

## Moral Liability to 'Crime-Preventing Neurointervention'

My aim in this essay is quite restricted. It is to offer a moral framework for thinking about certain issues that are often discussed under the label, "crime-preventing neurointervention." Suppose there were some medical procedure, to which we can refer as the "Treatment," that would permanently reduce or eliminate a person's disposition to act in certain morally wrongful and harmful ways. It might, for example, greatly diminish or eliminate sexual desire in persons otherwise strongly disposed to engage in sexual molestation of children. Suppose further that the Treatment would be medically safe and, if administered to those who have been convicted of certain offenses, such as child molestation, would be as effective as imprisoning them would be in preventing them from repeating those offenses. The Treatment would, however, involve some violation of bodily integrity, such as a minor surgical procedure or an injection, as well as a breach of mental integrity. The question I will consider is whether it could be permissible to administer it to at least some such offenders, either with their consent or in defiance of their refusal of consent, as an alternative to imprisoning them.

I will not discuss relevant empirical issues, such as whether the actual treatments that are available would be as effective as imprisonment, or whether those treatments are actually medically safe in the long term. Nor will I discuss some of the obviously relevant moral issues. My concern is solely to explore the application of a certain form of justification, which I call a "liability justification," to the question whether it could be permissible to administer the Treatment to an offender, with or without his consent.

Suppose that a person, Offender, has in fact engaged in child molestation and has subsequently been arrested, tried, and convicted. There are various possible moral justifications for imprisoning him: that he deserves to be punished and imprisonment will constitute appropriate retribution, that imprisoning him will help to deter him and others from molesting children in the future, that it will express society's condemnation of his action, that it will serve to reform him morally, and that it will physically prevent him, at least for a while, from molesting other children. Perhaps more than one of these considerations constitute good reasons for imprisoning him. But the only one I will discuss is the final one: defense of Offender's potential further victims.

By being responsible for having engaged in child molestation, Offender has made himself morally liable to be physically prevented from engaging in it again. His action has made it reasonable for others to believe that, if he is not restrained – for example, by imprisonment in the first instance and the threat of further imprisonment after that – he will sexually molest other children. Assume that this reasonable belief is true. In that case, he is not wronged by being physically restrained for a time, and thereby also deterred from engaging in molestation after his release. This is because, by acting on his disposition to molest children, he has made it unavoidable for others to choose which harms will occur: the harms to him of being imprisoned and the harms to children of being molested.

Because he is the one who is responsible for the fact that harm is unavoidable in the circumstances, it is just that he should be harmed rather than the children he would otherwise molest. He is therefore morally liable to be imprisoned in defense of his potential victims, provided that the imprisonment is both necessary and also proportionate in relation to the prevention of the wrongful harms he would otherwise inflict.

I stress that it is his having actually engaged in sexual molestation, together with there being some significant probability that he will do so again if he not restrained, that makes him liable to defensive action. By itself, the mere likelihood or even certainty that a person will engage in sexual molestation sometime in the future is insufficient for liability to preventive action. Suppose there were a test that could infallibly identify those individuals who would, unless restrained or deterred, engage in sexual molestation. And suppose that the test were to identify some small boy as a future offender. There might be a moral justification for imposing some restraints on him when he became older. I will not defend a position on that issue here. I will merely note that, if there would be a justification, it would not be a liability justification but would have to be, for example, a lesser-evil justification. This is important, as the constraints on such a justification, such as the proportionality constraint, would apply differently from the way they apply to a liability justification.

In the case of Offender, who *is* liable to defensive harm, it is reasonable to suppose that a period of imprisonment, even for a number of years, is a proportionate means of preventing him from molesting one or more unidentifiable children. At least until recently, imprisonment may also have been necessary as a means of preventing many people who have been guilty of child molestation from repeating their offense. But if the Treatment were available, that might make imprisonment unnecessary in the relevant sense.

The necessity constraint on defensive harming is actually quite complicated.<sup>1</sup> But the complexities do not arise in simple cases such as that of Offender. In this case, imprisoning Offender would be unnecessary, and therefore impermissible, if there were an alternative means of preventing him from engaging in molestation that would be at least equally effective as imprisonment, would be less harmful to him, no more harmful to others, no more costly to implement, and so on. I have stipulated, for the sake of argument, that the Treatment would be equally effective as imprisonment. We can also assume that it would satisfy the other conditions implicit in the necessity constraint. Assuming that it would be less harmful to Offender, it seems that the necessity constraint requires that it be chosen in preference to imprisonment.

One important issue, then, is whether receiving the Treatment would be less harmful to Offender than years of imprisonment. There are various reasons for

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<sup>1</sup> Seth Lazar, "Necessity in Self-Defense and War," *Philosophy and Public Affairs* 40 (2012): 3-44; and Jeff McMahan, "The Limits of Self-Defense," in Christian Coons and Michael Weber, eds., *The Ethics of Self-Defense* (New York: Oxford University Press, forthcoming).

thinking that it would be. Suppose that, although the Treatment would not be irreversible but could be terminated at any point, it would need to remain effective for the same length of time as the period of imprisonment. Whereas imprisonment deprives a person of many dimensions of well-being (freedom, privacy, the majority of ordinary enjoyments, and so on), the Treatment would deprive Offender of only one – sexual pleasure – of which he would also be deprived by imprisonment, at least in the form in which it is shared with another person. It seems highly implausible to suppose that the retention of sexual desire, together with the possibility of the solitary satisfaction of that desire, could be more important to a person's well-being than the retention of all that one loses by being imprisoned.

Indeed, a case can be made, not that receiving the Treatment would be substantially less bad than imprisonment, but that it would be less bad for Offender than his continuing to desire to molest children. It seems plausible to suppose that a desire to have sex with children is not just instrumentally bad, or bad because of its possible effects, but also *intrinsically* bad for those who have it. To appreciate this claim, those who have an adult child might consider whether they would think it better, *for their child's own sake*, that their child have no sexual desire at all or that he desire to have sex with young children. The answer may of course depend on whether this desire would coexist with other sexual desires of a more benign nature and on whether the adult child would attempt to satisfy it. But it does not seem unreasonable for parents to prefer, for their adult child's own sake, that he have no sexual desire at all rather than have sexual desires exclusively for children that are so overmastering in character that he is perpetually tempted to satisfy them, even if he never would actually attempt to satisfy them (except perhaps in imagination). This is not just, or even primarily because the unsatisfied desires would be tormenting, but because it is unworthy of a person to have such desires.

Suppose, then, that it would be better for Offender to receive the Treatment for some number of years than to be imprisoned for the same period. And suppose further that he recognizes this and requests to have the Treatment rather than to be imprisoned – or that he is offered the Treatment as an alternative to imprisonment and consents to receive it. Many people think it would nevertheless be impermissible to administer it to him because he has requested or consented to it only under duress, or coercion. He would not, they claim, request it or consent to it if nothing would be done to him were he to refuse to consent.

This latter claim is not, however, necessarily true. There would likely be instances in which an offender who consents to have the Treatment under duress would also request to have it in the absence of duress – either because he realizes that it is worse for him to be the sort of person who desires to molest children or because he recognizes that molesting children is wrong and wants to ensure that he will never engage in this kind of wrongdoing. But I will ignore this possibility and assume that Offender would not consent to receive the Treatment except as an alternative to imprisonment, or to some other more harmful means of preventing or deterring him from molesting children.

It is, however, a mistake to think that the significance of his consent is nullified because it has been given only because others have made the only alternative worse for him. His consent may still contribute to making it permissible to offer him the Treatment and to administer it. For imprisonment is a harm to which he has made himself liable (or, perhaps to which he will be liable *if* he does not receive the Treatment). That he is liable to imprisonment if he does not receive the Treatment means that there is a moral requirement to imprison him unless there are countervailing considerations that override that requirement. For, as I indicated earlier, the claim that he is liable to be harmed entails that, in the absence of countervailing considerations, it would be unjust *not* to harm him, as harming him is the only means of preventing him from wrongly harming others – in this case, the child or children he would otherwise molest – who are not responsible, or are less responsible than he is, for the fact that some harm is unavoidable. Because his being liable to be imprisoned is thus equivalent to there being a defeasible moral requirement to imprison him, it is misleading to suggest that his consent is coerced if he is offered the alternative of receiving the Treatment. For he is, in effect, being offered a less harmful alternative to the only other option that he could permissibly have. He is himself responsible for the morally justified restriction of his range of options; hence there is no exploitation in offering him a better option than would otherwise be available to him. It is possible that he could be the only beneficiary of the offer.

Some argue that permissible punishments are restricted to those that do not violate the offender's bodily or mental integrity. One can, however, grant that this could be true of punishments inflicted for most of the familiar reasons without accepting that it applies in the case of Offender. It is crucial to bear in mind here that, although I am discussing the Treatment as part of a practice of legal punishment, the moral justification for administering it is not punishment in the ordinary sense but is instead third-party defense of the innocent. And there are often liability justifications for violating people's bodily integrity in defense of others. If, for example, it is necessary to shoot a person in the leg to prevent him from sexually molesting a child, it can be permissible to do so on the ground that he has made himself liable to this defensive action. But to cause a bullet to rip through his flesh is certainly to invade his body, and to breach its integrity.<sup>2</sup> And, although realistic examples are more difficult to find, the same is true of breaches of mental integrity. Suppose that the only way to prevent a man from going off right now to rape a child were to put a drug in his drink that would immediately and completely suppress in him both sexual desire and sexual potency, and that these effects would continue for a further year. Although this would intentionally alter him mentally without his consent, there is a liability justification for doing it given that he will otherwise rape a child.

It seems, in short, that if the Treatment would be less harmful to Offender than imprisonment, and especially if he rationally prefers it and thus consents to

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<sup>2</sup> For an extensive and illuminating discussion of the right to bodily integrity as a moral obstacle to procedures such as the Treatment, see Thomas Douglas, "Criminal Rehabilitation Through Medical Intervention: Moral Liability and the Right to Bodily Integrity," *Journal of Ethics* 18 (2014): 101-122.

receive it, it is not merely permissible but morally required by the necessity condition to administer it to him rather than to imprison him. But suppose Offender withholds his consent. Suppose he refuses to receive the Treatment and demands imprisonment instead. We must consider whether the necessity constraint implies that he ought to be given the Treatment against his will rather than be imprisoned.

Those who accept a desire-satisfaction account of well-being may think that Offender's preference for imprisonment shows that it is in fact less bad for him than the Treatment, at least if his preference satisfies certain conditions. Since I believe that Offender could be mistaken about which of these options would be worse for him, even when his preference satisfies the relevant conditions, I reject the desire-satisfaction account of well-being. I will therefore continue to assume that the Treatment would be better for Offender than imprisonment.

At a minimum, however, it does seem that Offender has the moral power to suspend the requirement of necessity in its application to him. Suppose, for example, that the Treatment would be a somewhat costlier means of preventing him from molesting children than imprisonment, but not sufficiently costlier to prevent it from being morally necessary in relation to imprisonment, given that it would be less harmful to Offender. It nevertheless seems that Offender's emphatic preference for imprisonment could make it at least *permissible* to imprison him. There may even be conditions in which he has a moral right to veto the option of giving him the Treatment. Suppose, for example, that imprisonment would be equally effective as the Treatment (for even if it would last less long, it could afterwards be an effective deterrent) and would be no more costly. In those conditions, respect for Offender's autonomy might make it impermissible to force him to have the Treatment even if, objectively, it would be less harmful to him and thus apparently required by the necessity constraint.

In the world as it is, however, imprisoning a person tends to be extremely costly, or expensive. It is not unrealistic to suppose that the cost of administering the Treatment would be only a tiny fraction of the cost to others of imprisoning Offender for the number of years that would be proportionate in relation to preventing and deterring him from engaging in further molestation of children. If that were so and he was not administered the Treatment because he objected to it, the costs of preventing and deterring him from molesting children would have to be shared between him and those who would have to pay for the cost of his imprisonment – most likely the taxpayers in his society. The cost to him would be the losses he would suffer through imprisonment and the costs to the taxpayers would be the loss of the resources necessary to keep him imprisoned that could otherwise have been used for other purposes. Since he is responsible for the threat to children and they are not, it seems unfair that other innocent people should have to share with him the costs of defending children from him. Why should others have to sacrifice more just to enable him to have his preference between two alternative means of preventing him from molesting children? (If Offender preferred imprisonment to the Treatment and was so rich that he could pay the full cost of his own imprisonment, that could make it justifiable to imprison him even if the cost would be much greater.)

One might argue that there is in fact no serious unfairness in burdening taxpayers with the cost of his imprisonment because the additional cost of imprisoning him rather than forcing him to have the Treatment is so widely dispersed among the taxpayers that the additional burden for any individual taxpayer is negligible. But this response fails to take account of the possibility that the alternative to using the taxpayers' money to keep Offender in prison is not necessarily to allow that money to stay with the taxpayers, allowing each to retain some tiny amount to use for some trivial purpose. Rather, the sum required to keep Offender in prison could still be collected in taxes but be used for some other purpose, such as funding the National Health Service. Suppose that there are certain very expensive life-saving treatments that are currently unfunded on the ground that the money necessary to save a single life does more good when devoted to treating a large number of other people for some nonfatal but disabling condition. But suppose further that the cost of one of these life-saving treatments is equivalent to the difference between the cost of imprisoning Offender for the necessary number of years and the cost of giving him the Treatment. Suppose there were some single government agency that had to decide whether to allocate some fixed sum of money either to imprisoning Offender *rather than* giving him the Treatment or to provide one life-saving treatment to a person who is ill through no fault of her own. In these circumstances, it would, in my view, be unjust to allow Offender the right to choose imprisonment over the Treatment, particularly if imprisonment is objectively worse for him.

This problem is exacerbated by the fact that there are many people who are relevantly like Offender and also many people who need expensive medical treatments. Suppose a country's courts have just convicted many people of child molestation. Each of these offenders might either be imprisoned or given the Treatment. All object to receiving the Treatment. But this country's prisons are overcrowded, so that imprisoning all the new offenders for the necessary number of years would require the building of a large new prison. There are, however, plans for building a new hospital, without which many patients will be inadequately treated by the country's National Health Service. There are insufficient funds for building both the prison and the hospital. The only way for the country to be able to build the hospital is to forgo building the prison and to give the new offenders the Treatment instead. In these conditions, it seems to me that it would be immoral not to give the offenders the Treatment, even when they have refused consent, given the necessity of preventing them from further molesting children.

In actual practice, of course, it would be highly unlikely that one could be confident that resources saved by administering something like the Treatment as an alternative to imprisoning offenders would be used instead for a morally important purpose, such as saving lives. My aim here, however, is not to defend any particular policy but to sketch the type of moral case that could in principle be given for imposing something like the Treatment rather than using a more expensive form of social defense, such as imprisonment.

The argument I have presented is, I admit, a disturbing one; for it suggests that it is in general unfair to burden innocent people with the costs of less harmful modes of punishment, when the aim of punishment is both to prevent and to deter the offender from repeating his offense. If, for example, execution were substantially less costly than life imprisonment, the kind of argument I have just given might offer a case in favor of execution. That is not a conclusion I would welcome. But I will not pursue these larger issues here.

My conclusions, therefore, are only provisional – which is consistent with my announced intention, which was only to offer a framework for the moral assessment of certain alternatives to imprisonment, and not to resolve all the relevant issues within this framework. It does, however, seem reasonable to me to conclude that it can be permissible to offer, and to administer, treatments relevantly like my fictional Treatment as alternatives to imprisonment when the offenders consent to receive them. And it also seems plausible to suppose that there can be a liability justification for forcing certain offenders to undergo such alternatives to imprisonment, against their will, if the costs of imprisonment would be sufficiently high that paying them would make it impossible to avert substantial harms to others, even when the offenders would be in no way responsible for those other threatened harms.

I will close with a brief observation about deterrence. While giving offenders some actual analogue of the Treatment rather than imprisoning them could eliminate any future threat from those offenders (assuming that the analogue could be continued as long as necessary, or that the threat of its being re-administered could itself serve as a deterrent), it might have a weaker deterrent effect on *other* potential offenders than imprisonment would. This could happen if the analogue of the Treatment were widely perceived to be less harmful than imprisonment. It is, however, unclear how significant an objection this is, as there may be no liability justification for harming offenders as a means of deterring others except when those harmed would otherwise be in some way responsible for the action of others that is to be deterred – which may often not be the case.<sup>3</sup> Whether this is correct depends on whether people can be liable to be harmed as a means of preventing harms for which they would not be responsible. This issue is the subject of current debate but is far from being resolved.<sup>4 5</sup>

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<sup>3</sup> See Daniel Farrell, “The Justification of General Deterrence,” *Philosophical Review* 94 (1985): 367-94.

<sup>4</sup> See, for example, Jeff McMahan, “Self-Defense and Culpability,” *Law and Philosophy* 24 (2005): 751-74; Victor Tadros, *The Ends of Harm* (Oxford: Oxford University Press, 2011), esp. pp. 186-96; and forthcoming work by Lars Christie of the University of Oslo.

<sup>5</sup> I am grateful to the editors and to two anonymous reviewers for very helpful comments on an earlier draft.