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Neurotechnological Behavioural Treatment of Criminal Offenders

A Comment on Bomann-Larsen

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Published in:
Neuroethics

DOI:
10.1007/s12152-011-9146-0

Publication date:
2013

Document Version
Early version, also known as pre-print

Citation for published version (APA):
Ryberg, J., & Petersen, T. S. (2013). Neurotechnological Behavioural Treatment of Criminal Offenders: A Comment on Bomann-Larsen. *Neuroethics*, *6*(1), 79-83. https://doi.org/10.1007/s12152-011-9146-0

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Download date: 04. Dec. 2025

Neuroethics (2013) 6:79–83
DOI 10.1007/s12152-011-9146-0

ORIGINAL PAPER

Neurotechnological Behavioural Treatment of Criminal Offenders—A Comment on Bomann-Larsen

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Received: 11 November 2011 / Accepted: 1 December 2011 / Published online: 15 December 2011
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Abstract Whether it is morally acceptable to offer rehabilitation by CNS-intervention to criminals as a condition for early release constitutes an important neuroethical question. Bomann-Larsen has recently suggested that such interventions are unacceptable if the offered treatment is not narrowly targeted at the behaviour for which the criminal is convicted. In this article it is argued that Bomann-Larsen's analysis of the morality of offers does not provide a solid base for this conclusion and that, even if the analysis is assumed to be correct, it still does not follow that voluntary rehabilitation schemes targeting behaviour beyond the act for which a criminal is convicted are inappropriate.

Keywords Bomann-Larsen · Inappropriate offers · Neurotechnological treatment · Rehabilitation

Introduction

The use of psychopharmacological methods—or other methods with a direct impact on the central nervous system (CNS)—as an instrument to improve behaviour which is "medically unremarkable but socially undesirable"[1], such as the behaviour of violent criminals, constitutes a highly controversial issue in modern neuroethics. As Farah has recently emphasized, psychopharmacological research has identified a link between impulsive violence and seretonergic abnomalities in criminals; and SSRIs (Selective Serotonin Reuptake Inhibitors) have been tried with some success as a treatment for aggressive behaviour.[2] Assuming that CNS-interventions do in fact turn out to be helpful, would it be morally acceptable to use forced interventions on violent criminals in the criminal justice system? Or, as a somewhat less controversial question, would it be acceptable to offer such interventions to criminals as a condition of early release? Questions such as these certainly deserve much more attention than they have so far received. However, an important contribution to the discussion of the latter question has recently been presented by Bomann-Larsen in a volume of this journal.[3]

What concerns Bomann-Larsen is the question as to under which circumstances voluntary rehabilitation by

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[1] See M. J. Farah, "Emerging Ethical Issues in Neuroscience", in W. Glannon (ed.), *Defining Right and Wrong in Brain Science*, New York: Dana Press, [2], p. 26.
[2] M. J. Farah, ibid. p. 27.
[3] L. Bomann-Larsen, "Voluntary Rehabilitation? On Neurotechnological Behavioural Treatment, Valid Consent and (In)appropriate Offers", *Neuroethics*, Online First, 18 March [1].

CNS-interventions offered as an alternative to incarceration is justified. This question naturally leads her into considerations of the formal criteria for informed consent. What she convincingly argues is that even though a criminal's decision to accept (or reject) rehabilitation instead of imprisonment is taken under coercive circumstances, the criminal nevertheless does have the sovereign authority to consent. However, though this view in itself seems quite permissive, and even though Bomann-Larsen ends her article by holding that it can be seen as delivering an argument in favour of voluntary rehabilitation by CNS-interventions, the major part of the article consists of considerations of how the use of such interventions should be constrained. More precisely, what she suggests is that rehabilitative treatment "should not go beyond what is necessary in order to correct the behaviour for which the criminal is imprisoned" (p. 11). Thus, even though treatment by CNS-interventions is acceptable, it should be very narrowly targeted. How does she reach this conclusion? The answer is that in her view, in order for a consent to be normatively valid, the subject must not only have the sovereign authority to consent but the offer-giver must also be in the right normative position to make the offer. It is the latter clause that provides the background for the view that only narrowly targeted types of treatment are acceptable. Simply put, the argument in favour of this conclusion can be summarized in the following way: A) An offer is wrong in itself if it is made by someone who does not stand in the right normative position, *vis-à-vis* the other, to make it. B) The state does not stand in the right normative position *vis-à-vis* the criminal if it offers rehabilitative treatment that goes beyond the behaviour for which the criminal is convicted. Therefore: It is wrong for the state to offer rehabilitative treatment that goes beyond the behaviour for which the criminal is convicted. Now, though we believe that many will be sympathetic to Bomann-Larsen's conclusion, it nevertheless seems to me not to be convincingly sustained. At least, so we shall argue in the following. Let us consider each of the two premises in turn.

Premise A

Is it plausible to hold that some offers are wrong in themselves? That there are some coercive offers that strike us as wrong is indisputable. As Bomann-Larsen suggests, most of us would certainly be appalled by the offer "I will pay for medical help for your (otherwise dying) child if I get to have sex with you". As she also observes, there are some options which B would be wrong to offer A, but which are not wrong of C to offer D. "If you stop gambling, I will stay with you, but if you do not quit, I will have to leave you" is an offer which might well be made by the wife of a gambling husband but which cannot be appropriately made by anyone else. And "I'll pay your bill (at this expensive restaurant) if you help in cleaning my house" might be a kind offer if made to a student in need of extra money, but would perhaps seem highly inappropriate if made to a business associate. What Bomann-Larsen suggests is that for an offer to be appropriate it must be made by someone who is in the right normative position *vis-á-vis* the other, and that some offers are inappropriate *tout court* because no one is in the right normative position to make them (e.g., in the dying-child example). However, Bomann-Larsen's observations give rise to two comments.

First, it is correct that there are some offers which are inappropriate if made by A to B, but fully acceptable if made by C to D. However, there are also offers which it would be acceptable for A to make to B in one situation but unacceptable if made by A to B in another. For instance "I'll pay your bill if you'll have a beer with me" may be a highly dubious offer if A makes it to B who is an alcoholic and who cannot stop drinking once he has had the first beer. At a later point in time, if B has overcome his alcoholic problems, the same offer may be regarded as unproblematic (or even generous). Whether an offer strikes us as appropriate or not is—as is the case in many other speech acts performed in our daily life—a highly context-sensitive matter. The inappropriateness of an offer in a particular situation may sometimes be the result of habit or mere tradition and it may well be that, on closer reflection, it is hard to see that this offer constitutes a genuine moral problem (perhaps we are just not used to this kind of offer). In other cases a particular offer may constitute a genuine moral problem. Thus, as when dealing with other highly context-sensitive issues, we should be careful not to regard our immediate moral judgements as offering a firm ground for a final ethical assessment. On the contrary, it seems reasonable to engage in more thorough considerations of what it is that makes some offers wrong (if they

really are wrong). This kind of standard moral philosophical reflection may help us to get a more firm ground for the assessment of offers (and may lead us to revise some of our more immediate and sometimes even powerful judgements).

However, when it comes to arguments as to why some offers are wrong, Bomann-Larsen has little to offer. All she says is that some offers constitute a violation of the other's "claim to moral respect" and that the other is not being recognized as a "moral equal" (p. 9). But it is far from obvious what this precisely means and, therefore, also questionable whether this sort of argument can provide a criterion for distinguishing between appropriate and inappropriate offers (which, after all, is the point of the analysis). Consider, for instance, the following two types of offer: "I'll help you solve your minor problem, it you give me a little money" and "I'll help you solve your major problem, if you give me a lot of money". While the first offer seems close to the kind of transaction which Bomann-Larsen regards as morally acceptable (p. 9) the second has a shape which she clearly finds inappropriate (note: this is a version of her example "I will help you out of the water if you give me all your money").[4] But in a move from the former kind of offer to the latter, involving slight changes in the magnitude of the problem and the amount of money, does it make sense to say that somewhere we reach a point where the person involved is no longer treated as an equal? And if so, where should the line be drawn?[5] Though we will not here pursue these questions more closely, they seem to us at the least to indicate that the suggested criterion for distinguishing between appropriate and inappropriate offers is very weak. However, this fact becomes important when it is kept in mind that the point is to contribute with answers to questions such as precisely what sorts of CNS-intervention it is acceptable to offer as part of voluntary rehabilitation schemes.

Second, as a further point it might be questioned whether it is at all plausible to hold that some offers are wrong in themselves.[6] Are there some types of offer which it is always wrong to make? As mentioned, Bomann-Larsen seems to believe that some offers—such as "I will pay for medical help for your (otherwise dying) child if I get to have sex with you"—are always wrong. Now, we think that the main reason why we regard this offer as morally unacceptable is that there is another morally preferable option open to the offer-giver, namely, simply to help without requiring anything in return.[7] But if that is so, then our judgement might change if the context in which the offer is made leaves out the possibility of other (and better) options for the offer-giver. Suppose that the offer-giver's only motive is to assist the child, that the only way he can provide money to do so is by having sex with the parent (because some other person has offered money to someone who has had sex with the parent) and that for some reason it is not possible for the offer-giver to explain this to the parent, would the offer then still be morally abhorrent? Now, it might well be objected that this example constitutes an extremely hypothetical scenario that can only be dreamt up by absurdly imaginative philosophers. And indeed this is correct: the example is highly hypothetical (which is precisely why this kind of offer in real life would probably always be wrong). However, it may nevertheless help us when it comes to considering the wrongness of such offers. If there were no other way in which the offer-giver could possibly assist the dying child than by making the offer, then this offer no longer strikes us as morally inappropriate. In fact, I tend to believe that it would be wrong not to make the offer and thereby let the child die.

Without engaging further in this discussion, we believe that these considerations underscore the point made above, namely, that more needs to be said on the

[4] Bomann-Larsen presents an example of the second type of offer—"I will help you out of the water if you give me all your money"—which she regards as clearly inappropriate.

[5] To avoid misunderstandings, the point is not to suggest that a justification should be rejected if it does not provide absolutely precise limits but, more modestly, to indicate that a "claim of moral respect" constitutes a very (and for the purpose of the present discussion unsatisfactory) vague criterion.

[6] What Bomann-Larsen says is that an "offer itself is a wronging" (p. 9). But clearly the point is that some offers are wrong in themselves. Otherwise the analysis would not provide a basis for the suggested appropriateness-constraints on rehabilitation offers.

[7] Probably, our intuitions are also affected by the magnitude of what is required in return. We are more shocked if what is required is sex than if it is a cup of coffee. But it strikes me that it would be wrong even to require a cup of coffee in return of assisting the dying child.

justification of the view that some offers are simply wrong. We do not believe that Bomann-Larsen in her general analyses of offers has succeeded in underpinning premise A in a way that provides a solid base for drawing conclusions on such detailed matters as how offers of CNS-interventions should be constrained.

Premise B

Leaving the general analysis of the morality of offers aside, we can now turn to the more narrow considerations of the appropriateness of rehabilitation offers in the criminal justice system as expressed in premise B. Should we accept that the state does not stand in the right moral position *vis-á-vis* the criminal—and hence that it acts wrongly—if it offers treatment that is targeted beyond the behaviour for which the criminal is convicted?

Let us *arguendo* assume that we accept the conclusion of the general analysis of the significance of the moral position in which an offer-giver stands relatively to the party to whom the offer is made. The question that arises then is: How do we determine what constitutes the right moral position of the state towards a criminal? What Bomann-Larsen says is that there are some acts for which we are responsible to the state and must answer for to the state and, furthermore, that "what citizens are answerable for to the state determines the scope of behavioural conditions for which the state can appropriately offer convicts treatment" (p. 10). This is the reason why the state should only offer treatment of the behaviour for which a criminal is convicted. As she underlines, not all wrongs are "public wrongs" and "not all socially undesirable behaviours are the state's concern" (p. 10). However, this argument prompts two challenges.

First, even if we accept what seems to be the basic idea of Bomann-Larsen's suggestion, namely, that the state should not make offers which have nothing to do with what constitutes the proper function of the state, it remains unclear why the scope of this function should be determined on the ground of what citizens are answerable for to the state. Why not hold that the proper function of the state and, more narrowly, the purpose of the criminal justice system is to protect citizens or to prevent crimes? And, therefore, that it would be fully acceptable to offer CNS-interventions as part of medical experiments which can be used in the development of treatment of future criminals?[8] Surely, future crimes do constitute "socially undesirable behaviours" and Bomann-Larsen cannot object that this is not the "state's concern". Thus, it remains unclear why she explicitly rejects it as inappropriate to offer a criminal to take part in medical experiments. What we are saying, it should be noted, is not that such offers are acceptable, but simply that it is hard to see that Bomann-Larsen has succeeded in rejecting the plausibility of such offers on the ground of her considerations of what constitutes the "state's concern".

Second, even if one accepts that the state cannot appropriately make offers concerning the benefit of others and that it is only appropriate to make an offer which involves treatment of the criminal himself, it is unclear why offers should be limited to treatment that concerns the very behaviour for which the criminal is *convicted*. Suppose that a criminal is convicted for crime C_1 but that there are strong reasons to believe that he will in the near future commit crime C_2. Why then would it be acceptable to offer treatment that would prevent a future instance of C_1 but inappropriate to offer treatment targeted at preventing C_2? Surely, C_2 is the "state's concern" to the very same extent as is C_1. Obviously, there may be difficulties in predicting future crimes. A standard objection in the traditional discussion of preventive punishment of dangerous offenders concerns the problem of making reliable predictions of criminal behaviour (that is, there will be a high number of "false positives").[9] However, this would be the case both with regard to C_1 and C_2. And, more importantly, what Bomann-Larsen is considering is the in-principle justification of constraints on CNS-intervention; not the present practical limitations.

Thus, in sum, even if one accepts the more general analysis of the appropriateness constraints

[8] Another possibility—if one prefers a retributivist outlook to a consequentialist preventive position—is to suggest that the purpose of the criminal justice system is to distribute just deserts and that it, therefore, would be inappropriate for the state to offer treatment as an alternative to punishment (that is, if one assumes that such a treatment is not a punishment and that a shortened period of imprisonment would violate the retributivist proportionality constraint).

[9] See, for instance, A. von Hirsch and L. Maher, "Should Penal Rehabilitation be Revived?", in A. von Hirsch and A. Ashworth (eds.), *Principled Sentencing*, Oxford: Hart Publishing, [3].

on offers and Bomann-Larsen's view on what can properly be regarded as the "state's concern", it remains unclear why one should accept that the state cannot make appropriate offers of treatment that goes beyond the behaviour for which the criminal is convicted.

Conclusion

Bomann-Larsen indisputably deserves credit for having directed attention to the issue of voluntary rehabilitation by CNS-intervention. The issue has so far been only tentatively dealt with and some of the comments made have been over-simplistic. However, though Bomann-Larsen offers a detailed and thoughtful analysis, what we have suggested is that her conclusions are not persuasively underpinned. More precisely, what we have argued above is, firstly, that the general analysis of the morality of offers does not provide a solid base for the distinction between appropriate and inappropriate offers; secondly, that it is questionable whether there are offers which are wrong in themselves; and, finally and most importantly, that even if one accepts the general analysis it remains unclear why voluntary CNS-interventions should be reserved only for treatment of the behaviour for which a criminal is convicted.

References

1. Bomann-Larsen, Lene. 2011. Voluntary rehabilitation? On neurotechnological behavioural treatment, valid consent and (in)appropriate offers. *Neuroethics*, First Online (18 March).
2. Farah, M. 2007. Emerging ethical issues in Neuroscience. In *Defining right and wrong in brain science. Essential readings in neuroethics*, ed. W. Glannon, 16–36. New York: Dana Press.
3. Von Hirsch, A., and L. Maher. 1998. Should Penal Rehabilitation be Revived? In *Principled Sentencing*, ed. A. von Hirsch and A. Ashworth. Oxford: Hart Publishing.