

Perspective on Imitation: Empathy and Criminal Responsibility

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Recent research suggests that empathy plays an important role in normal social awareness and behaviour. What does this mean in regard to criminal responsibility? Do judges and forensic experts consider the capacity for empathy to be a precondition of criminal responsibility? Given the fact that recent investigations suggest capacity for empathy is required to behave “normally”, lacking this, is a person who commits a criminal act responsible?

Within the last 15 years, debates have occurred in philosophy of mind and psychology. How are human beings capable of understanding the mental states and actions of their fellow beings? Is it because they develop a folk theory (use rules), or because they are capable of imagining what it is like to be another person (use intuition)? If imagining what others think and feel is important, it follows that this ability is required for at least some moral and legal interpretations and judgments — if I know whether Joe is angry and jealous and hit me *on purpose*, then I can pass a moral and, if necessary, legal judgment on Joe.

The disorder of autism plays an important role in this debate. Normally-intelligent autists have some understanding of the mental states and behaviour of other human beings, as well as of moral and legal rules. However, their knowledge is impoverished when compared to the “norm”. As an example:

At some point in her conversation with Oliver Sacks, the well-known autist Temple Grandin remarks that she could *logically* infer that a colleague was jealous of her because she noticed that he was sabotaging her work, but she said that she could not see any jealous look on his face.

Autists apparently use a more explicit and inferential, “theoretical” route than “normal” human beings to understand others. For most people, social knowledge is largely a matter of implicit practical knowledge. The following two examples illustrate the detached nature of autistic social understanding:

Whereas a normal child would have to think hard to tell *how* he knows that his father is angry, he “just knows” it (that is, he sees and feels it), it turns out that autistic children *infer* that their father is angry — for example from the shape of his moustache. Their knowledge is also fragmented, for the children only look at, for example, the moustache and do not have an integrated “holistic” picture of their father’s angry face and bodily gestures. Even more convincing perhaps are the reports of autistic children who tell their teacher that another child is “making a strange noise” when the other child is crying.

Developmental studies show that the innate capacity to *simulate* in newborn babies is the building block of social knowledge and that this capacity does not work properly in autistic children.

There is also physiological research that shows that subjects who are instructed to describe the negative emotions of others are better at the task if some of their physiological states “resonate”, that is become similar to, those of the people they observe. The discovery of mirror-neurons is relevant in this respect. Mirror-neurons not only fire when you do something or when something happens to you (for example, when you prick yourself with a needle), but also when you observe *someone else* doing the same thing (pricking himself with a needle). Thus, these neurons “resonate”. Some theorists think deficiencies in the mirror-neuron system play a crucial role in the disorder of autism.

Research on autists shows that physiological changes do not occur in autistic children; similar physiological changes are also absent in psychopaths. Thus, disorders such as autism and psychopathy seem to offer a serious argument in favour of the claim that empathy plays an important role in understanding social expectations. Purely inferential and detached knowledge of mental states, actions, and social rules is impoverished and insufficient when compared to the seemingly practical, seemingly automatic and intuitive knowledge of “normal” human beings.

Moral psychologists argue that a capacity for empathy is necessary for the development of moral emotions — compassion, shame, guilt, feelings of justice and the like. If someone lacks the capacity for empathy, he is not capable of precisely those emotions that form the foundations of ethics and criminal law. The question is, to what extent do these deficiencies affect his culpability and responsibility? There are two categories of people who have serious deficiencies in their capacity for empathy: psychopaths and autists. (Other categories of people with empathic deficiencies are: people with prefrontal damage, fronto-temporal dementia, and anorexia nervosa.)

Psychopathy is characterised by “an early onset of extremely aggressive behaviour that is not tempered by any sense of guilt or empathy with the victim.” Although most serial killers and rapists are psychopaths (for example Hannibal Lecter in *The Silence of the Lambs* is supposedly a psychopath), many psychopaths perform less extreme anti-social behaviour. Some commit only white-collar crimes (fraud), or even manage to keep within the boundaries of criminal law. All are characterised, however, by the fact that they have very shallow emotions and do not experience feelings of empathy and guilt.

In view of the deficiencies of psychopaths, it might seem right to accord a crucial role to affective empathy in moral cognition and conclude that Kantians are wrong to emphasise the feeling of respect for the “categorical imperative” as the only foundation of ethics. [Immanuel Kant was the 18th-century sage of Königsberg whose iron reverence for absolute truth as the core value of human nature defeated many a dialectical opponent.] But autists are much more morally responsible persons than psychopaths and this fact can only be accounted for from Kantian perspective.

Autism, too, is characterised by lack of empathy. However, although autists can exhibit aggressive behaviour as a consequence of their deficiencies, autism is not characterised by aggressive behaviour. Moreover, autists, unlike psychopaths, *do* adhere

to rules, distinguish between merely conventional and moral rules, experience feelings of guilt and have a strong sense of justice. The following example serves to illustrate the differences between psychopaths and autists:

An autistic boy was still on the platform when the conductor asked for his train ticket. The boy refused. Things got out of hand and the boy ended up being picked up by the police. Had the boy been a psychopath, he might have had a fight with the conductor “just for kicks.” The autistic boy, however, was not trying to provoke the conductor. Unlike psychopaths, autists are socially very naive and they are incapable of complex social interactions such as provoking. In the boy’s rigid perception of the situation, the conductor had a right to see his ticket if, and only if, he was *in the train*, but not when he was still on the platform. The boy was not a “rebel without a cause.” His refusal was a matter of principle.

Thus, although autists apply rules too rigidly and are incapable of weighing interests appropriately, they seem to be moral agents in a Kantian sense of the term, precisely *because* they have such a rigid view of the world.

An important question to be addressed therefore is how to account for the fact that although both autists and psychopaths lack empathy, autists perform much less anti-social behaviour and are much more responsible beings than psychopaths. What role does empathy play, and what roles do other criteria, such as respect for the law, play in normal behaviour? The answer will help determine whether empathy should be a precondition of criminal responsibility.

Culpability and responsibility in (Dutch) criminal law

The principle “no punishment without guilt” is a foundation of Dutch criminal law. Contrary to civil law, criminal law does not allow for strict liability for any criminal act. For a defendant to be punishable, he should be *guilty* of committing the criminal act. For someone to be guilty, his act must be culpable. An act is culpable if defendant “could have done otherwise.” Although Dutch criminal law is guilt-based law, the question whether defendant is guilty is not the first question to be dealt with. The court must first determine

1. whether the elements of the act are proven as charged and
2. whether the act can be qualified as a criminal fact.

If either proof or qualification fails, the verdict will be “not guilty”. Otherwise, a further question must be answered:

1. whether defendant has raised a special defence.

Defences can be either justifications or excuses. Justifications are defences that take away the unlawfulness of otherwise criminal facts; excuses take away the culpability. If the defendant has either a justification or an excuse, he is not punishable and the court will discharge him from further prosecution.

It should be noted that the distinction between justifications and excuses is developed more in the theory than in case law. The statutory description of the special defences in articles 40 — 43 of the *First Book of the Dutch Penal Code* reflects another distinction, that is, between internal and external causes. As a consequence, some of the articles which deal with external causes deal with both justifications and excuses.

There are two kinds of external causes. They are related to justifications and excuses, respectively. Some external causes are of such a nature that in reasonableness we should not ask of any normal human being to refrain from committing a criminal act (for example self-defence). Therefore such external causes take away, not just the culpability, but the unlawfulness of the act. Characteristically, the defendant acted freely and rationally in such cases.

There are also external causes that affect otherwise normal human beings to such an extent that they were not capable of acting fully rationally and freely *at the time*

of the crime (for example, *excessive* self-defence). These external causes do not take away the unlawfulness, but only the culpability of the act.

Finally, internal causes are conditions in the personality of the defendant that have caused him to commit a criminal act. The criminal code recognises two kinds of internal cause: the juvenile age and the insanity of the defendant. The juvenile age (in the Netherlands under 12 years) takes away the possibility of prosecution altogether. The insanity of the defendant might take away the culpability of the act and therewith the possibility of prosecution. Article 39 says:

Not punishable is he who commits a criminal act for which he cannot be held responsible because of the poor development or pathological disturbance of his mental capacities.

Although it is common to talk about the responsibility of a disturbed person in general, it should be noted that article 39 deals with criminal responsibility for a particular act only. In cases where article 39 might apply, a forensic expert must determine whether there is a causal relationship between the mental disorder and the criminal act; the court must then decide whether the defendant therefore lacked responsibility for his act. Obviously, whether having a mental disorder results in diminished responsibility for a particular act will depend on the type of act and the circumstances of the act. Thus, a psychotic defendant might be liable for tax fraud, but not for manslaughter.

If there is total absence of responsibility, the court will discharge the defendant from further prosecution. The court can, but need not, combine this decision with an order. Article 37 allows for admission into mental hospital for one year. Articles 37a and 37b allow for placing defendant at the disposal of the government, and this order can be combined with an order to stay in a secured hospital.

Finally, although article 39 suggests that criminal responsibility is an all-or-nothing affair, a five-point scale is commonly used to indicate the degree of criminal responsibility:

- total absence of responsibility
- severely diminished responsibility
- diminished responsibility
- slightly diminished responsibility
- complete responsibility

In cases of diminished responsibility a combination of punishment and an order is possible.

Does lack of empathy count as an internal cause?

What role do lawyers and forensic experts in fact accord to a lack of empathy? Preliminary investigations into these matters suggest that the capacity for empathy is not systematically taken into account when the mental state and possible excusability of the defendant is investigated. Only one forensic psychologist has explicitly addressed the question what role the capacity for empathy plays in forensic diagnosis. He argued that neither judges nor forensic experts accord a systematic role to the capacity for empathy.

Have the courts given any arguments for according full responsibility to defendants who did not show feelings of empathy and guilt towards the victim? Lack of empathy is more often seen as a reason *against* mitigation of a sentence than as an excuse for one's action. There is at least one legal case where a lack of empathy was explicitly mentioned as a mental incapacity, but this empathic deficiency did not result in according diminished responsibility. Is there evidence that some of these defendants who were held fully responsible were, in fact, psychopaths or autists? Is there evidence that some of them should have been considered as having diminished responsibility but this was overlooked by the prosecutor or the examining judge or misdiagnosed by forensic experts? Almost certainly, as most jurisdictions around the world consider psychopaths to be legally sane.

Should lack of empathy count as an internal cause resulting in diminished responsibility? Since the legislation intends not only "thinking" disorders, but also strong impulses and emotions to count as "mental disorders" when appropriate, lack of empathy could be a reason for according diminished responsibility.

From an "empathic" point of view, there is an interesting difference between pervasive thought disorders and emotion disorders. Whereas it is difficult, if not impossible, to empathise with someone who has a pervasive disorder, we (or rather some forensic experts and judges) do seem capable of empathising with people who suffer from an emotional disorder. For example, although we know that someone in an acute psychosis is capable of murdering his mother whom he has always loved dearly, we seem to know it in a theoretical way only. Our knowledge is based on explicit inferences from psychiatric theories, not on an imaginative or emotional perspective. Both the content and the structure of psychotic thought are incomprehensible to us. It is in part because we cannot empathise with psychotic defendants that we consider them to be severely diminished responsible. In such cases, perhaps we understand their behaviour in the

same way as autists understand *our* behaviour: our knowledge is explicit, inferential, detached and third-person.

What about those people who seem to be in contact with reality and who are capable of means-ends reasoning and thus seem to be fully rational? Could they yet be have diminished responsibility due to their empathic deficiencies?

Normally intelligent autists are capable of means-ends reasoning and of adhering to rules. Moreover, they experience feelings of guilt when they break a rule. They also are capable of distinguishing between merely conventional and truly moral rules. They fail, however, in properly understanding and weighing the *interests* of different people and they apply the rules too rigidly.

Psychopaths, conversely, are impulsive, live for the moment, and lack feelings of guilt. Most of them are normally or even *highly* intelligent and their behaviour appears to be the outcome of a cold but rational choice. Since many psychopaths are glib and charming and capable of deceiving and manipulating, they seem much more *normal* than autists. As a consequence, we are inclined to think of them as normal but evil beings. Only if we pay careful attention, we notice that the emotions they express so vividly are in fact shallow and that the structure of their thought is defective (they contradict themselves a lot). There is neurophysiological evidence for these defects. The question to be investigated is whether their empathic deficiencies *should* result in diminished responsibility.

Preliminary investigations strongly suggest that neither legal scholars, nor forensic experts, pay systematic attention to the relation between empathy and criminal responsibility. The empirical-philosophical findings, on the other hand, give a more up-to-date and systematic account of the capacity for empathy and the relation between empathy and “normal” thought in general to assist in answering the question “Should empathy be a precondition of criminal responsibility?” The answer seems to be, “While It may not feel ‘right’ to you, probably, ‘Yes.’”

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