PRISONER ORGAN DONATIONS?

A CONSIDERATION OF PRISON INMATES VS. THE REST OF SOCIETY

PART TWO: CAN PRISONERS APPROPRIATELY CONSENT TO ORGAN DONATION?

In 1977 the Commission for the Protection of Human Subjects of Biomedical and Behavioral Research was formed,[1] which was established by Congress to make recommendations on experimental issues involving prisoners. The concern was that inmates were being misused as test subjects despite the fact that the inmates had "consented". The Commission maintained that "although prisoners who participate in research affirm that they do so freely, the conditions of social and economic deprivation in which they live compromise their freedom." And as one Georgetown University Professor who maintains that the prison environment is inherently coercive stated, "When persons seen regularly to engage in activities which, were they stronger or in better circumstances, they would avoid, the principle of respect for persons dictates that they be protected."[2] In other words, prisoners are subject to coercion by virtue of the circumstances of their environment and they should be protected from doing things they might not do if they were not in this environment.

The necessity for this commission was brought about due to increasing revelations of abuses of those prisoners who had volunteered and consented to research. By 1972, the pharmaceutical industry was doing more than 90 percent of its experimental testing on prisoners.[3] Oftentimes facilities conducted nontherapeutic studies involving various infectious diseases. Doctors in the field do not usually know in advance the disease which they will encounter. But in inmate studies the doctors knew which disease had been administered to a volunteer and could thus diagnose and treat it at a very early stage if the volunteer developed symptoms of the disease.[4] Thus they could learn a valuable amount of information about early detection and treatment of a variety of diseases through human imprisoned guinea pigs.

Between 1963 and 1973, the Pacific Northwest Research Foundation conducted a study on the effects of radiation on Oregon inmates.[5] Known as the Heller experiments, as these studies were conducted by Dr. Carl Heller for the Atomic Energy Commission, researchers sought to determine the human body's responses to various experimental regimens, among them the effect of radiation on human testicular function.

From Holmesburg Prison in Philadelphia between 1961 and 1974 nearly 300 former inmates filed suit against the University of Pennsylvania, a prison dermatologist, Dow Chemical, and Johnson & Johnson for injuries, physical illnesses, and psychological trauma suffered as a result of experimental research conducted there.[6] The plaintiffs claimed that the prison officials and researchers deliberately exposed prisoners to dangerous and toxic substances without informing them of the risks.

EXPLOITATION

The prison population is a uniquely vulnerable one which is prone to exploitation by nature of incarceration and deprivation of certain freedoms. The history of medical exploitation of prisoners referenced above becomes glaring cases in point.

The presiding rationale for claiming exploitation focuses on the presumably fallible decision-making abilities of the prisoner. In other words, a person in an imprisoned state cannot make certain rational decisions because such a state of physical deprivation and psychological instability that the prisoners' ability to reason practically is impaired. Therefore, true and voluntary consent cannot be obtained.. A variety of factors including feelings of guilt, depression, grief, fear, hopelessness, loneliness or even boredom will cause prisoners to make choices that would not otherwise be made if they were not locked up. Arguably it becomes too difficult to evaluate how a person might have acted under a different set of psychological circumstances and to figure out what "makes sense", as a rational matter, for the prisoner.

In the case of medical experimentation prisoners were given inducements to participate that were oftentimes so great, relatively speaking, that the prisoners' participation in the medical research program was virtually coerced. Many prisoners couldn't afford to turn it down.[7] Specifically recognized as factors which might motivate an inmate to consent to participate in a research project were relief from the every day monotony, providing a source of income, securing good food, a comfortable bed and medical attention, and favorable parole considerations. The poor prison conditions, idleness, and the high level or pay relative to other prison jobs indicated that the prisoners' participation in the program was not exactly voluntary. The medical community was therefore exploiting these inmates to become research subjects for studies that nobody else would subject themselves to under ordinary circumstances.

CAN APPROPRIATE CONSENT EVER BE GIVEN?

While inmates are certainly a vulnerable class of persons whose voluntary consent cannot always be assumed there are guidelines which are designed to obtain appropriate consent. The Department of Health & Human Services (HHS) and the Food & Drug Administration (FDA) have promulgated regulations governing experimentation, which include safeguards to insure adequate consent by prisoners.[8] In addition to these general provisions, the Department of Justice Bureau of Prisons has issued regulations that deal exclusively with studies involving prisoners of persons employed in the prison system.[9]

In addition, the medical community has provided an explicitly detailed method by which to obtain prisoner consent for any medical treatment.[10] Corrections societies include guidelines created for the purpose of obtaining such consent.[11] If prisoners can give consent to medical treatment generally, or even choose to exercise a constitutionally protected right to die or refuse medical treatment,[12] then they must be presumed to be capable of consenting to less vital issues.

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The problems arise when consent is coupled with any sort of perceived advantage or inducement that the prisoner may receive upon giving his consent that takes it over the threshold of coercion. A prisoner is not likely to consent to medical experimentation without some incentive to do so. But even the smallest inducement which makes the life of the prisoner more comfortable or simply adds something to the grind of day-to-day prison life can be an overwhelming enticement which no longer makes the decision truly voluntary.

The only way for an inmate to truly be able to give consent or volunteer is if there is nothing for them to gain by doing so, which in effect makes prison experimentation nonexistent.

CONSENT & ORGAN DONATION

Willing organ donations by prisoners cannot be construed in the same light as medical experimentation or research. It is not the medical community or the corrections departments who are requesting involvement with organ donations from prisoners. It is the inmates themselves who are requesting to be considered as donors. They are doing so for reasons of altruism, not for some gain in freedoms or comfort level.

To avoid the negative perceptions associated with inmate organ donations and the issues of consent or coercion it is necessary to *assure that the inmate who is about to give an organ has done so absolutely voluntarily and without any financial incentives whatsoever.* Other states have considered inmate organ donation programs which offer "good time" type incentives to increase inmate participation. But doing so reignites the original dangers of coercion and *cannot* be considered. If inmates do not receive any inducements it cannot be argued that they were coerced in any way.

Even without outside incentives to participate in organ donations some might argue from a spiritual point of view that there is an internal motivation that is so intense that it influences the actor's ability to reason effectively and creates conflict between competing values, beliefs and desires. When a mental compulsion is so overpowering that it is considered to be irresistible, it renders the resulting behavior un-free. Because of the prisoners state of punishment for something that they have done wrong, their own need for redemption may "coerce" them into donating for fear that without such redemption they will further be punished in a spiritual sense. There would be some debate as to whether this is a wrong view at all. But it should be noted that the deciding factor for determining consent is whether a person would make the same decision were he not in this circumstance. Such "coercions" affect the daily lives and decisions of many religious persons not incarcerated and should have no further relevance here than would be considered for others who wish to donate.

ORGAN DONATION FROM THE CONDEMNED

Some will continue to bring up the atrocities concerning China and the harvesting of organs from executed inmates to demonstrate some potential "slippery slope" as a defense as to why organ donations cannot be considered from the condemned. Not coincidentally these will likely be death penalty opponents who proffer these arguments. Anything that sanitizes or brings some benefit from the execution process will never be condoned by the anti-death penalty community and the China argument is an easy one.

The unfortunate reality of such an atrocious organ procurement plan as China's should not undermine every program centered on organ donation. The execution processes in the States differs in just about every ethical way from those in China. To follow the logic that the U.S. cannot consider organ procurement from the condemned because China set a bad example is not sufficient rationale for disallowing consideration of organ donations from willing condemned inmates. Under that reasoning, due to how China implements the death penalty we would not have a death penalty in the U.S. for fear of similar abuses. The two governments prison policies are not comparable.

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Unlike China's practices, organ donation in the U.S. is by voluntary consent only. Any organ procurement policy regarding the condemned will likewise necessarily be at the willful consent of the condemned with several safeguards in place to ensure that this was unquestionably voluntary. And unlike China, organs will not go to the highest bidder. Organs procured from the executed prisoner will only be available to those recipients who are registered on the national waiting list. Although China's organ procurement system should serve as a powerful reminder what not to do, it must not be used to distract attention away from the ability to allow organ donations from willing condemned prisoners in an ethical and practical manner.

OBTAINING APPROPRIATE CONSENT

Consent from willing inmates to donate organs will necessarily require a more detailed process. The procedure is non-therapeutic from the medical communities' point of view and should therefore be treated like an invasive elective surgery. Examples for such appropriate consent can be seen within various regulations already in place, such as Oregon's life ending Death With Dignity Act, an assisted suicide law. While this may seem extreme, the necessity for discovering the nature of the inmates' wishes to donate is of serious concern. Without such considerations their may still be doubts as to the inmates motives simply because of the nature of the prison environment.

Similar to an Oregon resident making a life-ending decision, the inmate would initially be examined by a physician who must "verify that the patient is capable, has acted voluntarily, and has made an informed decision."

OREGON'S DEATH WITH DIGNITY ACT:
ORS 127.820 § 3.02. Consulting Physician Confirmation
"Before a patient is qualified, a consulting physician shall examine the patient and his or her relevant medical records and confirm, in writing … that the patient is capable, is acting voluntarily and has made an informed decision.

If the inmate is diagnosed with any underlying psychological disorder or depression causing impaired judgment, the patient is referred to appropriate counseling until deemed competent to make a request.

ORS 127.825 § 3.03. Counseling Referral.
"If in the opinion of the attending physician or the consulting physician a patient may be suffering from a psychiatric or psychological disorder or depression causing impaired judgment, either physician shall refer the patient for counseling. No medication to end a patient's life in a humane and dignified manner shall be prescribed until the person performing the counseling determines that the patient is not suffering from a psychiatric or psychological disorder or depression causing impaired judgment."

In addition, Oregon's DWD Act enforces a waiting period from the time of request to the date they are given their lethal prescription to ensure adequate time to reconsider the decision.[13] And there is explicit wording to ensure that the patients' right to rescind is protected.[14] The right to rescind is an important one and must be granted unequivocally. And due to concerns with vacillation, an inmate who does choose to take back his decision to donate should never again be allowed the option to be a donor.

If the prisoner makes an unsolicited decision to donate and meets similarly stringent criteria as is required in Oregon's DWD Act, his voluntary choice to be an organ donor upon execution is absolute and clear. With these careful guidelines the issue of consent from the inmate's point of view should be explicitly satisfied.

CONCLUSION

Concerns over truly voluntary consent from prisoners are very real and should be given careful consideration. History certainly proves that prisoners decisions are heavily influenced when offered incentives to obtain their consent.

While it is rare that an inmate will choose to undergo invasive procedures without some sort of financial inducements there are many who are willing to give up an organ to save a life. They do so for reasons separate from prison life, reasons which have nothing to do with relief from boredom, providing a source of income, securing good food, a comfortable bed and medical attention, or favorable parole considerations.

Twenty people will die today while waiting for an organ needed to survive. Over 110,000 Americans are currently in need and it's likely that another new patient in need of an organ transplant will be added in the time that it took to read this. [15]

Inmates make up nearly 2 million of the potentially available donors; most of which are currently prohibited from such donations due in part to reasons discussed above. While the vast majority of prisoners would likely decline to donate an organ, even if just one percent chose to participate it would yield nearly an additional 20,000 donations; more than doubling the number of current donors.

Organ donation creates an opportunity for prisoners to give back to the community whose social norms have been violated and it provides an opportunity to help a fellow citizen who desperately needs help. Cultivating such a generosity of spirit can do much to rehabilitate criminals conditioned by a life of hardship who think only of themselves. The more that is being done to prepare an inmate for a positive reentry into the community benefits all involved.

Should the donor happen to be a death row inmate who is forced to be executed, allowing good to come out of an otherwise hopeless situation only heightens the benefit to the institution and the community in general and it gives the condemned inmate a way to die with a dignity and humaneness that is not in any other way possible.

When you consider organ donation from voluntary prisoners *without incentives* past practices involving exploitive research and coercive experimentation have no bearing. The benefits to the community along with the potential benefits to the prison as well as the inmate donor far outweigh other considerations or further dwelling on abhorrent past practices which do no apply.

When presented with the need for organ donations and the possibility of such donations coming from truly willing prisoner donations with nothing to gain but a satisfaction from helping another human survive, it's only rational that the possibility be given careful honest attention.

Thank you for your time and consideration.

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[1] The National Research Act, approved July 12, 1974, established a program partly for behavioral research and a mechanism for the development of standards and procedures for protection of human subjects involved in biomedical and behavioral research. Title II of the Act provides in Part A for the establishment of a National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research. This was followed by subpart C on November 16, 1978, "Additional Protections Pertaining to Biomedical & Behavioral Research Involving Prisoners as Subjects", restricting research on prisoners (45 C.F.R. 46.301 - 46.306).

[2] Professor Patricia King, a strong opponent of research on prisoners.

[3] Talvi, S. J., *The Prison As Laboratory: Experimental Medical Research on Inmates Is On the Rise*

[4] States in which some medical research was conducted on prisoner volunteers during at least some period of time after 1970 include Michigan, Montana, California, Texas, Indiana, Connecticut, Missouri, Oklahoma, Illinois, Florida, Georgia, Massachusetts, New Jersey, Ohio, Rhode Island, Nebraska, and Kentucky. Nontherapeutic biomedical research was conducted in state prisons in the following states in 1975: California, Indiana, Maryland, Michigan, Montana, Texas, Virginia, Connecticut, and Massachusetts.

[5] Bibeau v Pacific Northwest Research Foundation, 980 F. Supp 349 (1997), U.S. Dist. Court Ninth District

[6] *Abbdulaziz v City of Philadelphia*, 2001 U.S. Dist. Lexis 16972, U.S. Dist. Court Eastern Dist of PA

[7] For voluntarily participating in the Heller Experiments in the 1960's, inmates were paid $ 5 per month for agreeing to radiation exposure, $ 10 per biopsy, and $ 100 for undergoing a vasectomy.

[8] See 45 C.F.R. §§ 46.301-306 (1985)(HHS) "ADDITIONAL PROTECTIONS PERTAINING TO BIOMEDICAL AND BEHAVIORAL RESEARCH INVOLVING PRISONERS AS SUBJECTS"

[9] 28 C.F.R. §§ 512.10-22 (1985)(BOP)

[10] *Consent to Treatment, A Practical Guide*, Fay A. Rozofsky (2d Edition 1990), 216-219

[11] OAR 291-124-0080 Patient Rights (Inmate Health), Sec. 2: Informed Consent

[12] *Thor v. Superior Court*, 855 P.2d 375, 5 Cal. 4th 725 (1993)

[13] ORS 127.850 § 3.08 "No less than fifteen (15) days shall elapse between the patients' initial oral request and the writing of a prescription..."

[14] ORS 127.845 § 3.07. Right to rescind request, "A patient may rescind his or her request at any time and in any manner without regard to his or her mental state. No prescription for medication under ORS 127.800 to 127.897 may be written without the attending physician offering the qualified patient an opportunity to rescind the request."

[15] See current numbers regarding waiting list candidates at www.unos.org or www.organdonor.gov.