



The “untreatability” of psychopathy and hospital commitment in the USA[☆]

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ABSTRACT

One argument in support of a public policy of not subjecting persons with psychopathic disorders to civil or criminal commitment is that these disorders do not improve with treatment. This article examines the relationship between the assumption of untreatability of psychopathic disorders and outpatient civil commitment, inpatient civil commitment, and insanity acquittee commitment. Research on the treatability of psychopathy is reviewed and the treatment of conditions co-morbid with psychopathy is considered. Research evidence is insufficient to support the conclusion that psychopathy is improved, worsened or not affected by treatment. Evidence does support effective treatments for conditions that can be co-morbid with psychopathic disorders including impulsive aggression which can be interpreted as a manifestation of psychopathic disorder.

The absence of evidence based treatment efficacy for psychopathic disorders is a logical reason for not subjecting individuals with only a psychopathic disorder to involuntary hospitalization. This assumption should not becloud the possibility of treatable co-morbid conditions which may or may not qualify for involuntary hospitalization. Where the primary mental disorder, for which an individual is involuntarily hospitalized, results in behavioral improvement, the continued presence of a psychopathic disorder itself, should not be sufficient reason to continue coerced confinement. Even so, where the primary disorder is incompletely treated, psychopathy can be considered a risk factor when deciding upon the appropriate time for discharge and when formulating a safe and effective after care plan.

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1. Introduction

Psychopathic disorders,¹ a spectrum of character pathology ranging from Antisocial Personality Disorder of DSM IV-TR (American Psychiatric Association, 2004) to Clecklian Psychopathy (Cleckley, 1976) and Hare Psychopathy (Hare, 1991, 2007), are widely assumed to be untreatable conditions. The presumption of “untreatability”² appears to have been a decisive factor in formulating public policy in the United States that disfavors civil and criminal commitment of individuals with only a psychopathic disorder. Because psychopathic disorders represent psychopathology, they warrant treatment, or therapeutic

research if evidence based treatments are lacking. The future DSM V will revise the taxonomy of personality disorders which could remain as categorical disorders and traits, to designate lesser degrees of anomaly, or the nomenclature could be transformed into one of pathological dimensions rather than disorders with arbitrary thresholds. More likely, the revised nomenclature will consist of a hybrid of disorders and dimensions (Regier, Narrow, Kuhl, & Kupfer, 2009). In any case, whether disorders or dimensions, psychopathic psychopathology will remain and will remain in need of effective treatments.

The presumption of “untreatability” of psychopathic disorders argues against the treatment of psychopathically disordered individuals and especially their legally coerced treatment. If psychopathic disorders are untreatable, it makes little sense to subject individuals with psychopathic disorders to outpatient civil commitment, let alone inpatient civil commitment. If hospital commitment is inappropriate for psychopathically disordered individuals, it is equally inappropriate regardless whether the commitment is civil or criminal. If an NGRI acquittee cannot be hospitalized for public safety reasons, allowing an NGRI defense in the first place would seem to be imprudent public policy, putting aside in this discussion other arguments for and against NGRI acquittal based only upon psychopathy.

Are psychopathic disorders as untreatable as received wisdom would suggest? After examining the relationship between the presumption of untreatability and civil and NGRI commitments in the United States, this analysis will review the evidence that Hare

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¹ For a review of the conceptual development of psychopathic disorders, see Saß and Felthous, (2007).

² “Treatability” is not a word that is recognized in common household, medical, psychological and psychiatric dictionaries. Equivalent expressions such as “amenable to treatment” are too cumbersome to be used repeatedly in discussing the treatability of psychopathic disorders. No distinction is made here between effective and efficacious treatment. The issue is simply whether one or more methods of treatment have been demonstrated to bring about the desired result. If a condition is “untreatable”, no treatment is known that improves the condition.

psychopathy is or is not treatable. Regardless whether the core psychopathology of psychopathic disorders is amenable to treatment, other treatment considerations are appropriate and must be considered. Psychopathically disordered individuals may not be as categorically and absolutely untreatable as is so widely assumed, but what does this mean for their civil commitment and criminal commitment?

2. Outpatient civil commitment

Outpatient civil commitment of individuals with psychopathic disorders should be less controversial than inpatient commitment to a total institution with its vastly greater restriction of freedom. If in principle, like probation or parole in the criminal justice system, outpatient commitment provides an attempt at treatment and some measure of legal control, perhaps individuals with psychopathic disorder could be more safely managed with consequent reduction in the risks of criminal and violent conduct that victimizes others and subjects the individual herself or himself to the much more costly and punitive response of incarceration.

Winick, LoPiccolo, Anand, and Hartswick (2007) present a cogent legal argument against outpatient commitment of individuals with psychopathy. Their objections to outpatient commitment of psychopathic individuals are both constitutional and related to public policy. Their two constitutional objections are predicated on the assumption that psychopathy is untreatable. Because no treatment is effective for psychopathy, outpatient commitment would not benefit the individual and there would therefore be no *parens patriae* justification for outpatient commitment. Also because treatment would not benefit the individual, outpatient commitment would not protect the public from the individual's tendency toward criminal or violent conduct. Without increased public safety, *police power* cannot justify outpatient commitment.

In addition to these constitutional concerns, Winick and colleagues present five public policy objections to outpatient commitment of psychopathic individuals: 1) Because treatment is of no benefit, outpatient commitment would waste precious mental health services. 2) The criminal justice system, including imprisonment, is intended to deal with criminal offenders and is appropriate for psychopathic offenders. 3) If treatment is desired, it can be offered to the psychopathic inmate in prison. 4) Outpatient commitment for treatment would undermine the psychopathic individual's sense that she is responsible for her own behavior and should exercise appropriate self control. 5) And outpatient commitment of psychopathic individuals would in effect diminish the legitimacy of the mental health system as well as the criminal justice system. Some of these public policy concerns are premised on the assumption of the untreatability of psychopaths: Both constitutional objections are based on untreatability.

3. Inpatient civil commitment

Unlike outpatient commitment, inpatient commitment could serve to protect the public, even without therapeutic benefit to the individual. Beyond the controversial potential for preventive detention, the untreatability premise would pose the same kind of constitutional and public policy problems as outpatient commitment, except for the second constitutional exception pertaining to police power. At least while the dangerous, psychopathic individual remains safely confined in a hospital the public is protected from potential predation or violence. Inpatient commitment, when no effective treatment exists, is even more violative of the individual's liberty, because confinement in a walled institution is so much more restrictive. Among other objections, Habermeyer, Rachvoll, Felthous, Bukhanowsky, and Gleyzer (2007) include the presumed untreatability of psychopathic disorders as reason not to support inpatient commitment. Their other objections are similar to those that Winick and colleagues have against outpatient

civil commitment of individuals with psychopathic disorders. In addition Habermeyer notes that psychopathic inpatients disrupt the therapeutic milieu and compromise the safe treatment of inpatients with mental illness, a point previously made by Fitch and Ortega (2000) as well. This latter reason for not subjecting those with psychopathic disorders to civil inpatient commitment is strengthened with the presumption of untreatability.

4. Insanity commitments

The hospital commitment of a defender who has been found not guilty by reason of insanity presupposes an NGRI finding. In law and in practice an insanity defense and verdict wherein the defendant's only mental disorder is a psychopathic one is discouraged and seldom occurs. But it has occurred (see generally Greenberg & Felthous, 2007). A full analysis of the relevance of the NGRI defense to psychopathic disorders is beyond the scope of this present review. It is also unnecessary for the present discussion, because regardless whether or not a psychopathic disorder should qualify for insanity acquittal or diminished responsibility, the presumed untreatability of psychopathic disorders is irrelevant to the issue of criminal responsibility. The insanity and diminished responsibility defenses are based upon mental disability regardless whether the condition is treatable.

Nonetheless, the remote possibility of NGRI acquittal based upon a psychopathic disorder raises the question of involuntary hospitalization of the NGRI acquittee whose only disorder is a psychopathic one. If civil commitment of a person with only a psychopathic disorder is discouraged as public policy in part because the condition is untreatable, one would expect the same logic to apply to NGRI acquittees. In *Jones v. United States* (1983), however, the United States Supreme Court made a distinction between civil and NGRI hospital commitments: “[W]hen a criminal defendant establishes by a preponderance of the evidence that he is not guilty of a crime by reason of insanity, the Constitution permits the government, on the basis of the insanity judgment, to confine him to a mental institution until such time as he has regained his sanity or is no longer a danger to himself or society” (p. 370). Insanity acquittee Jones suffered from schizophrenia, paranoid type, a condition whose symptoms are usually controllable with pharmacotherapy. Even though the Supreme Court did not equate NGRI commitment criteria with civil commitment criteria, the criteria of mental illness and dangerousness to self or others are shared by both types of commitment. The presumption of untreatability was not relevant to Jones whose primary mental disorder was not psychopathic.

In *Foucha v. Louisiana* (1992) the United States Supreme Court considered the continued hospitalization of an insanity acquittee whose only disorder was antisocial personality. Terry Foucha may have had a drug induced psychosis at the time of his offenses of aggravated burglary and illegal discharge of a firearm. He was found NGRI and committed to East Feliciana Forensic Facility in Louisiana. After signs of mental illness dissipated, a three-member panel reported that Mr. Foucha had shown no evidence of mental illness and recommended his conditional discharge. The committee further recommended that Mr. Foucha

- “(1) be placed on probation;
- (2) remain free from intoxicating and mind altering substances;
- (3) attend a substance abuse clinic on a regular basis;
- (4) submit to regular and random urine drug screening; and
- (5) be actively employed or seeking employment” (note 2, p. 1782).

In their written report, a two member sanity commission appointed by the trial judge concluded that Mr. Foucha “is presently in remission from mental illness [but] [w]e cannot certify that he would not constitute a menace to himself or others if released” (p. 1782). Testimony by one of the doctors indicated that Mr. Foucha was no longer psychotic but he still had an antisocial personality that

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