

# **NEUROSCIENCE, CRIMINAL RESPONSIBILITY AND PREVENTIVE DETENTION**

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# Introduction

- Dennis Nilsen, pleading ‘diminished responsibility’
- Three psychiatrists were asked does/did the defendant have an ‘abnormality of mind’
- Crown psychiatrist: “he is (merely) statistically abnormal”.
- Defence psychoanalyst: “of course...”

- A third responded... “it depends what you mean by ‘abnormality of mind’”

That is ...

- What did the law mean by 'abnormality of mind' ...
- and by 'diminished responsibility'?

- To many the nature of Nilsen's offending behaviour itself suggested not just *statistical* abnormality but also *pathological*, ...
- and his mental pathology was the subject of the trial.

BUT

- What if Nilsen's brain had been shown as abnormal,
- By way of 'inherent difference' or 'damage/degeneration'
- Would that not have clinched the issue?

OR

- Would he merely have been '*statistically abnormal*' as regards his brain ?

# Historical Context

There is ...

- Resurgence of neurobiological research on aggression ...
- within context of a growing contribution of the neurosciences to the understanding of complex behavioural traits and behaviour generally...

Coincidental with

- Violence being increasingly identified as a major international public health problem, and
- Society becoming increasingly risk averse

So ...

- As description of the biology of some perpetrators of violence becomes increasingly sophisticated...
- including developmentally
- Is it inevitable courts will begin to incorporate such knowledge as evidence?

Recognising ...

- Efforts to understand aggression from a biological perspective have a troubled history,...
- Evoking images of the Italian school of criminal anthropology...
- and the eugenics movement...
- with the misappropriation of biology to provide a rationale for oppressive social policies.

So ...

Caution

# A Criminal Legal 'Wish List' of Questions ...

... which the courts might *hope* neuroscience could help them towards answering might include...

- whether a defendant '*intended*' to do what he did, or
- determining the degree to which his urges are '*resistible*'; or
- otherwise assisting in determining his level of *responsibility*; or
- assisting in determining *memory*
- whether a defendant is *lying*

Plus

- can genetics or neuro-imaging *predict violence*; or
- suggest forms of *treatment* to reduce risk; or
- predict '*treatability*';

Boil down to questions within two broad legal domains:

- 'determining culpability'

and

- 'predicting and preventing re-offending'

However ...

## Whilst

- There is an understandable *scientific drive* towards understanding brain function, including in relation to violence...
- Even if science may develop so as to demonstrate correlations of particular genes, or types of brain state, with aggression or violence...
- Could that ever necessarily/reasonably *infer* diminished or absent criminal culpability, or
- *justify* preventive detention?

# Summary of Current State of Knowledge

- Neuroscience is increasingly identifying *associations* between biology and violence
- These appear to offer courts evidence *relevant to* criminal responsibility, and the risk of violence

However:

[leaving aside multiple methodological scientific problems]

- Given that the brain may be in particular states when its owner 'decides to be' violent ...
- What is *cause* and what is *effect*?
- What is cause and what is *mediation* (by the brain)?

However ...

- More fundamentally ...

- There is a *mismatch* between the (many different) questions which the courts might wish answered by biology and those questions which neuroscience is capable of answering

Exemplified by ...

- Definitions of mental disorder varying according to legal purpose

[Compare definitions adopted

- for the purpose of potential criminal exculpation; or
- of 'preventive detention', or...
- within mental health legislation, or ...
- in relation to various civil incapacities]

That is ...

- In law there is no 'real' mental disorder,
- only various abstract definitions of it,
- adopted for differing legal purposes ...
- which usually have little/no basis in medical or scientific constructions of mental disorder

And

- Failing to recognise this ...
- poses a risk to the proper exercise of justice
- and to civil liberties.

Since ...

- Addressing moral or legal responsibility may properly ‘utilise’ scientific data...
- but then require entry into a entirely different ‘*thought domain*’

And

- Although demonstrating that particular brain function is associated with violent behaviour might contribute towards inferring diminished or absent culpability, or towards justifying preventive detention, ...
- could it ever be properly applied to the *individual*,
- or be ‘sufficient’ of itself?

# CONCLUSIONS AND FUTURE PERSPECTIVES

- Psychiatry, or neuroscience, may be able to describe abnormalities of mental functioning, in their own terms, but that is not to answer questions about legal responsibility; or to justify preventive detention.
- ‘Scientific explanation’ is *just that*,
- and legal attribution of responsibility/justification of preventive detention is *also just that*.
- To attempt to go from ‘science in being’ to ‘law in the abstract’, involves a journey for which there is no map ...
- and which may not even ‘exist’, as a journey.

'Law asks questions which science cannot answer;  
whilst *science* answers questions that the law largely  
does not pose'

[Eastman N and Campbell C, (2006) Neuroscience and  
Determination of Criminal Responsibility, *Nature  
Reviews Neuroscience*, 7, 311-318;

Eastman N et Campbell C (2006) Crime, Biologie et  
Chatiment, *Grands Articles*; 4:62-71]

Because ...

- What is at issue is whether the model of a given science that is being offered to the courts can '*map onto*', or not, the legal questions to which that science is to be applied
- In relation to some 'low order' questions (eg memory, deception?) it may; but not directly in relation to 'high order' questions
- There will always be need of 'translation' from science into law

And ...

- were 'direct mapping' in future to prove possible, we would perhaps have 'biologically explained away personhood', ...

That is...

We would have...

subsumed both legal and moral responsibility into biology!