

Is Coercive Treatment of Offenders Morally Acceptable? On the Deficiency of the Debate

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Abstract Is it morally acceptable to instigate criminal offenders to participate in rehabilitative treatment by offering treatment in return for early release from prison? Some theorists have supported such treatment schemes by pointing to the beneficial consequences that follow from the treatment. Others have suggested that the schemes are unacceptably coercive, which implies that consent becomes an illusion. This paper argues that the discussion—with clear parallels to debates of other healthcare treatment offers in medical ethics—has adopted a too narrow focus. By failing to consider the question as a penal theoretical problem, the arguments—both by proponents and critics of coercive treatment—become premature.

Keywords Coercion · Criminal offenders · Punishment · Treatment

The view on penal rehabilitationism—the idea, roughly, that sentences should aim to change the criminal tendencies of offenders—has undergone significant changes over the last couple of decades. However, even though the rehabilitative ideal has in some periods been the subject of much criticism, both empirically and ethically, it is a fact that offender rehabilitation still plays an important role in the criminal justice systems in many countries. A large number of methods exist designed for the purpose of fostering law-abiding habits in offenders by changing their attitudes or inclinations. Some of these rehabilitation schemes are offered to offenders as a supplement to punishment; for instance, while the offender is serving time in prison. The important issues in relation to such schemes are, obviously, whether they are in fact efficient and whether they are offered to a sufficient extent. However, another model that has become increasingly popular over the last ten or 15 years is to tie the rehabilitation scheme directly to the punishment imposed on the offender by making the severity of the punishment conditional on the offender's participation. More precisely, with this model, rehabilitative schemes are offered in return for

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early release from—or even as an alternative to—prison.¹ This article focuses on this kind of punishment-conditioned offer of treatment to criminal offenders.²

It is not hard to think of strong reasons in favour of offering rehabilitative treatment in return for early prison release. There is no doubt that early release constitutes a powerful incentive and that such offers will, compared to a model where a rehabilitation scheme is offered only as a supplement to a prison term, urge more offenders to take part in the programmes. As Burdon and Gallagher have emphasized “one of the most consistently cited findings in studies examining the efficacy of coerced treatment has been its success at bringing clients into and retaining them in treatment”.³ In so far as such programmes are in the end efficient, this may imply, firstly, that an offender’s risk of falling back into crime and thus of being re-convicted and re-punished is reduced. Secondly, that there will be, comparatively, fewer future victims of crime. And, finally, that the society at large may, as a result of the reduced prison terms, save resources that could be used for other urgent societal purposes. However, despite these possible advantages, there also exists widespread scepticism against this practice. Many theorists, representing different academic fields, hold that the whole idea of promoting offender participation in rehabilitation programmes by offering penal reductions is morally dubious.

The purpose here is not to answer the question as to whether the practice of making participation in rehabilitative treatment conditional on penal reductions is morally acceptable, but rather to show that much of the present debate on this issue has been on the wrong theoretical track. The typical way in which such offers have been discussed has been, as we shall see shortly, to focus on questions such as whether the offers involve an unacceptable form of coercion and whether the formal criteria for consent are satisfied in such cases. In other words, the question has been addressed in the way treatment offers are traditionally discussed in medical ethics. However, what I will argue in this article is that this focus provides an inadequate background for the ethical evaluation of such offers. The fact that the issue has been addressed narrowly, as a problem within the framework of medical ethics, rather than, more broadly, as also constituting a penal theoretical problem has meant that several of the conclusions reached in the current discussion—both by theorists opposing such offers and by the proponents—are basically premature.

In order to sustain this contention, the paper proceeds as follows. In the first section, I briefly present a number of cases in which rehabilitative treatment has been offered in return for early release. The cases include both examples of treatment programmes that are currently being offered within the criminal justice system to offenders in return for penal reductions, and examples which may in the future involve such offers and have, therefore, become the subject of increasing attention and discussion. The examples are: treatment of sex offenders; treatment of offenders suffering from substance abuse; and treatment of offenders suffering from aggressive and violent behaviour. Some of the main arguments

¹ In the following, I shall use the standard terminology of referring to offers of treatment in return for early release as “coersive offers”. See, for instance, A. Day et al., “Coerced Offender Rehabilitation – A Defensible Practice?”, *Psychology, Crime and Law*, vol. 10(3) 2004, pp. 259–269. In the following I shall not discuss compulsory treatment (though several of the presented arguments may also be relevant to this type of treatment).

² It seems to be a widely shared assumption in the discussion of coercive treatment that treatment does not amount to an alternative punishment, but rather an alternative to punishment. With regard to some types of treatment this assumption seems highly plausible and I accept the assumption in the following. However, I do not here wish to deny that some types of treatment could function as punishment. See note 31 below.

³ W. M. Burdon and C. A. Gallagher, “Coercion and Sex Offenders”, *Criminal Justice and Behavior*, vol. 29 2002 (pp. 87–109), p. 101.

for and against these treatment programmes are subsequently outlined. In section “[A penal theoretical perspective](#)”, attention is then directed to the tension between, on the one hand, the presented arguments and, on the other, penal theory. It is argued that penal theoretical considerations have direct implications with regard to the assessment of such treatment offers and thereby reveal a significant lacuna in the existing debate. Section “[Conclusion](#)” summarizes and concludes.

Coercive Rehabilitation Programmes

Even though rehabilitation programmes can be offered to many kinds of criminal offenders, there has, unsurprisingly, been a particular focus on such programmes in relation to what are regarded as high-risk offenders. Several commentators have observed that the practice of coercing such offenders to attend rehabilitation programmes is increasingly being regarded as an acceptable course of action.⁴

The first group of offenders in relation to which coerced treatment has attracted significant attention is that of drug users (and other types of substance-abusing offenders). The idea of coercing drug users into treatment is not new. In the United States the idea can be traced back to the “narcotic farms” of the 1920s and 1930s. These farms treated not only genuine volunteers with no prior engagement in criminal activity, but also offenders who were offered treatment in lieu of punishment. Coercive treatment has since—though to a varying extent and in different forms—been applied within the US criminal justice system. In Australia, coerced treatment of drug offenders has constituted a popular alternative to incarceration for about 40 years. And a number of other countries have more recently adopted similar initiatives. For instance, from being a generally accepted view in Britain in the 1980s and early 1990s, namely that treatment and coercion should not be mixed, a radical shift of policy took place. This occurred at the start of the new millennium, leaving coercive treatment a key element of British drug policy.⁵

Another group of offenders, particularly relevant in relation to the discussion of rehabilitative treatment as an alternative to imprisonment, is that of sex offenders. Several types of treatment exist which aim at either curing paraphilic disorders or at controlling their manifestations. Until a few decades ago, in the treatment of sex offenders, surgical castration constituted an accepted medical intervention both in the US and in Europe. Today this type of permanent medical intervention is still applied in a few countries (e.g. Germany and the Czech Republic), while it has been abandoned as a viable option in most other countries including the US.⁶ However, since the late 1990s there has been an increase in the types of methods used—for instance, making participation a condition of probation or parole—to pressure sex offenders into other kinds of treatment including medical treatment and cognitive-behavioural therapy.⁷

⁴ See, for instance, A. Day et al., “Coerced Offender Rehabilitation – A Defensible Practice?”, *op. cit.* note 1, p. 259.

⁵ See, for instance, T. Seddon, “Coerced Drug Treatment in the Criminal Justice System: Conceptual, Ethical and Criminological Issues”, *Criminology and Criminal Justice*, vol. 7(3) 2007 (pp. 269–286), p. 270.

⁶ Although a few states provide it to those volunteering. See W. M. Burdon and C. A. Gallagher, “Coercion and Sex Offenders”, *op. cit.* note 3, p. 95.

⁷ See W. M. Burdon and C. A. Gallagher, “Coercion and Sex Offenders”, *op. cit.* note 3, p. 99.

The final group of offenders that should be mentioned is that of violent criminals. Several types of rehabilitative treatment—including, first and foremost, different forms of cognitive behavioural therapy—have for some time been offered to offenders suffering from explosive violent temperaments. However, attention has more recently been drawn to new types of treatment. For instance, studies conducted on criminals have found that aggressive and impulsive responses were suppressed in subjects assigned paroxetine treatment relative to subjects assigned placebo treatment.⁸ Moreover, similar results may in the future be reached by other technological methods—such as, for instance, deep brain stimulation (DBS)—that directly affect the central nervous system. Thus, it is in this case the promise of new pharmacological and neurotechnological types of treatment (rather than, as in the case of drug offenders, where an already established practice exists) that has opened up discussion whether or not it would be acceptable to offer such treatment in return for early release from prison.⁹

Whether or not rehabilitative treatment of drug-using offenders, sex offenders, and violent offenders that stipulates participation as a condition of early release or a genuine alternative to imprisonment is morally acceptable, is a controversial issue. An adequate ethical assessment would of course require a detailed analysis of the different programmes. Obviously, such treatment programmes may vary in many ways, for instance, with regard to whether penal reductions require merely initial participation or completion of a treatment, and in other respects as well.¹⁰ However, in the present context these details are not important. As mentioned, what matters here is the overall idea of instigating offenders to accept treatment by using penal reductions as the incentive. Moreover, another crucial question obviously is whether the different treatment programmes are in fact efficient. In this respect, over the last couple of years, there has been conducted a large number of studies and meta-analyses. As one might expect, the results differ relatively to the type of offender being examined, and with regard to the specific treatment involved. I shall not here summarize the different studies, except by remarking that the overall picture of the results gives no reasons to believe that treatment involving coercive measures is inefficient.¹¹ However, in the following I shall simply assume that the treatment is in fact

⁸ D. R. Cherek et al., “Effects of Chronic Paroxetine Administration on Measures of Aggressive and Impulsive Responses of Adult Males with a History of Conduct Disorder”, *Psychopharmacology* 159 2002 (266–274).

⁹ See, for instance, J. Ryberg, “Punishment, Pharmacological Treatment and Early Release”, *International Journal of Applied Philosophy*, vol. 26(1) 2012 (pp. 231–244).

¹⁰ See W. Hall and J. Lucke, “Legally Coerced Treatment for Drug Using Offenders: Ethical and Policy Issues”, *Crime and Justice Bulletin*, vol. 144 2010 (pp. 1–12); or A. Day et al., “Coerced Offender Rehabilitation – A Defensible Practice?”, *op. cit.* note 1, p. 262.

¹¹ For a few works that summarise the evidence on the effectiveness of coerced drug treatment see, for instance, W. Hall and J. Lucke, “Legally Coerced Treatment for Drug Using Offenders: Ethical and Policy Issues”, *op. cit.* note 10; S. Klag et al., “The Use of Legal Coercion in the Treatment of Substance Abusers: An Overview and Critical Analysis of Thirty Years of Research”, *Substance Use and Misuse*, vol. 40 2005 (pp. 1777–1795); A. Stevens et al., “Quasi-Compulsory Treatment of Drug Dependent Offenders: An International Literature Review”, *Substance Use and Misuse*, vol. 40 2005 (pp. 269–283); D. B. Marlowe, “Coercive Treatment of Substance Abusing Criminal Offenders”, *Journal of Forensic Psychology Practice*, vol. 1(1) 2001 (pp. 65–73). For works on the effectiveness of coerced sex offender treatment see: A. Birgden and H. Cucolo, “The Treatment of Sex Offenders: Evidence, Ethics, and Human Rights”, *Sexual Abuse: A Journal of Research and Treatment*, vol. 23(3) (2011) (pp. 295–313); W. M. Burdon and C. A. Gallagher: “Coercion and Sex Offenders”, *op. cit.* note 3. For at recent meta-analyses of neuroscientific work that has been done on violence, see Y. Yang and A. Raine, “Prefrontal Structural and Functional Brain Imaging Findings in Antisocial, violent, and Psychopathic individuals: A Meta-Analysis”, *Psychiatry Research*, vol. 174(2) (pp. 81–88).

efficient, in the sense that it results in the increasing recovery of offenders and in reducing their future engagement in criminal activity. Given these assumptions, we can now return to the cardinal issue as to whether making treatment conditional on early release is morally acceptable. The picture of the arguments that has been presented in support of the opposing answers in this debate is relatively simple.

Theorists who hold that the answer should be in the negative have in some cases based their critical stand on arguments relating specifically to a particular type of treatment. For instance, it has been suggested that certain types of treatment of sex offenders may violate these offenders' procreative rights. Or that treatment that involves pharmacological intervention may conflict with rights to bodily integrity. However, these rights-based considerations have mainly been brought forward in legal contexts, that is, in discussions of whether the offered sorts of treatment may be in conflict with legal prohibitions (national laws or human rights conventions).¹² As moral objections, such rights-based arguments have been very little developed. However, the main objection that has been presented in slightly different versions has focused directly on the fact that treatment is offered in return for early release. The argument is that such offers are coercive and therefore unacceptable. This objection has been directed against the treatment schemes designed for each of the above-mentioned groups of offenders.

The main reason as to why coercive treatment is held to be unacceptable is that it implies that the targeted individuals are not genuinely able to give proper consent to the offered treatment. Even if the other standard conditions of consent are fully satisfied, that is, even if an individual possesses the cognitive capacities to understand treatment and to communicate wishes, and if she is fully informed of the risks and benefits of the treatment, the offer is still unacceptable because it violates the voluntariness clause of consent. When the alternative is imprisonment, the argument goes, the idea of a free choice becomes an illusion. In relation to treatment of drug offenders this point has been made forcefully by the Center for Cognitive Liberty and Ethics (CCLE), which contends that "being forced to choose between imprisonment or 'medical treatment' with a pharmacotherapy drug is inherently coercive. There are very few things that people will avoid more than going to jail or prison. Informed consent is incompatible with inherently coercive situations that force a person to barter his or her natural neuro- and biochemistry in exchange for freedom".¹³ The same point has been strongly emphasized in relation to treatment of sex offenders. For instance, in his considerations of castration as an alternative to incarceration, Vanderzyl holds that "the doctrine of informed consent requires a knowledgeable and voluntary decision to undergo treatment, yet offering a convicted offender castration as an alternative to a lengthy prison sentence constitutes an inherently coercive practice rendering truly voluntary consent impossible".¹⁴ In the same vein, Macmillan has recently held that, if castration is the only way in which offenders will be released back into the community then the status of their decision as a genuine expression of their autonomy is questionable, and he concluded that "sex offenders should not be coerced into castration".¹⁵

¹² See, for instance, A. Birgden and H. Cucolo, "The Treatment of Sex Offenders: Evidence, Ethics, and Human Rights", *Sexual Abuse: A Journal of Research and Treatment*, vol. 23(3) 2011 (pp. 295–313).

¹³ Center for Cognitive Liberty and Ethics, *Threats to Cognitive Liberty: Pharmacotherapy and the Future of Drug War*, 2004, p. 33.

¹⁴ K. Vanderzyl, "Castration as an Alternative to Incarceration: An Impotent Approach to the Punishment of Sex Offenders", *Northern Illinois University Law Review*, vol. 15 1994, p. 140.

¹⁵ J. MacMillan, "The Kindest Cut? Surgical Castration, Sex Offenders and Coercive Offers", *Journal of Medical Ethics* (forthcoming). It should be underlined, though, that MacMillan believes that sex offenders should not necessarily be deprived of the option of surgical castration. However, the point is that this option should not be coercively offered.

Though minor differences exist in the ways critics have objected to the idea of offering treatment as an alternative to incarceration, there is widespread agreement that the overall problem in one way or another relates to the coercive nature of such offers.¹⁶

Something close to an overall consensus is also found if we leave the antagonists' camp and turn instead to the arguments that have been presented by the theorists, who have defended the use of coercive measures as part of rehabilitative schemes. The arguments in favour of such schemes have been based on advantages of the sort outlined at the beginning of this paper. Some theorists have drawn attention to the beneficial consequences that coercive treatment schemes will have for the offenders themselves.¹⁷ For instance, it has been underlined that a sizeable portion of offenders does not show distress in response to their offending behaviour and their likely prospects of re-offending and that, since this is the case, some degree of coercion will be necessary to instigate offenders to take part in rehabilitation schemes. Moreover, the claim is that once these offenders accept treatment their resistance will reduce over time and that they will in the end benefit. Other theorists have directed the main attention to the fact that coerced treatment will prevent re-offending and consequently reduce victimisation. For instance, several theorists have underlined that coerced drug treatment is much more effective than imprisonment in reducing recidivism. And it has been suggested that coercion constitutes the only effective means of protecting society from sex offenders.¹⁸ However, as one might expect, most proponents have, as the justification of coercive treatment, pointed to the combination of the beneficial consequences that such treatment schemes will have for the offenders themselves and the society at large. This line of justification has been presented by organizations such as the WHO and the United Nations Office on Drug and Crime (UNODC); these have recommended drug dependence treatment offers as an alternative to criminal sanctions these being a means of increasing recovery, preventing recidivism, and reducing criminal justice costs.¹⁹

Even though more can of course be said on the respective arguments that have been presented for and against offering treatment instead of imprisonment, we have sufficiently characterized the structure of the opposing views. Though a rejection of coercion has sometimes been defended on purely consequentialist grounds, this is not how objections to coercive treatment schemes is typically presented in the debate. On the contrary, the arguments pointing to the unacceptable use of coercion (or other rights-based objections) usually have the form of deontological constraints; that is, even if it will lead to the overall best consequences to use punishment-conditioned offers of treatment, this will nevertheless be morally unacceptable.²⁰ On the other side, the arguments in favour of such treatment schemes constitute standard consequentialist justifications. Moreover, as initially indicated, the debate—with its focus on consent and the possible advantages of the application of coercive measures—has clear affinity with standard autonomy *versus* beneficence discussions of healthcare treatment offers in medical ethics. This is not surprising. After all,

¹⁶ As mentioned, the purpose here is not to consider whether the consent-based objection to coercive treatment *per se* is morally plausible. However, for a critical discussion of this objection (and for a different approach to coercive offers), see L. Bomann-Larsen, “Voluntary Rehabilitation? On Neurotechnological Behavioural Treatment, Valid Consent and (In)appropriate Offers”, *Neuroethics*, vol. 6 (2013) (pp. 65–77).

¹⁷ See A. Day et al., “Coerced Offender Rehabilitation—A Defensible Practice?”, *op. cit.* note 1 p. 261.

¹⁸ See W. M. Burdon and C. A. Gallagher, “Coercion and Sex Offenders”, *Op. cit.* note 3.

¹⁹ See “From Coercion to Cohesion: Treating Drug Dependence Through Healthcare, not Punishment”, UNODC, (2009); and W. Hall and J. Lucke, “Legally Coerced Treatment for Drug Using Offenders: Ethical and Policy Issues”, *op. cit.* note 10.

²⁰ I here use the standard terminology of characterizing deontology in terms of constraints. See, for instance, S. Kagan, *Normative Ethics*, Boulder, Westview Press, 1998.

even though the target group is criminal offenders, what we are considering are still offers of treatment. However, as we shall now see, this framework of the discussion is implausibly narrow leaving both the argument for and against coercive treatment schemes basically inconclusive. At least, so it will be argued in the following section.

A penal theoretical perspective

In the light of the fact that the main part of the controversy on the acceptability of coercive rehabilitation has, as we have seen, centred around the question as to whether offenders can realistically give informed consent to a treatment programme if the alternative is *prison*, it is remarkable that penal theoretical considerations have been almost absent in the current discussion. However, it is not difficult to see that this may constitute a significant flaw. For instance, it seems obvious that there could be a tension between holding, on the one hand, that it is acceptable (or required) to lock up offenders for years in prison while holding, on the other, that a conditional treatment offer constitutes a morally unacceptable way of coercing offenders. In order to clarify what this sort of tension more precisely amounts to, and to show the defects of the current discussion, I shall now analyze the outlined arguments for and against coercive treatment of offenders within a penal theoretical framework, starting with a standard consequentialist approach to punishment and subsequently turning to retributive penal theory.²¹

Suppose *arguendo* that a plausible justification of punishing those who have infringed the law is provided by a consequentialist approach to punishment. That is, that the infliction of a punishment on an offender—which, if seen in isolation, is just “adding one evil to another”²²—is nevertheless justified because it leads to the best overall consequences. More precisely, on a standard consequentialist view—such as a traditional utilitarian approach—punishment is justified as an instrument to crime prevention attained, for instance, through deterrence, reformation, or incapacitation of the offender. Other effects of a punishment may of course also figure in the consequentialist calculus such as, how the public will react to the penal levels, or the economical costs of punishing in one way rather than in another. However, these details are not important here. Now, given the consequentialist approach to the justification of punishment, what does this imply with regard to the outlined arguments for and against the use of coercive treatment of offenders?

Consider first the objection that there is a constraint against coercive treatment. It is, as indicated above, not obvious how one can defend a constraint against coercive treatment while, at the same time, accepting a consequentialist justification of punishment. For instance, to hold that sex offenders—as is the case in several countries—may be incarcerated, perhaps even indefinitely, in order to protect society, may conflict with the view

²¹ It is a well-known fact that there exist many different ethical theories of punishment, such as, for instance, a number of theories that seek to combine consequentialist and deontological considerations (e.g. limiting retributivism, negative retributivism, exceptional deviation models, etc). In the following, I cannot go through all of these theories. However, in the vein of the discussion presented here, it is not difficult to imagine that each of these theories will have implications with regard to the question as to whether early release from prison is morally acceptable and that—if one of these theories that constitutes the most plausible approach to punishment—the proponents and critics of coercive treatment still cannot ignore penal theoretical considerations if they wish to reach an adequate conclusion in the moral assessment of coercive treatment.

²² J. Bentham, “Principles of Penal Law”. In *The Works of Jeremy Bentham*, ed. J. Bowring, Edinburgh, William Tait, (1838–1843), p. 396.

that it would be an unacceptable constraint violation to offer such criminals treatment instead of prison. Surely, locking people up involves a much more forceful use of coercion (in fact compulsion) than what would be involved in the making of a coercive offer of treatment. Or put a little differently, there is a risk that an argument to the effect that a coercive offer is unacceptable would be undermined if one, at the same time, accepts that offenders can be kept behind bars out of purely crime-preventive reasons. At the very least, the adherent of deontological constraints-based arguments against coercive treatments would face the challenge of showing that a constraint against coercion can be consistently maintained against a background of a consequentialist justification of punishment.

Consider next the suggested arguments *in favour* of coercive treatment schemes. As we have seen, these arguments were based on the expected beneficial consequences of coercing resistant offenders into treatment. Thus, from a theoretical point of view, these consequence-based arguments go hand-in-hand well with a consequentialist justification of punishment. However, this does not mean that the sketched arguments provide an adequate assessment. Suppose it is correct that coercive treatment will have the suggested advantages; that is, that such programmes will help offenders to overcome problems—such as drug dependence or paraphilic disorders—that they will reduce the likelihood of recidivism, and reduce certain economical costs. Even if all this is correct, the arguments would still not suffice as an assessment of these treatment programmes. For instance, we would also have to know how early release from prison (for those who accept treatment) would influence the deterrent effect of the punishment system, that is, other people's tendencies to break the law. Moreover, some theorists have suggested that there are consequentialist reasons—in terms of trust in the criminal justice system, cooperation, and compliance—in favour of setting penal level in accordance with the general public's sense of just deserts.²³ If this is correct, then one would also have to consider how treatment instead of punishment would affect the public's perception of the criminal justice system. Furthermore, suppose there exists a divergence between what the consequentialist penal theory of punishment implies and how the actual penal system is designed. That is, suppose the consequentialist approach is the plausible theory but that the punishment system does not live up to the consequentialist prescriptions. For instance, it might be the case that the length of prison sentences contribute very little in terms of deterrence and that the actual penal levels are—from a consequentialist point of view—much too high.²⁴ In such a state of over-punishment of criminals, the arguments in favour of coercive treatment become less important. For instance, under these conditions it may be desirable to implement a system offering early release in favour of treatment participation, even if the treatment does not in itself increase recovery, has no impact on the offenders' risk of relapsing into crime, and is cost-neutral. In fact, even if there are some costs associated with such treatment programmes, they may nevertheless—everything considered—be preferable to making coercive offers as a means of avoiding the over-punishment of at least some offenders.

²³ See, for instance, P. H. Robinson and J. M. Darley, "Intuitions of Justice: Implications for Criminal Law and Justice Policy", *Southern California Law Review*, vol. 81 2007 (pp. 1–67); or P. H. Robinson, "The Proper Role of The Community in Determining Criminal Liability and Punishment", in *Popular Punishment*, J. Ryberg and J. A. Roberts (eds.), Oxford University Press, New York (forthcoming).

²⁴ For an analysis of the general deterrence research concluding that there is weak evidence of a link between the severity of sentences and crimes rates, see Von Hirsch et al, *Criminal Deterrence: An Analysis of Recent Research*, Hart Publishing, Oxford, 1999; or A. Doob and C. Webster, "Sentencing Severity and Crime", *Crime and Justice: A Review of Research*, vol 30 2003.

Now, it should be strongly underlined that I do not here wish to defend any empirical claims concerning general deterrence, the possible drawbacks in terms of community reactions to early release of offenders convicted of sex crimes or drug-related crimes, or whether existing criminal justice systems actually over-punish criminals. The point is simply to highlight the fact that the outlined consequentialist arguments in favour of coercive treatment becomes inconclusive if they ignore the broader consequentialist approach to the justification of punishment.

Thus, in sum, what we have seen so far is that, if the consequentialist theory of punishment is correct, then this may seriously challenge the deontological arguments against the use of coercive treatment and may render the outlined consequentialist argument in favour of such treatment schemes inconclusive. However, as is well known, consequentialism only constitutes one possible approach to punishment. The standard alternative is to defend a retributivist theory of punishment. In fact, as often emphasized, retributivism has dominated penal theory for the last three or four decades.²⁵ Thus, perhaps it is simply unfair to assess the arguments in the debate of coercive treatment against a background of consequentialist penal theory. Let us therefore now re-stage the discussion by asking what a retributivist approach to punishment would imply for the outlined arguments for and against coercive treatment programmes. In doing so, I shall not engage in considerations of the many different versions of retributivist theories that have been developed in recent years, but simply assume that punishment is justified in terms of the deserts of the offender and that the goal of the penal system is to give offenders their just deserts.

Consider again firstly the arguments *against* the use of coercive treatment programmes. From the outset it might seem that constraint-based arguments against coercion would not be challenged in the same way as we have just seen might be the case if one adopts a consequentialist approach to punishment. After all, it is usually agreed that retributivism is not a consequentialist theory.²⁶ Thus, retributive theory and the constraint-based argument against coercive treatment are, so to speak, operating in the same overall theoretical field. Moreover, since what matters to the standard (positive) retributivist is that offenders get a proportionate punishment, that is, that they are punished neither more severely nor more leniently than they deserve, this view seems to fit perfectly with a rejection of treatment programmes that are open to the possibility that offenders get an early release or perhaps no sanction at all.²⁷ In fact, it might well seem that the wrongness of such programmes, as

²⁵ See, for instance, R. A. Duff and D. Garland (eds.), *A Reader on Punishment*, Oxford University Press, Oxford, 1994, Introduction; or J. Ryberg, *Proportionate Punishment*, Kluwer Academic Publishers, Dordrecht/New York, 2004, Introduction.

²⁶ Obviously, desert can be interpreted within the framework of the value theory of a purely consequentialist theory of punishment. However, if retributivism is interpreted in this way then this simply means that the proponent and critic of coercive treatment would have to engage in the sort of considerations outlined above (where the consequentialist theory of punishment was taken for granted). For a discussion of one possible version of a desert-based consequentialist theory of punishment, see for instance J. Ryberg, "Punishment and Desert-Adjusted Consequentialism", in M. Tonry (ed.), *Retributivism Has a Past—Has it a Future?* Oxford University Press, New York, (2012).

²⁷ The distinction between positive and negative retributivism was originally introduced by J. Mackie, *Persons and Values*, (1985), pp. 207–8. While positive retributivism implies that there exists an obligation to impose deserved punishments on perpetrators, adherents of negative retributivism hold the view that it is wrong for the state to punish a perpetrator more severely than she deserves. However, even if one subscribes to the latter, and deontically weaker, position this will not avoid the point made here, namely, that penal theory should be consulted in the evaluation of coercive treatment. If the way a perpetrator should be punished is—as long as the punishment does not exceed the desert level—determined on consequentialist

established on the ground of a constraint against coercion, is—with the widening of the perspective—further consolidated by the retributivist constraint against disproportionate (lenient) punishment. However, one does not have to scratch much of the surface to see that the picture is not as simple as that.

As we have just seen in the discussion of the consequentialist approach to punishment, there might exist a divergence between what a penal theory prescribes and how the actual punishment system works. In fact, the view that existing penal systems do not work in the way they should be working is a judgement to which several modern retributivists subscribe. For instance, Murphy has underlined that, if deserts theory were followed consistently, one would probably punish less and in more decent ways than one actually does.²⁸ And von Hirsch has suggested that in following a retributive view on penal distribution, the terms of imprisonment, even for the most serious crimes, should seldom exceed 5 years.²⁹ Of course, the precise penal levels may be a matter of dispute amongst retributivists. However, let us here assume, for the sake of argument, that we are considering a society in which the penal levels are much higher than what would follow from a retributivist view on penal distribution. What would this imply for the arguments against coercive treatment programmes?

Suppose that the criminal justice system offers a penal reduction to an offender who accepts participating in a treatment programme, and that this reduction would bring the punishment she then receives close to the one she actually deserves, that is, the punishment that is proportionate to the gravity of her crime. From a retributivist perspective this would be highly desirable. It would imply that the offender who accepts treatment would end up being punished as she deserves rather than getting a disproportionately severe punishment. Thus, in a retributively imperfect punishment system—that is, one in which offenders are over-punished—it seems preferable if the system provides coercive treatment offers to offenders. This could be a means of reaching just punishments (i.e. avoiding excessive punishments).³⁰ However, if one at the same time holds that there exists a constraint against coercion then it seems that one ends up with moral requirements pointing in different directions: a system that does not offer penal reductions in return for treatment would conflict with the proportionality constraint, while a system that offers coercive treatment would violate a coercion-based constraint. What one should recommend under these conditions is not obvious. It may be the case that an adherent to a constraint against coercive treatment can find a theoretically satisfactory way out of this challenge. However, it should be recalled that the point here is not to suggest that one is faced with an insurmountable problem but, much more modestly, to show that an answer to this challenge would presuppose that one engages in penal theoretical considerations.

Finally, let us turn to the arguments *in favour* of the use of coercive rehabilitative treatment. Would these arguments be affected by the assumption that the punishment system is justified on retributivist grounds? As we know by now, the pro-arguments are

Footnote 27 continued

grounds, then arguments for and against coercive treatment would simply have to be evaluated against the background of consequentialist penal theory, as considered above.

²⁸ J. G. Murphy, *Retribution, Justice, and Therapy*, Dordrecht, (1979) p. 230.

²⁹ A. Von Hirsch, *Censure and Sanctions*, Clarendon Press, Oxford, (1993), chapter 10.

³⁰ Suppose, for instance, that there is a majority in parliament in favour of an existing punishment level that is clearly excessive (if seen from a retributivist point of view) but also that it may be possible to convince the parliament to pass a new law opening for the possibility of offers of treatment in return for early release from prison. In this case, I guess, the retributivist should speak in favour of passing the law.

based on consequentialist considerations (increased likelihood of recovery, reduced recidivism, etc.). That such arguments may be in direct conflict with the prescriptions of retributivism is not hard to see. Suppose first that the punishment system works in accordance with retributivist prescriptions. That is, that offenders actually receive the punishment that is proportionate to the gravity of their crime. In this case it would obviously be unacceptable to give an offender, who accepts treatment, a penal reduction. Given the assumption that the treatment is not a punishment, this would imply that the offender does not get the punishment she deserves.³¹ The fact that there may be strong consequentialist reasons in favour of coerced treatment would not impress the retributivist. After all, the crucial idea behind retributivism is that justice cannot be sacrificed even if the best consequences could be achieved by this.³² However, suppose alternatively that we are again considering a state that does not live up to the retributivist prescriptions. That is, which punishes offenders much too severely. In this case, there may suddenly be concordance between the retributivist and the consequentialist adherents to coercive treatment. If the coercive treatment programme is implemented under these circumstances this might imply that at least some offenders—those who accept the treatment offer—would get a punishment closer to the one they actually deserve. Thus, what the adherent to coercive treatment regards as a way of promoting the best consequences may for the retributivist constitute a way to obtain justice for at least some offenders under non-ideal circumstances.

Therefore, even though there are different possibilities with regard to what precisely will follow when the arguments in favour of coercive treatment are evaluated against the background of a retributivist approach to punishment, it is once again clear that a judgment with regard to whether coercive treatment is acceptable cannot be reached independently of penal theoretic considerations.

Conclusion

The time has come to sum up the considerations of the previous sections. As indicated, the motivation for the above discussion is the fact that coercive rehabilitative treatment programmes are to a large extent, and increasingly, being used within the framework of the criminal justice system. Some of the coercive treatment schemes—such as the coercive treatment of sex offenders—have been applied for many decades. Other coercive schemes—such as coercive treatment of drug-using offenders—have, in some jurisdictions, been used to an increasing extent over the last few decades. With the advance of new types of pharmacological treatment, and other sorts of non-invasive neuroscientific treatment, it is reasonable to believe that the question of the use of treatment in return for early release from prison, or as an alternative to imprisonment, will become more pertinent. As

³¹ As mentioned, I am here assuming that the treatment is not a type of punishment. However, if one holds that some types of treatment itself could function as a sort of alternative punishment (rather than an alternative to punishment), one would have to ensure that the reduced prison term and the treatment together mounted up to the total penal bite that is proportionate to the gravity of the crime committed. In other words, even if the treatment could be regarded as a sort of punishment one would still have to consider and evaluate the coercive offer of treatment from a penal theoretic perspective. For considerations on whether treatment could work as a type of punishment, see J. Ryberg, “Punishment, Pharmacological Treatment, and Early Release”, *op. cit.* note 9.

³² Obviously this is not to say that retributivists are typically defending an absolutist interpretation of constraints. On the contrary, many retributivists would probably subscribe to a threshold position. However, it is generally agreed that such thresholds are placed at a very high level; that is, it requires significantly bad consequences to overrule proportionality constraints.

mentioned, the coercive treatment of aggressive violent offenders constitutes one of the more recent examples of treatment, discussion of which is prompted by new technological developments. However, as suggested, the focus of current discussion has often been unacceptably narrow.

What I have suggested above is that the arguments in the debate tend to be split between those arguments that oppose the use of coercive treatment by defending the existence of constraints against the use of coercion and consequentialist arguments pointing to the beneficial consequences of coercive schemes. The discussion thereby has an unsurprising affinity with standard discussions of treatment offers within medical ethics. However, as we have seen, in the present context this focus is insufficient. What I have argued is that the constraint-based arguments *against* coercion may prompt theoretical challenges when assessed both within the context of a retributivist and a consequentialist approach to punishment. And that the consequentialist arguments *in favour* of coercive treatment would have to be adjusted to the consequentialist theory of punishment and would, at least under some circumstances, be in direct conflict with the retributivist approach to punishment. More precisely, the scope of the discussion of coercive treatment needs to be expanded to include considerations on a) what constitutes the most plausible ethical theory of punishment and b) whether the existing penal systems concord with what constitutes the most plausible theory of punishment. Obviously, this means that the discussion of coercive treatment of offenders will become much more complex. However, without widening the perspective of the discussion in this way, the conclusions drawn both by proponents and critics of coercive treatment will be at best premature, at worst mistaken.

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