Public Reason and Biotechnological Moral Enhancement of Criminal Offenders*

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Abstract: There are two prominent classes of arguments in the debate on mandatory biotechnological moral enhancement (MBME) of criminal offenders. Some maintain that these interventions are not permissible because they do not respect some evaluative standards (my illustration is represented by autonomy). Others, however, argue that this type of intervention is legitimate. One of the latter argumentative lines appeals to the reduction of the high costs of incarceration. In this paper, I argue that such polarization in the debate suggests handling the problem of the protection of autonomy in the case of MBME of offenders as an allocative question. Moreover, I offer a novel approach to this question by adopting the Rawlsian method of public reason. According to this method, public decisions are legitimate only if they can be justified through reasons that can be accepted by each free, equal, and epistemically reasonable agent. I argue that, within this framework, for a specific class of criminal offenders, we can conclude that MBME, although undermining a certain form of autonomy, could be legitimately mandatory. Because of reasonable pluralism, the final verdict on legitimacy is made based on the results of fair procedures of decision-making among proposals supported by persons in a condition of reasonable disagreement.

Keywords: autonomy, allocative justice, biotechnological moral enhancement, public reason, Rawls.

1. *Introduction*

Scientific advancements and hypotheses concerning the modification of morally relevant behavior through technological resources have, in recent years, prompted discussions on the biotechnological moral enhancement (BME) (Harris 2016; Persson *et al.* 2012). Within these, the case of a mandatory biotechnological moral enhancement (MBME) of criminal offenders that refuse rehabilitation holds a number of prominent and promising discussions (Birks

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et al. 2018). Broadly speaking, this type of treatment involves hindering antisocial behavior by modification of emotional responses, dispositions, or motivations, or directly impeding some behaviors of targeted individuals through biotechnological means. Such means are different from external coercion, like imprisonment, because they involve modifying a person's psychological, physiological, or mental structure.

Debates on BME most frequently refer to medical interventions, but my discussion could be applied to possible cases of moral enhancement through AI, as well as other resources (Savulescu *et al.* 2015; Giubilini *et al.* 2018). Some BME interventions are already applied in criminal justice, particularly in drug addiction and sex offending. Research is being conducted on the possibility of interventions to modify impulse control and reduce aggression (Ryberg 2012: 231; Shaw 2018: 251). Yet, the current resources for BME at our disposal are incomplete, to say the least. Thus, the possible immediate contribution of the paper, in practice, is not that of offering recommendations on whether to apply MBME. However, some authors remark that promising research is being conducted (Chew *et al.* 2018). This is enough to render the discussion in the present paper meaningful. Primarily, the intention is to contribute to the inquiry into whether it is morally permissible or even recommendable to invest intellectual and material means into attaining possible technological resources for realizing the MBME of criminal offenders resistant to rehabilitation. If such MBME could not be justified through valid moral reasons, a positive answer is excluded. Contributions of the present paper could be, for example, those indicating some principled reasons as relevant in the dispute about MBME and the proper method of deliberation. Such recommendations could be addressed, for example, to bodies that establish whether to sustain research of BME technologies with public funds, or not, to permit them, or to ban them.

Several rights and values are discussed in this context (Bublitz 2018; Douglas 2014; 2018; Shaw 2018; 2019). Disputes include theories of punishment as well (Matravers 2018; Ryberg 2012). An important line of argument in favor of MBME has been inaugurated by Thomas Douglas, a pioneer in the debate. He suggests that MBME is morally analogous to some accepted or intuitively acceptable practices, like incarceration or environmental modulation, which defuses criticisms that appeal to physical and mental integrity (Douglas 2014; 2018). I focus on a particular question here, and I try to formulate a plausible answer by employing a method of public justification originally present in theories of political philosophy. The method will be utilized to assess normative reasons employed by actual participants in the MBME dispute. Precisely, in the present paper, I focus on one of these reasons, the normative importance of autonomy – does it defeat the legitimacy of MBME in the case of criminal offenders?

I use 'autonomy' in the present paper, with two meanings. First, 'autonomy' corresponds to personal autonomy. It includes the capacity to choose actions through rational and free choices (Harris 2016: 78), as well as "the ability to determine for oneself the nature of the moral reasons, considerations and principles on which to act" (Bullock 2018: 162)[1]. Further, 'personal autonomy' refers to the capacity to do, or not to do, something (Harris 2016: 78), as well as to the capacity to act on the moral reasons, considerations, and principles that one has determined (Bullock 2018: 165-166). Personal autonomy includes the internal capacity of an agent. In other words, the capacities that a person has in virtue of her inner mental and physical abilities.

The other conception of autonomy that I discuss is autonomy as non-domination. Hauskeller endorses this type of view. For this view, the concept of autonomy is characterized socially. What comes to the fore is not our inner ability to make choices but the condition of not being dominated by others, i.e., being the authors of our lives in a social context. The domination complaint points to a different aspect of autonomy loss than the one shown above: the agent is bypassed, and others use their position of power to make decisions instead of her (Hauskeller 2017).

I argue that certain forms of MBME of certain criminal offenders could be legitimate under certain conditions. Precisely, I argue that MBME could be part of an eligible set of public decisions that could be the matter of choice in a fair procedure. My argument relies on two principal claims. First, following Matt Matravers (2018) and Jeff McMahan (2018), I maintain that the economic burden placed on society by incarcerating offenders is a relevant factor in the discussion of MBME. As such, the dispute about the MBME of offenders connects with issues of allocative justice (just allocation of resources).

Second, I employ and adequately adapt to the present debate, a general method of justification of public decisions. The method that I use is represented by John Rawls's theory of public reason (2005). This method requires that relevant public decisions are justified through reasons that all qualified persons can accept. In applying this method, within the present context, I assess the reasons of authors who participate in the debate on MBME. Thus, as defined previously in this discussion, I examine the prospect of an economic argument for the MBME of criminal offenders from a moral viewpoint, and I evaluate autonomy because authors who participate in the dispute are concerned about its normative strength. I discuss whether, under what conditions, and in what limits, this concept's employment is legitimate and what conclusions we can

[1] My terminology differs from that of some other authors. For example, Bublitz "denotes the psychological faculty to form and revise moral beliefs" by the term 'conscience' (Bublitz 2018: 300).

derive from its use. Finally, I analyze which conclusions are eligible.

Rawls's theory is complex and constituted by various components, such as, for example, his theory of justice and his theory of public justification. Although I am concerned with applying Rawls's method of public justification, I do not try to show what kind of conclusion for MBME follows from Rawls's theory of justice, nor am I committed to endorsing all of its elements. Instead, my goal is to assess the present debate and the use of reasons employed by actual participants through Rawls's method of public justification.

I see the employment of Rawls's public reason as important for a general question of political philosophy. His influential political-philosophical opus has been charged because of the alleged inability to deal with some crucial justice questions (Nussbaum 2006). In the present paper, I extend a part of his doctrine, precisely, his theory of public justification, to a domain sidestepped by him. In this way, I try to show that at least a part of Rawls's doctrine can be extended to embrace a wider domain of issues than those addressed by the author. Divergences that regard MBME represent a relevant issue for this method's employment. I explain why, although Rawls never discusses the current topic.

I will proceed as follows. First, I will clarify the exact scope of the discussion, the nature of the interventions discussed by my argument, and the types of offenders targeted. This part will explain the extent of my main conclusion.

In the second part, I present some reasons for MBME shown by Matravers (2018) and McMahan (2018). Such reasons point to the fact that considerations of costs could matter for the moral assessment of MBME.

In the third part, I describe arguments against the MBME of criminal offenders that represent challenges to the argument that economic reasons matter and that they could speak in favor of this practice. There is a variety of such arguments. Still, the focus of my discussion is the worry that the MBME of criminal offenders undermines autonomy.

In the fourth part, I illustrate the method of justification of public decisions that I employ in this paper.

Finally, I develop my central argument for my main thesis. The conclusion I derive from my application of the method of public reason is that there is not a unique reasonable decision whether we can (or, even, must) adopt MBME, or that it is inadmissible. We are not able to establish through valid public reasons a single decision as to the most reasonable. Instead, we arrive at a set of reasonable and, thus, eligible proposals. Consequently, final legitimate decisions on whether to opt for MBME or incarceration are derived from fair procedures. According to such procedures, agents decide between competing eligible proposals supported by valid reasons – i.e., reasons that are epistemically reasonable and that they can accept as free and equal citizens.

2. *Setting the debate*

Because I do not discuss the already available technologies, I cannot offer a detailed description of the BME interventions. In my discussion, I refer to all prospective interventions that could achieve BME as defined at the beginning of the paper. From a moral point of view, we can distinguish between two broad forms of BME: those interventions that modify aspects of the subject's personality (for example, their emotions or dispositions), and those that change only capacities for behavior (by making specific actions physically impossible or very unlikely, like causing nausea when an agent wants to perform a violent act). The latter could resemble ordinary social reactions to people who represent a threat to society or some criminal offenders, like incarceration. However, MBME is peculiar because it consists of a modification of the internal abilities, of a person's constitution, and not only of external limits to the capacities to act. In MBME, we change how a person is and who they are (although not always so profoundly as when we change a person's character traits). In other words, we do not change only what the person can or cannot do. This is why MBME can be a problem, even if external limits to people's behavior, like incarceration, are accepted. The problem is present because, at least in usual liberal views, the state's jurisdiction includes regulation of persons' behavior according to justice requirements. That is, the state stands limited to change the persons' internal characteristics (Jacobs 2016).

Despite arguments by authors who find interventions that modify aspects of the subject's personality worse than interventions that change only capacities for behavior (Shaw 2011: 197, 200-202), my argument aims to show the possible legitimacy of both kinds of interventions. I include all such cases under the label of 'direct interventions' as I refer to modifications that are not consciously mediated by their subjects. For instance, those represented by electrochemical or physical reactions (Bublitz *et al.* 2014: 69). Distinct from such direct forms of moral enhancement is an indirect enhancement, accomplished, for example, through powerful rhetorical speech (Liberto 2018: 203), or through cognitive enhancement that leads to better reflection, for example, by reducing distractions and impulsive reactions (Bullock 2018: 167)[2].

[2] To be sure, I concede, but do not endorse the conceptual distinction between direct and indirect interventions. To illustrate, Kasper Lippert-Rasmussen's arguments that deny the difference between direct and indirect interventions (2018), or the doubts raised by Hallie Liberto (2018: 203), are highly relevant. But my intention is to show that there is a reasonable argument in favour of the more controversial of the two kinds of interventions, i.e. mandatory interventions that are clearly direct, and, thus, I do not need to take a stance on this question. A consequence of the conceptual concession might be that indirect attempts of modifications for the ends of pro-socialisation and rehabilitation are to be favoured over direct modifications, and the latter can be legitimate only after the former have persistently failed.

I limit the discussion to criminal offenders that have committed particularly grave crimes, who oppose traditional forms of rehabilitation, and are a persistent clear and present danger to society. I do not defend the extension of MBME to all criminal offenders, nor do I rule out that such a justification can be offered. An obvious problem, at this point, is how can we determine whether some convicted criminal offenders are, in fact, clearly present and persistent dangers to society (Matravers 2018: 85). This is a relevant question, and uncertain cases require a separate discussion, which is vital for the possibility of extending MBME. This would be important for gaining more comprehensive benefits from MBME. However, I skip this question in the present paper. Instead, I shape the illustrations of my discussion's scope to clarify that we have persons who represent a persistent and clear danger to society. This is because I want to focus on the fundamental question addressed by opponents of MBME discussed in the present paper. Are there principled reasons, evaluative standards, that outweigh the possible benefits of MBME of criminal offenders who are resistant to rehabilitation even in the most extreme cases? If the answer is affirmative, the discussion on MBME would be resolved at the very beginning.

One of the two case illustrations discussed in the present paper uses the film character Hannibal Lecter. The other is a politically radical terrorist. Let us call him Anders. Anders has committed politically motivated mass murder. He persists in affirming the rightness of his criminal act, the ideology that had motivated it, and the readiness to repeat his actions. Imagine that Hannibal Lecter is exactly like the character in *The Silence of the Lambs* but does not suffer any pathology that impairs him in making choices. He is deliberately a cruel person who takes pleasure in other people's suffering and humiliation and has, in the background, adopted an intellectual construction that justifies such an attitude to himself. He is delighted with his motivations, and they fully correspond to his evaluations. Like Anders, he wants to continue being like he is and repeat the same crimes if given the opportunity. The two persons clearly have unacceptable conceptions of justice and the good. There are no doubts that society can legitimately impede them from committing violent criminal acts that harm other persons. But the moral problem for MBME is represented by the tendency of liberal states to use coercion only for regulating external behavior, and not for changing inner conditions of persons, like, for example, particular dispositions, character traits and internal abilities to act. Such conditions are not in the domain of

This holds if we can prove that indirect interventions are preferable to direct intervention (which I concede). But I interpret this thesis as depending on what I only take to be a conditional concession, not an endorsement of the distinction between direct and indirect interventions.

the state's legitimate use of coercion (Jacobs 2016).

The scope of the application of MBME that I defend in the paper partly overlaps with Ingmar Persson, and Julian Savulescu's God Machine thought experiment. The God Machine is an imaginary device that controls people's behavior to exclude the worst forms of antisocial behavior and related character traits. I refer to this heuristic device to indicate the scope of moral enhancement that I have in mind to be achieved via prospective biotechnological means. This is how Persson and Savulescu describe it:

> The God Machine was designed to give human beings near-complete freedom. It only ever intervened in human action to prevent great harm, injustice, or other deeply immoral behavior from occurring. For example, the murder of innocent people no longer occurred. As soon as a person formed the intention to murder, and it became inevitable that this person would act to kill, the God Machine would intervene. The would-be murderer would 'change his mind.' The God Machine would not intervene in trivial immoral acts (Savulescu *et al.* 2012: 411).

The range of interventions of the God Machine example does not overlap precisely with instances of MBME that I discuss in the present paper. In Persson and Savulescu's proposal, it is applied to all agents to pre-empt the morally worst actions. In the cases that I discuss, MBME is used only after an agent has already committed a horrible crime and the person persistently refuses rehabilitation via traditional means. Furthermore, in the cases that I discuss, the person is already deprived of freedom. However, the range of interventions of the God Machine and the cases that I discuss overlap in that, in both situations, the worst and only the worst moral actions are impeded.

I limit the discussion to agents who are not diagnosed with any condition that would restrict their autonomy. I presuppose that these agents deliberately choose criminal behaviors. This is because the relevant normative constraint highlighted by opponents of MBME that I discuss here is autonomy. I bypass the question of whether agents are in a medically diagnosed condition to focus on the normative weight and the implications that autonomy can have. Further, my argument does not engage the question of whether MBME provides medical benefits to its subject (Bublitz 2018: 296). This is also why I use the expression 'enhancement' and not 'treatment.'

3. *Why MBME?*

Of central importance to my paper are the reasons for MBME explained by Matravers and McMahan. First, there is the fact that offenders, due to their

crimes, are liable to treatment that cannot be applied to the general population (Matravers 2018; McMahan 2018: 117-118). In the usual social practice, this is, for example, imprisonment. However, Matravers and McMahan explain in their articles a specific reason for MBME. They take into serious consideration the fact that incarceration is expensive. This introduces a possible justification of MBME in the context of resource allocation between competing rights and values. MBME could be justified if it happens to be less expensive than imprisonment (McMahan 2018: 121-123). Namely, the offender is responsible for his imprisonment. It would be unfair to be frugal about, say, resources for life-saving treatments, in order to offer a dangerous criminal offender who refuses rehabilitation the possibility to choose the way that society will protect people from the violent and harmful acts that he would repeat (McMahan 2018: 121). The argument, as I employ it, raises an allocative issue. The intention is to find the most reasonable balance of the normative strength of competing rights and values.

An assumption in the discussion is that MBE costs will be lower than the costs of incarceration. This is not an unreasonable assumption, given the high costs of incarceration. In the UK, for instance, keeping a person in jail for one year costs the taxpayers a staggering amount of £40,000 (Matravers 2018: 73). For the 86,000 prisoners in England and Wales in 2016, the overall cost was £3.4 billion. We should also note that, while they are in prison, criminal offenders do not earn wages or pay taxes, which represents additional financial burdens for society. Most strikingly, about one-half of the imprisoned criminal offenders re-offend within a year after release and are imprisoned again, bringing about additional costs (between £9.5 and £13 billion) (Matravers 2018: 73-74).

In fact, when commenting on the argument related to the incarceration costs, opponents of MBME admit the assumption that such costs are more significant than MBME costs (Bublitz 2018: 291, 315; Shaw 2015: 1389). Their line of argument is that, even if this were the case, MBME would still not be justified. One possible reason is that the right to oppose MBME is a negative right and, as such, does not imply allocative issues because persons who appeal to it do not require allocation of resources but, merely, non-interventions. The other possible reason is that strong values and rights that are lexically superior in comparison to possible reasons for MBME are undermined by it. Thus, they represent reasons to rebut such practice. These are the arguments that I address in this paper.

Obviously, in order to establish whether MBME could be justified overall in practice through the economic argument, we would require data about the costs of MBME, like, for example, BME-related research and its possible applications. At the present moment, MBME technologies are mainly prospective, so such data remains unavailable. We can only discuss whether costs matter in

principle for justifying MBME, which is, in general, one of the contributions that a philosopher can offer to the debate. The discussion makes sense in virtue of the high costs of imprisonment. This is a problem that, together with the argumentative dialectic accepted by opponents of MBME, as discussed in this paper, justifies looking for alternatives provided they are morally legitimate.

4. *The autonomy objection*

There are at least two versions of the autonomy objection. One of them is based on perfectionism, the other one on respect of basic rights and liberties.

The standard definition of perfectionism establishes that (i) objective goods (values, virtues) exist and (ii) that the state legitimately enforces or favors them. Some perfectionists claim that autonomy is one of them (Wall: 1998). In the MBME debate, the perfectionist objection has appeared in two shapes. One establishes a constitutive link between virtue and autonomy. According to this view, an agent cannot be virtuous if she is not autonomous because autonomy is part of what constitutes virtue.

John Harris has offered early criticisms to BME that can be interpreted as an expression of this perfectionist challenge. Here, like in some other parts of the paper, I consider arguments from the general debate on BME pertinent to the specific question of MBME of criminal offenders. In Harris's view, we must not harm the capacity to exercise choices. This also includes the capacity to choose the bad instead of good, because: "without that freedom, there is no virtue in right action and no evil in wrongdoing. [MBME] would attack agency itself not just prevent bad decisions" (Harris 2016: 98-99). If a person behaves laudably simply because she is programmed not to do otherwise, then she is impeded from attaining virtue (Harris 2011; 2016)[3]. Harris' thesis does not oppose only a complete loss of freedom but also losing a significant portion of it (Harris 2016: 78).

This kind of view is described (but not endorsed) by Michael Hauskeller (2017). In his description of the central perfectionist idea opposed to MBME, a person who does good as a result of MBME is no better than a person who deliberately acts badly. In fact, the latter is preferable.

In the other version, the perfectionist objection points out that virtuous action, because of its complexity and context-sensitivity, requires a subtle capacity of choice and the abilities, with varying moral valence, to realize choices, or, in other words, autonomy. Autonomy is, thus, a complex capacity

[3] To be sure, Harris does not discuss BM of criminal offenders specifically, and I leave aside the interpretative question of what he would say about that particular case. It is nonetheless possible to extend his arguments to the question of MBME of criminal offenders.

needed to have the possibility to manifest virtuous behavior.

John Harris (2016) and Katrina Sifferd, in her virtue ethics proposal (2016), explain why the removal of traits, dispositions, and capacities of criminal offenders reduces them to a less developed stage[4] by limiting the range of options they can choose from. In other words, there are cases when precisely manifestations of traits, dispositions and capacities that, according to my description, are candidates to be removed from persistent offenders are contextually virtuous**.** For example, aggressivity is usually condemnable, but it can be required, when needed to protect victims of maltreatment. Moral enhancement is not achieved by removing traits, dispositions, and capacities that have, in general, negative valence, and therefore, by eliminating some options for the criminal offender. This is so because their valence changes contextually. Thus, moral enhancement is realized by developing the capacity to exercise proper choices, i.e., to choose and practice behaviors rather than limiting the range of options. In other words, moral progress requires autonomy and stands damaged by simplifying the range of possible choices.

Harris's and Sifferd's theses could be related to a generalization of Jacob's arguments (2016) and further supported by it. He speaks about the punishment of criminal offenders and focuses on long-term incarceration. Additionally, his concern is about traits linked to agential capacities in civil society, related to the functioning of a liberal order. But there are no reasons not to extend the discussion to other forms of sanction, like MBME. The central thesis is that punishment must be careful about not harming the character of convicted criminal offenders in a way that disables them to be self-determining agents and valid participants in civil society. The argument is linked to Harris's and Sifferd's theses because they say that alleged MBME deprives of virtuous social interaction capabilities and, thus, presumably, of capabilities needed for virtuous participation in civil society. Therefore, MBME could not be accepted in virtue of Jacob's argument.

The present perfectionist objection might be irrelevant for the conception and goal of MBE that I discuss in the present paper. In some sense, the goal of MBE that is in my focus is comparatively modest. As I present it through the God Machine example, it consists of impeding agents to misbehave. On the other hand, the perfectionist objection that we read in Harris's and Hauskeller's texts is that MBE impedes us to live well.

However, it is visible, for example, through Harris's refusal of God's Machine (Harris 2011) that the perfectionist objection targets even the kind of BME that I have in mind. The objection's point is that the kind of MBE that I have in

[4] I interpret perfectionism and virtue theory as correlated. Perfectionism is the political side of virtue theory, in the present context.

mind damages the perfectionist moral goal, which affirms human virtues and living a good human life. This goal, in the perfectionist objection to MBME, is rendered impossible by it. By trying to ensure a decent life, we impede virtue, and we impair capacities for virtuous participation in social cooperation

The other kind of objection to MBME appeals to human rights and liberties. The thesis is that autonomy is significant and deserves to be protected through a right that has strong lexical priority. This is true for personal autonomy (Bublitz 2018) and autonomy as non-domination (Hauskeller 2017).

Protection of autonomy as non-domination has its rationale in safeguarding an agent's capacity to be the author of her life. The intention is to protect moral capacities and the rationality of a person from possible abuses in a social and political context.

The right to the integrity of what I denote by 'personal autonomy' is constituted or backed up by several familiar rights in liberal democratic constitutional orders (Bublitz 2018: 300-302). Recognizing the right to make rational and free choices and the right of a person to determine the norms that lead her behaviors is a distinctive feature of such orders. In general, the right to personal autonomy is supported by the idea that the state's legitimacy to interfere with persons' freedom lies in its role to regulate conflict. But such disputes involve external behavior. They can be legitimately controlled through external coercion and not by modifying agent's internal capacities (Bublitz 2018: 306; Jacobs 2016).

Further, we see the relevance of autonomy, as it is defined by Bullock (2018: 162, 165-166) and Harris (2016: 78), as the basis of rights and liberties with strong lexical priority in liberal conceptions of justice, if we consider its relevance for the two moral powers described by Rawls. This is visible, in particular, for the capacity for a conception of the good. This is "the capacity to form, to revise, and to rationally pursue a conception of one's rational advantage, or good" (Rawls 2005: 19). It implies elements present in the definition of autonomy. Precisely, the capacity for a conception of the good implies, for example, the capacity to choose actions through rational and free choices (Harris 2016: 78), as well as "the ability to determine for oneself […] considerations and principles on which to act" (Bullock 2018: 162). But, then, we see why a reasonable and rational person can endorse a strong right protective of autonomy. Like Rawls says, people have a higher-order interest in developing and exercising the two moral powers (Rawls 2005: 106). Because of the fact that autonomy as defined above is implied by at least one of the two powers, we have a basis for determining it as protected through a strong right. Of course, in the case of criminal offenders that refuse rehabilitation, society can legitimately intervene to impede behaviors that they choose. Again, the target is represented by their behavior and not by their internal capacities, as the capacity to establish for themselves "considerations and principles on which to act".

5. *Lexical order or a flexible model?*

I move now to the argument that considers the costs of imprisonment as a reason for MBME. It might be objected that the debate on MBME of criminal offenders should not be set up in an allocative framework. The challenge can appear in two forms. First, the objection would be that there is no allocative question since convicted criminal offenders do not demand any resources to protect their autonomy. They only require a negative right that is satisfied by mere abstinence from imposing MBME. The objection says that contrary to positive rights, such rights are not disputable through economic arguments.

This kind of argument has already been criticized by Stephen Holmes and Cass Sunstein (1999) and Colin Farrelly (2007). Their theses are that, based on the facts of real-life, protection of negative rights costs. In a condition of limited resources, we must consider their protection through a proper balance of costs relative to the protection of costs of other rights. "Putting a price tag on such central guarantees" (Bublitz 2018: 315) is thus, a reasonable consideration conformed to a necessity of real life. It "runs counter to the idea of human rights" (Bublitz 2018: 315) only if we do not take into consideration real-world constraints. We see the relevance of costs in the specific case of MBME, as well. We must not lose sight of the fact that a criminal offender who refuses rehabilitation represents a persistent threat to other people. He is legitimately impeded for being a menace to society (not impeding him is not a legitimate option, in consideration of other people's rights). The usual way to do this is incarceration. But imagine that an alternative – MBME – is available and less costly. The prisoner who refuses BME, thus, opts for incarceration. Such an option would cause avoidable economic burdens to society for the sake of maintaining the criminal offenders' traits, dispositions, and capacities to act. In circumstances of limited resources, the orientation of resources for satisfying the convicted criminal offender's goal also implies the denial of resources to other agents for their needs. Consequently, we have a social issue in the context of resource allocation for the protection of rights.

Supporters of liberty rights can reply by affirming their lexical superiority. They could say that, of course, such rights imply costs. But their normative strength is such that they need absolute protection, nonetheless (Bublitz 2018: 315). In virtue of this argument, other rights could only be protected after these rights have been fully protected. This argument is familiar in political philosophy, and it corresponds to Rawls' lexical order. According to this thesis, to put it simply, social and economic justice questions come to the agenda only after questions of basic liberties have been fully managed (Rawls 1999: 37-38, 53-54).

The question that appears is whether adopting a rigid principle of lexical

order is the most reasonable alternative. Or, is it more reasonable to opt for a more flexible model that admits trade-offs? In the present context, for some, the strength of autonomy is such that it defeats other rights and, in effect, the financial rationale that would support MBME were it less costly than incarceration. Others deny such strength to autonomy. The question must be assessed through a proper model of public justification.

6. *Public reason*

At this point, I introduce a distinctive and pivotal element in the debate so far not employed by other contenders in the dispute. I suggest applying to the allocative formulation of the MBME of dangerous criminal offenders John Rawls's model of public justification, the theory of public reason (Rawls 2005). This model's core idea is that public decisions are justified if, and only if, they are justified through reasons that all reasonable persons can accept as free and equal. Included in such reasons are some political ideas, like the idea of society as a fair system of cooperation among free and equal citizens on the basis of reciprocity, some basic rights, liberties, and opportunities, their priority, the means to make effective use of them, and truths and methods of science when these are not controversial. These reasons are shared among reasonable citizens as free and equal, and in the process of public justification, they are referred to as valid public reasons (Rawls 2005: 212-254).

The alternative approach is to identify a favorite moral conception or theory of justice. From this, we derive prescriptions for disputed issues despite whether reasonable persons disagree with it and cannot accept the policy's justification. I assume that this is a wrong approach. There are various explanations for rejecting this approach and the requirement to employ public reason in public justification (Quong 2014: 270-275). One of these is that by enforcing a decision based on reasonably contested reasons, one person, a group, or even the majority of people would take the position of authority concerning other agents as interpreters of the truth (Gaus 2011; Ferretti 2018; Rawls 2005). Other agents would be treated as less than equal, and the basis that earns them the status of free and equal citizens - namely, their moral and epistemic capacities and their responsible use of them - would be pushed to the side. This holds even if the doctrine were true since there would still be reasonable pluralism about such truth. I find this an important consideration. I indicate an additional one, represented by Quong's theory (Quong 2011; 2014: 273-275). The rationale for public reason consists in the support it gives society as a fair system of cooperation among free and equal citizens. This is represented by the requirement to justify, at the very least, public decisions that concern basic rights, liberties, and

opportunities through the kind of reasons listed above.

Notably, public reason does not need to aim to achieve a unique reasonable answer in each dispute "based on decisive public reasons that defeat all competing considerations, and which each citizen is expected to endorse" (Williams 2000: 209). The method of public justification proposed by Rawls can appeal to the resolution of such cases, where public decisions remain undetermined (Williams 2000: 209). We can still hope that further reflection and research will help us to overcome the situation. But, sometimes, rational underdetermination remains persistent. In such cases, public reason obtains relevant achievements, nonetheless. First, although we do not have decisive reasons, i.e., reasons that justify a unique answer to each reasonable person, we have at our disposal undefeated reasons. Such are reasons that a reasonable person can endorse. Second, although we cannot establish, through undefeated reasons, uniquely required decisions, we have arrived at a set of eligible decisions (Williams 2000: 209). The achievement is significant because we have, at least, warranted that the final decision will not be unreasonable.

I illustrate this with cases in a pandemic. We need to make a public decision. We have proposal P1 based on pseudoscience and conspiracy theories. We have two further alternative proposals, P2 and P3, based on undefeated valid scientific reasons. Because both P2 and P3 are justified through undefeated but not decisive, valid public reasons, we do not have a unique response that each reasonable person must accept. We have, nonetheless, done significant work in distinguishing between reasonable proposals P2 and P3 on one side, and unreasonable P1, on the other side. P2 and P3 are eligible proposals, while P1 is not eligible.

But, in some situations, there might still be pressure to make a public decision. In such a case, we can recur to a fair resolution, like a fair democratic procedure (Williams 2000: 210). The decision is fair, in virtue of the procedure, and reasonable, at the same time, because it is represented by choice between reasonable eligible proposals.

Coming back to the present paper's topic, we can assume that reasonable agents accept one of the reasons employed in the MBME debate, autonomy, as normatively stringent. For them, autonomy is a valid public reason for justifying public decisions. However, for some of them, autonomy implies a right that always has lexical superiority and, thus, deserves absolute protection. For others, supremacy can be negotiated to some extent. For them, the right to health care, for example, can in some cases be normatively stronger. We have, thus, opposite proposals, both of them eligible, because they are both supported by reasons that all reasonable persons can accept as free and equal. In such circumstances, legitimacy belongs to the decision that is victorious among eligible proposals in a fair procedure.

One could question the use of the public reason test in the present context. For instance, one could note that Rawls himself has never written about criminal offense and punishment. Further, a famous criticism of his theory affirms that the exclusion of some topics from his opus is not accidental. Instead, the argument says that it testifies the limits of his paradigm (Nussbaum 2006). On the contrary, I think it is possible and valuable to extend Rawls's doctrine to topics not embraced in his opus. I do this for the theory of public reason and for a topic that enters the field of criminal justice, side-stepped by him.

Rawls indicates the proper application of public reason to "cases involving the constitutional essentials, and, also, in other cases, insofar as they border on those essentials and become politically divisive" (Rawls 2001: 117). For example, abortion is a case when public reason needs to be applied, because, although it is not strictly a constitutional essential, it borders on it and is politically divisive. In my view, MBME can be such a case. It is related to questions of basic rights and liberties because it strongly enters into the domain of liberty of conscience and the "liberties specified by the liberty and integrity (physical and psychological) of the person" (Rawls 2001: 44). At the moment, we cannot say that it is politically divisive, like abortion, in public at large. But the reason is that, for the moment, it is mainly a conceivable possibility. However, the actual academic dispute shows that it can become politically divisive if the relevant biotechnologies will have a clear perspective of being available.

A further challenge could be represented by the fact that the method of public reason is proper to mutual justification among reasonable persons. Such are persons who, among else, recognize other persons as free and equal and who are disposed to establish with others fair cooperation on terms of reciprocity (Rawls 2005). The question is, why are we, and how could we be, obliged to justify to clearly unreasonable persons, like Hannibal and Anders, public decisions on public reason terms.

To answer this objection, it is important to establish the subjects to which public justification is addressed. Notably, we are not obliged to justify principles and public decisions to unreasonable persons. In other words, we are not obliged to address them justification based on reasons that they can accept. Reasonable persons establish principles of justice and make related public decisions for them. But, reasonable persons must not do this arbitrarily. Instead, they must properly justify reasonable principles and public decisions. This is required to avoid the challenge addressed by Martha Nussbaum to Rawls's political philosophy (Nussbaum 2006) that claims how Rawls neglects an entire set of relevant categories of subjects. For instance, the mentally impaired or disabled people that, according to our considered judgments, deserve justice considerations. One could say the same for criminal offenders.

But how can reasonable persons extend justification of principles and public decisions to subjects who deserve consideration of justice but are not qualified to take part in the justificatory process? In my view, and in coherence with Rawls's original view of public justification, reasonable persons who participate in this justificatory process must apply the method of public reason. Similarly to how they do when they justify principles and public decisions that apply to themselves. In other words, they must justify to each other how the principles and public decisions stand applied on non-reasonable persons by relying on reasons that each reasonable person can accept. In this process, they must use the same reasons, or reasons coherent with these reasons, that they usually employ when principles and public decisions that apply to them are concerned. I illustrate this through an example related to the present paper.

Let's assume that a, at least pro tanto, valid public reason for the justification of public decisions applied to reasonable persons is represented by the following principle. States can legitimately coercively regulate only the behavior of competent persons but not their inner states. A sufficient condition for being a competent person is that the person can choose her actions through rational and free choices, determine for themselves evaluative reasons, etc. At least pro tanto, the consequence is that we must not regulate competent persons' inner states through coercive means even though they are not reasonable.

I show, now, how public reason functions in practice. I turn to the question of whether the thesis that autonomy is so normatively strong that it trumps competing reasons in resource allocations is publicly justified and, as a consequence, whether MBME of criminal offenders is defeated. In what follows, I distinguish between two different debates on the normative weight of autonomy and the allocative question regarding MBME: perfectionist arguments and human rights and liberties arguments.

7. *Perfectionism and autonomy*

I now discuss the perfectionist debate on autonomy's normative weight as a defeater of MBME of criminal offenders. Perfectionist conceptions that place autonomy at the core of their accounts represent a possibly decisive defeater of the economic argument for MBME of criminal offenders. If autonomy has such immense normative weight, it would have lexical priority. In other words, the allocative dispute with other rights and values that can be appealed to by supporters of MBME would never arise.

The classic public reason reply to such a thesis is that perfectionism cannot function in public justification because it represents a controversial philosophical doctrine not shared by citizens who reason as free and equal (Quong 2011).

There are, however, forms of perfectionism that are not evidently liable to such an objection. Collis Tahzib has proposed a kind of perfectionism, called political, by analogy to Rawls's political liberalism (Tahzib 2022). It preserves the Rawlsian public reason constraint that fundamental political decisions must be justified through reasons that all reasonable citizens can accept. But contrary to the typical political liberal view (Quong 2011), Tahzib affirms that perfectionist values can satisfy this condition. He assumes that arts and sciences are among perfectionist values that reasonable persons can share. Can we assume that autonomy is among these values, as well? In my view, we cannot assume that all reasonable persons will attribute value to autonomy in the perfectionist sense, at least not in the cases relevant for MBME, and, thus, we cannot employ it as a valid public reason. But before concluding this, I must analyze the thought of authors who do not share this view.

Harris (2016) and Sifferd (2016) offer reasons to endorse autonomy as a virtue. They explain that virtuous action, because of its complexity and context-sensitivity, requires a subtle capacity of making and realizing choices, or, in other words, autonomy. This is because the valence of actions and dispositions changes. MBME, thus, implies an enormous loss because it deprives agents of the capacity needed to practice virtuous behavior, or, at least, it strongly limits this capacity.

Still, Harris and Sifferd do not offer conclusive reasons for publicly justifying the needed strength of the value of autonomy in the present case. Their central thesis applied to the present context is that, after some traits, dispositions, and capacities have been removed from persistent criminal offenders, they will lose capacities that are sometimes morally laudable or the capacity to choose to practice these capacities out. They will thus be deprived of the potentialities to be virtuous in specific contexts. However, in my view, such potentialities are ephemeral in the present case because, for example, Anders and Hannibal will never exercise them or will exercise them only in limited cases. Such cases are irrelevant if compared with the horrible acts that they are disposed to perform.

Harris and Sifferd shape the debate so that it seems how the salient choice is between two alternatives—on the one hand, leaving agents the capacity to make and practice fine-grained reasonable choices (that implies autonomy). And on the other hand, making them people with restricted options (which limits their choices, including, on some occasions, to do what morality requires). But, due to agents' resistance, in the present discussion, the salient alternative stands between the option of restricting their choices and leaving them to remain persistent and ferocious criminals. The criticism to MBME cannot be that the capacities removed from criminal offenders resistant to rehabilitation could be helpful in some cases. Therefore, we must leave agents with these capacities and

the ability to choose when to exercise them. In fact, because of such agents' persistent dispositions, decisions, and preferences, such capacities will be mainly used for heinous acts, because such cases are marginal in their lives. Therefore, their virtuous potentialities are ephemeral. The loss of these capacities and the capacity to decide when to practice them are not a loss of virtue in this specific case. Thus, applying MBME does not cause a loss of virtue in this specific case.

The option that remains to perfectionists is to affirm a constitutive link between autonomy and perfection, or virtue. The objection to MBME is that, by utilizing it, we deprive a person of virtue because we remove a feature that represents a necessary component of the good human life. But such an assumption does not satisfy the public reason test. Imposing the idea that "ways of life have value only if they are freely chosen" (Barry 1995: 130) as a basic normative principle represents the imposition of a partisan view. From the public reason perspective, the problem is that some reasonable persons cannot endorse such an idea.

Further, Harris's and Seffird's argument in opposition to MBME can be opposed even by those who endorse the view that autonomy is a necessary component of a fully good human life. Namely, to be an objection to MBME, the thesis must be that autonomy does not only constitute virtue as one of its elements but that its presence implies virtue. It follows that a person who has the capacity to exercise choices and the abilities to practice them but who, persistently, has no, or has rare, intention to behave properly, is, at least in a relevant sense, in a virtuous condition. This is needed to say that being a bad person A is better than being an inoffensive but cooperative member of society, B if B is harmless due to MBME and restriction of autonomy. However, we might reasonably disagree whether restricting the autonomy of those who would mainly choose horrible options constitutes a moral loss.

Steven Wall, for example, offers reasons to think that it does not (Wall 2008). In fact, Wall does not speak in terms of public reasons. He affirms his theory as the simply correct one. But we can assume that his thesis, about how autonomy persistently exercised for the bad is not virtuous, stands to be a valid challenge in public justification. This is a thesis that a reasonable person can endorse. Favoring autonomy as an absolute overriding value despite such disagreement is, thus, not publicly justified through the lens of public reason.

This leads us to a conclusion for the present allocative issue. The perfectionist reasons described above do not provide legitimate public justification to protect the autonomy and mental integrity of criminal offenders who refuse rehabilitation at the expense of other normative demands.

8. *The allocative question*

I now discuss the allocative questions related to MBME by drawing from the discussion on rights and liberties as basic considerations. I start with the position that attributes personal autonomy with the status of superior right in lexical order.

This is a reasonable position. It appeals to a right that can be endorsed by all persons as free and equal. We see this, for example, through Bublitz's explanation shown above, as well as through the role of autonomy, as defined by Bullock (2018: 162, 165-168) and Harris (2016: 78), in Rawls's liberal theory of justice. But even though all reasonable persons can accept the appeal to autonomy as a valid public reason, reasonable persons can refuse its rigid priority in lexical order.

Farrelly (2007) has objected to the endorsement of such a rigid lexical principle. His specific target is represented by the rigid lexical priority that Rawls attributes to basic liberties. He says that the endorsement of such a rigid lexical priority implies that, in real life, important needs can never come to the agenda in virtue of real-life conditions. Instead, he proposes a more flexible view. According to such a view, we must not assume a rigid lexical order but consent trade-offs based on reasonable judgments sensitive to context.

A similar proposal can be applied to the MBME dispute. We could say that we must resolve the question of resource allocation when we address competing claims through context-sensitive, reasonable judgment. Such can be claimed for the protection of autonomy, on one side, or the protection of the right to healthcare, or the right to good education, on the other side. But, reasonable agents can diverge on the normative weight they attribute to autonomy and other rights and values. This is crucial in the present debate on MBME that I frame as an allocative issue. Some can consider autonomy as protected by a right superior in lexical order, that, in possible conflicts, overrides all other rights in public decision-making procedures. But the opposite view is reasonable as well. One can, legitimately from the public reason's viewpoint, attribute stronger weight to competing rights in some of these conflicts. Specifically, while some can think that autonomy is an overriding right in the cases of criminal offenders that refuse rehabilitation, others can think that it could be sacrificed through MBME for the sake of competing rights. First, this is so because the rights that compete with autonomy, such as healthcare or good education, represent reasons we can accept as reasonable persons. Further, one can adduce reasons that reduce the weight of the claim of criminal offenders. For example, one can say that the autonomy of criminal offenders can be sacrificed through MBME for the sake of competing rights in virtue of the poor way it is exercised (i.e., maintaining

criminal dispositions and capacities). Aside from the awful way in which serious criminal offenders exercise their autonomy, there is an additional reason to limit supporting it. It would be a waste of resources to employ them into cultivating dispositions for acts that will be impeded by means of even stronger limitations of freedom, like imprisonment. A further reason that we need to consider here is that the criminal offender is responsible for his condition. In contrast, his opponents in the allocative dispute, as a child in need of life-saving treatments, by assumption, are not (McMahan 2018: 121).

I argued for the conclusion that attributing overriding strength to the right to personal autonomy is reasonably contestable, and, thus, it cannot be considered decisive against the MBME of criminal offenders. However, I do not arrive at a conclusion that adjudicates between the competing theses – those in favor and those opposed to MBME. I merely show that we are within the bounds of reasonable pluralism. Reasonable persons can disagree about such theses. Each side can, sustained by valid public reasons, affirm either the thesis that autonomy must be safeguarded no matter the cost (in which case MBME of criminal offenders can have no legitimacy), as well as that the protection of autonomy must be balanced with other rights in an allocative dispute, and that, sometimes, such rights can deserve priority. The fact that there is no unique reasonable answer is not a problem for the public reason theory of justification, as shown in section 6. There, I have remarked that the aim of public justification is obtained when we warrant that public decisions are reasonable and fair. And in cases like the present one, where we do not have a unique reasonable answer, we use a two-step procedure. First, we arrive at a step of eligible valid public decisions. Each of them is justified through reasons that each reasonable person can accept. Second, we make the final decision among them in a fair procedure.

I turn, finally, to the opposition to MBME that is based on the idea of non-domination as advanced by Hauskeller (2017). As I have described in section 4, autonomy, in this context, is interpreted socially as the condition of not being dominated by others. In defense of the legitimacy of MBME, one can appeal to the interpretation of non-domination coherent with the Rawlsian theory of public justification. Non-domination is achieved when decisions are justified through public reason. This is so, even when the subjects of decisions do not factually consent to them. What matters is idealized consent. This is the consent that each reasonable person would give in virtue of her reasonableness and not factual consent.

Consequently, this is true for MBME, as well. Subjects of MBME are interpreted as co-authoring the decision because it is justified through reasons that they can all accept as reasonable, free and equal persons. Such are, first, rights that compete with autonomy in an allocative question, and that they accept as

reasonable, free and equal, and, second, the verdict of a fair procedure of choice among eligible proposals. Namely, when valid public reasons do not provide a unique reasonable answer, legitimacy derives from a fair procedural decision that is the expression of equality of all persons.

9. *Conclusion*

In conclusion, I have introduced some novelties into the debate about the MBME of criminal offenders. The first is methodological. In the current state of the MBME debate, authors typically proceed from their favorite moral views, broadly conceived, or from their favorite insights on values or rights. From these, they derive recommendations that they consider publicly justified. Instead, I employ the Rawlsian model of public reason that employs only reasons that all persons can accept as free, equal, and epistemically responsible. This approach pays attention to the pluralism among persons. It respects their freedom and equality by refraining from recommending proposals that are justified through reasons that some citizens cannot accept as reasonable, free and equal.

Second, I have offered further support to the thesis that costs matter when deciding about the MBME of criminal offenders. I, however, only endorse the principled version of this claim since we cannot know the costs of practices that are mainly prospective. But the discussion about the principle serves as an indication that moral relevance should be attributed to costs. Such an indication can be relevant to institutions that could be involved in decisions on whether to support the research of such practices and under what conditions.

Third, I have demonstrated that the perfectionist appeal to autonomy is not an absolute defeater for the MBME of criminal offenders. Such appeal is not admissible in public justification, from the Rawlsian public reason perspective, because it is linked to conceptions of good and value that are not shared by all reasonable agents.

Fourth, I have demonstrated that the non-perfectionist appeal to autonomy is admissible in the human rights and liberties context because it refers to a right that is part of the political culture of a society of free and equal citizens. But there can be reasonable disagreement among citizens as free and equal about its relative normative strength when we need to balance it with other rights in allocative disputes. Thus, we lack a conclusively victorious decision. In reasonable pluralism circumstances, the best that we can achieve is for final legitimacy to be derived from a fair decision-making procedure among eligible proposals.

As far as the arguments in the present paper are concerned, MBME of criminal offenders is neither defeated nor conclusively justified. The decision

pertains to a fair deliberation in the decisional process, like with other allocative questions, as indicated, for example, by Daniels and Sabin in healthcare justice (Daniels *et al.* 2008)[5].

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