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’
- ‘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’

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!