

Psychopathy and insanity defences: clarifying the terrain

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Outline

- Interdisciplinary perspective on psychopathy
 - Clinical perspectives
 - Legal perspectives
 - Relevant empirical research
- Psychopathy and insanity defences (main focus on defence in Scots law)
- Some general conclusions/clarifications

Clinical perspectives

- Clinical “psychopathy” is complex – three major broadly “antisocial” personality disorders in adults:
 - Antisocial personality disorder (ASPD) in DSM-IV/DSM-5 systems; largely behavioural criteria (but personality and affective symptoms are included as “associated features”)
 - Dissocial personality disorder (DPD) in ICD-10 system; mixture of personality, behavioural and affective criteria
 - PCL-R psychopathy: “unofficial” measure, used widely in prison and forensic psychiatric settings; more extensive criteria
- In general, these criteria describe individuals exhibiting:
 - Antisocial, including criminal, behaviour
 - Emotional abnormalities such as lack of affective empathy (callousness) and apparent lack of guilt, regret or remorse
 - Personality features like superficial charm, manipulativeness, grandiose sense of self worth, pathological lying
- May be a “dimensional” construct - i.e. psychopaths are different by degree, not in kind (i.e. “psychopathic” may be better than “psychopath”) (e.g. Edens et al. 2006)

Legal perspectives (1)

- Good example provided by Scottish Law Commission (SLC):
 - “psychopathy does not have the effect that a person cannot control his conduct. Its effect is to make it more difficult, but not impossible, for the person concerned to behave in a way that he knows is correct”
 - “because of the psychological make-up of the accused he has difficulties, not shared by the ordinary person, in complying with the requirements of the law”
 - “He appreciates what he is doing...”

Report on Insanity and Diminished Responsibility (Scot Law Comm No 195, 2004) para. 2.60

Legal perspectives (2)

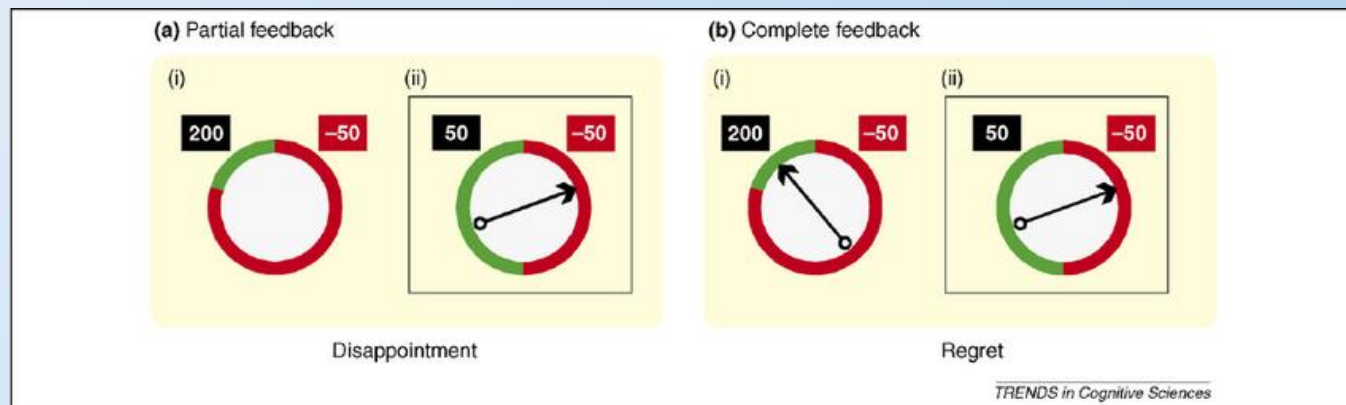
- Thus, from the SLC's perspective, psychopaths:
 - Suffer from a *partial* volitional disorder, where persons find it more difficult, but not impossible, to behave lawfully
 - Have a normal appreciation of what they are doing
- View is also framed in categorical terms
- Indicative of approach in other jurisdictions, e.g.
 - Canada: "Such a person is capable of knowing that his or her acts are wrong in the eyes of society, and despite such knowledge, chooses to commit them" (*R v Oommen* (1994)(SC Can.) at 521-2)
 - Australia: ASPD a "personality disorder evidenced merely by a lack of self control or indifference to standards of morality" (Law Reform Com. of Western Australia, *Criminal Process and Persons Suffering from Mental Disorder* (1991) para 2.13).
 - England & Wales: Law Commission favoured SLC's view (*Insanity and Automatism Discussion Paper* (2013) paras 4.96 & 4.98

Relevant empirical research (1)

- Brief - just intended to suggest that SOME psychopaths may have significant criminal responsibility-relevant abnormalities
 - mostly looking at PCL-R psychopathy (popular test!)
- 1) influential research in mid-1990s suggesting that psychopaths may not be able to distinguish between moral and conventional norms or transgressions has not been supported by a recent, larger study (Blair 1995; Blair et al. 1995; Aharoni et al. 2012);
 - psychopaths may be able to make this distinction just as well as non-psychopaths
- 2) other research on moral decision-making, using functional magnetic resonance imaging (fMRI) suggests that psychopaths may use alternative cognitive strategies, in particular using less emotional processing, when making SOME moral judgments (e.g. Glenn et al. 2009; Harenski et al. 2010; Pujol et al. 2012)
- 3) in general, though, psychopathic participants have provided normal responses to questions posed by researchers

Relevant empirical research (2)

- 4) In one study, though, PCL-R psychopaths lacked the bias towards blame normally directed towards those responsible for purely accidental (i.e. not intentional or negligent) harms; attributed to the lack of a normal emotional response to these scenarios (Young et al. 2012)
- 5) In another study, utilising an economic game, psychopathic participants appeared to experience regret normally when it became apparent that they could have obtained a better result had they made a different decision;
 - however, they were significantly less likely to take *potential for regret* into account while making economic decisions, instead relying more heavily on anticipated economic utility (in contrast to controls)
 - correlated strongly with the number of previous incarcerations for criminal offences (Baskin-Sommers et al. 2016)



(from
Coricelli
et al.
2007)

Psychopathy and insanity defences - preliminary points

- Criminal responsibility-relevant problems may not be morality-specific
 - prudential rationality may also be relevant
- May therefore be a mistake to focus too narrowly on issues of moral rationality when assessing responsibility
- Begs the question whether moral and prudential rationality SHOULD be relevant to criminal responsibility...
 - ...but insofar as they ARE, assessment ought arguably to consider both*

Psychopathy, moral rationality and insanity (1)

- If moral rationality is relevant, assessment is complex, e.g. :
 - Threshold-setting: at what point is an individual's capacity to recognise and respond to moral reasons not to commit an offence sufficiently impaired to undermine capacity for moral responsibility?
 - Varying demands on moral rationality: not all morality-related offences make the same demands on us (e.g. capacities required may vary from case to case)
 - Weighting of demands made on *moral* versus *non-moral* rationality
 - Non-moral reasons are also relevant to criminal offences, insofar as they normally provide reasons for us to act lawfully or refrain from acting unlawfully

Psychopathy, moral rationality and insanity (2)

- Some insanity defences require a jury to deliberate along these lines
- e.g. “appreciation” component of the new “mental disorder” defence in Scots law. Defence states that:
 - “A person is not criminally responsible for conduct constituting an offence, and is to be acquitted of the offence, if the person was at the time of the conduct unable by reason of mental disorder to appreciate the nature or wrongfulness of the conduct.”

s.51A(1) Criminal Procedure (Scotland) Act 1995 (CPSA)

[as amended by s.168 Criminal Justice and Licensing (Scotland) Act 2010;
came into force in June 2012]

Psychopathy, moral rationality and insanity (3)

- To clarify meaning of “appreciate”, in its 2004 Report the SLC referred to the Australian High Court case of *R v Porter*, where Dixon J stated:
 - “The question is whether...[the accused]...was able to appreciate the wrongness of the particular act he was doing at the particular time. Could this man be said to know in this sense whether his act was wrong if through a disease or defect or disorder of the mind he could not think rationally of the reasons which to ordinary people make that act right or wrong? If through the disordered condition of the mind he could not reason about the matter with a moderate degree of sense and composure it may be said that he could not know that what he was doing was wrong...What is meant by wrong is wrong having regard to the everyday standards of reasonable people” (*R v Porter* (1933) (HC Aust.) at 189-90 (my emphasis))
- Consistent with decision in recent appeal *MacKay v HM Advocate* [2017] HCJAC 44 – “appreciation” component of the defence “can...cover an inability to conduct oneself in accordance with a rational and normal understanding” (Lord Carloway, para 30).

Psychopathy, moral rationality and insanity (4)

- **QUESTION: could this apply to psychopathy?**
 - i.e. where a person, due to severe psychopathy, lacks an ability to incorporate potential for regret into their decisions, and this causes them to lack “a moderate degree of sense and composure”
- Possible objection: “regret” research only sheds light on why psychopaths make bad decisions, and why it is “more difficult, but not impossible” for psychopaths to act lawfully;
 - we do not exculpate defendants simply because they have made a bad decision
- Possible response: from the perspective of *Porter* (and now *MacKay*), what matters is whether behavioural regret-insensitivity could lead to irrationality relative to the “everyday standards of reasonable people”;
 - if so, then “badness”, or otherwise, of decision is beside point
 - *Porter*, and approach of the SLC, is consistent with conceptualisation of insanity defence as a capacity-based **exemption** rather than an **excuse**

Psychopathy, moral rationality and insanity (5)

- Analysis could also apply to defences in other jurisdictions (ignoring any formal exclusions) where the concept of “appreciation” is used – e.g.
 - Canadian law
 - U.S. States following the Model Penal Code
- But is not going to work in every jurisdiction, e.g. English law
 - to succeed with insanity defence, jury must accept that:
 - “at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to **know the nature and quality** of the act he was doing; or, if he did know it, that he **did not know he was doing what was wrong** (*M’Naghten’s Case* (1843) (HL), per Lord Tindal CJ at 210)
 - “nature and quality” has been held to refer only to the “physical character” of an act, and not to “distinguish between the physical and moral aspects” of conduct (*R v Codère* (1917) (CA) at 27).
 - “wrongfulness” limb has also been interpreted restrictively: “wrong” has been held to mean legally wrong (*R v Windle* (1952)(CA) at 832–3)

Psychopathy, prudential rationality and insanity

- Evidence from the study by Baskin-Sommers et al suggests broader problems with rationality, including prudential rationality
 - Prudential rationality problems in keeping with other data on psychopaths
- Prudential rationality is potentially relevant to criminal responsibility (e.g. ability to respond to threats of criminal sanctions/deterrent “message” of criminal law);
 - consistent with *Porter*, and also the “rational and normal understanding” referred to *Mackay*
- If prudential rationality is ALSO relevant (i.e. in addition to moral rationality) to an insanity defence then evidence of prudential rationality could bolster chances with defence (for some psychopaths)
- Jurisdiction-dependent (cf. M’Naghten Rules)

Conclusion

- “Psychopathy” is more complex than represented in many policy discussions, such as in the Report by the SLC
- There is a risk of oversimplification in this area, where lawmakers and policymakers attempt to define psychopathy or its responsibility-relevant features.
- Scientific evidence raises significant questions about the criminal responsibility of psychopaths
 - some psychopaths may be entitled to succeed with some insanity defence (ignoring any formal exclusions)
 - BUT ALSO broader responsibility-related questions, e.g.:
 - are insanity *defences* the right focus? What about fitness to plead?
 - what about less severely affected psychopaths with responsibility impairments? General defence of diminished responsibility?
- Should responsibility theory alone determine policy?

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