the last accountability condition of the Penal Code.

The conundrum of joining intuitions concerning criminal responsibility, on the one hand, and need of psychiatric care, on the other, is reflected in the troublesome concept of severe mental disorder. Though severe mental disorder is declared to be a legal concept, the forensic psychiatric investigation, ordered by the court and performed by a team lead by a psychiatrist, is supposed to tell whether the criminal act was caused by a severe mental disorder, and whether the offender is still suffering from it at the time of the judicial decision. Since mid-year 2008, the investigation is also supposed to tell whether the offender, due to severe mental disorder, either lacked the ability to understand the meaning of the act or lacked the ability to adjust his or her acting in accordance with such an understanding. Finally, the investigation should tell whether the offender has self-induced the severe mental disorder. Not all of these issues stand out as ones that can be settled by psychiatry.

The Swedish forensic psychiatrist, in his or her role as an expert witness, is supposed to settle whether the defendant is suffering from a severe mental disorder. Considering that severe mental disorder has the special role that it has in the Swedish penal law system, the forensic psychiatrist is more or less in the same position as an American or British psychiatrist asked to give *ultimate issue testimony*, i.e., to testify whether the defendant is (legally) insane (Reznek, 1997, p.3). Surely, this legal issue is not for the psychiatrist, but for the court, to settle.

Best would be to discard the concept of severe mental disorder from the penal law (cf. Malmgren et al., 2010). Discarding it from the penal law probably would make it easier to uphold the distinction between what the court should decide and what psychiatry should assist with. Evidently, it is not for psychiatry to give an answer on whether the offender acted with intent. Nor on whether the offender is to be held responsible for what he or she has done. The latter is nevertheless what psychiatry is doing, in the Swedish system, and this because the concept severe mental disorder is so easily mistaken for a psychiatric concept. I remind the reader of the accountability requisite proposed by the government official reports quoted. Severe mental disorder is being listed as one of four ground conditions that can result in unaccountability. What meaning does the term “severe mental disorder” have here?

In my view, the rejection of severe mental disorder as a core concept in penal law should be combined with a reintroduction of accountability as a condition for criminal responsibility, not however in the form of another medico-legal construction, but as a strictly legal concept that it is up to the courts to apply on the basis of strictly medical information delivered by forensic psychiatrists. The prison prohibition would as a consequence also be discarded. The concept severe mental disorder might still have a role to play within compulsory psychiatric care.

CONCLUSION

In order to avoid the conceptual confusions that for many years have infested the debate on how to deal with mentally disordered criminal offenders, the roles of the psychiatrist and the court have to be much better separated. The psychiatrist should do psychiatry and nothing else. Then the court can simply use the psychiatric judgment as the empirical basis for its decision, and different standpoints within the court will no longer mean that the validity of the psychiatrist’s judgment is up to discussion because it is really a hidden legal judgment.

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Corresponding Author:

Christer Svennerlind, PhD
University of Gothenburg
Box 422, SE-534 03
Stora Levene, Sweden

E-mail: christer.svennerlind@gmail.com
Phone: +46 (0)76 1855 802

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