

1976

Should Prisoners Be Permitted to Serve as Subjects of Research?

Larry I. Palmer

William & Mary Law School

Repository Citation

Palmer, Larry I., "Should Prisoners Be Permitted to Serve as Subjects of Research?" (1976). *Faculty Publications*. 521.
<https://scholarship.law.wm.edu/facpubs/521>

Copyright c 1976 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.
<https://scholarship.law.wm.edu/facpubs>

Should Prisoners Be Permitted to Serve as Subjects of Research?

Larry I. Palmer

Editor's note: This is a revised and condensed version of a paper Professor Palmer delivered on January 7, 1976, to the National Minority Conference on Human Experimentation sponsored by the National Urban Coalition.

Suppose a drug manufacturer wants to test the toxicity of a new drug that will relieve the discomforts of common colds. Suppose a leading cancer researcher needs healthy people for a study to determine if cancer can be transmitted by

inoculation of "live cancer cells." Suppose a psychologist wants to determine if a drug is as effective a means of controlling assaultive acts as is solitary confinement in a maximum security prison. Suppose a university researcher wants to administer a questionnaire to female prisoners concerning the uncertain lives of their children.

Should prisoners be permitted to serve as subjects for proposed research of the foregoing kinds? The simple answer is that it all depends. But on what? And there simplicity ends. The interests involved must be identified, evaluated, weighed, and balanced. But this will not be enough, for the combinations of interests and the conflicts between them depend on the nature of the proposed research and other factors. Thus differential analyses, not some single general answer, are called for. For example, we should allow prisoners to consent to be interviewed for research on prison life but not to be experimented on with dangerous drugs.

The issues are not merely academic. Considerable research already occurs in prisons, and proposals for further research

are regularly made to prison officials throughout the country. On July 12, 1974, Congress passed Public Law 93-348, which established the National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research. The commission was instructed to study a variety of ethical and legal issues surrounding human experimentation including issues of fetal research and psychosurgery and the effects of experimentation on the delivery of health care.

The commission was also instructed to determine the require-

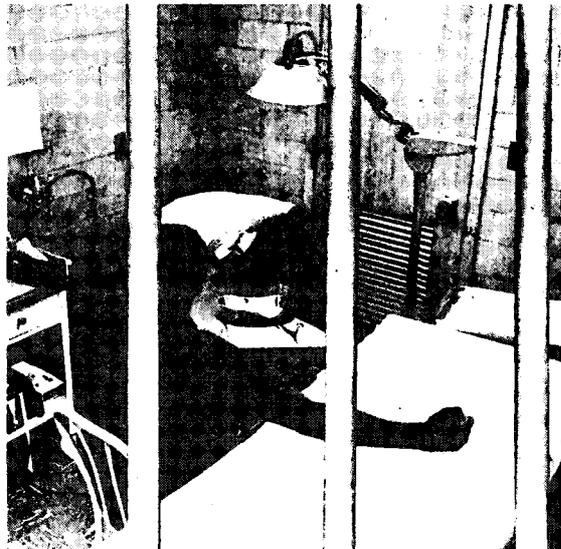
ments of informed consent for experiments on prisoners, children, and the mentally ill.

It is evident that the commission and any person confronting the problem of use of prisoners in research must at the outset take into account the interest individual prisoners have in being treated as *human beings*, worthy of respect. They have an interest in being allowed to exercise free choice in deciding whether to participate in a research project, for above all, a human being is a self-determining being.

Autonomy is of special significance to a prisoner, for pris-

oners have little to make choices about.

People who propose using prisoners for research should be mindful that several factors diminish the likelihood that a prisoner's consent will be as voluntary as that of a non-prisoner. The wages prisoners receive are extraordinarily low; yet prisoners need money for the few luxuries of prison life—cigarettes, for example. Thus prisoners are specially vulnerable to monetary research inducements. Also, there is little to do in prison. Prisoners might volunteer simply to es-



cape the boredom of prison life. Further, conditions in most of our prisons are such that some prisoners will readily volunteer if the research gives them the opportunity to be isolated from more violent and aggressive prisoners. To the extent such factors influence prisoners' decisions to participate in research, those choices are less voluntary than would be choices of nonprisoners.

Another aspect of the prisoner's interest in genuinely choosing whether to participate in research is one that applies also to people out of prison. Consent is always given *to something*, and it is in the nature of some research that the parties proposing it cannot fully describe for the prisoner all that will be involved. It goes without saying that there can be no such thing as genuine assent to unknown risks. Of course, researchers should be required to be as specific as possible about known risks, both short run and long run. Sometimes risks can be described in advance only in general terms. Is assent genuine when this is so? Certainly in the optimal case of genuine assent the prisoner would be faithfully told all that might happen to him, and with precise predictive accuracy.

Still another aspect of the prisoner's interest in genuinely assenting is the individual's capacity for such assent. Surely those who for psychological reasons might not be able to exercise a considered judgment should be removed from the pool of research prospects. Analogously, it may be that some prisoners are more or less by nature averse to long-term risks. When this can be reliably determined, they too should be removed from the pool of research prospects, at least whenever the research project involves such risks. The rationale for such actions calls forth a second basic interest of both prisoners and society, namely the interest in not taking advantage of demonstrated human weakness. If it be objected that this is paternalism, it is of a kind borne of a concern for those who have dramatically evinced the relevant weaknesses.

Besides the foregoing interests, there are still others. Even if the conditions for genuine assent are present, and a pool of potential volunteers is readily identifiable, there will still be some forms of research that our society should not permit anyone to do on human beings. Among other things, it must be remembered that what research the state permits in prisons will have *symbolic* significances in the larger society. The symbolism takes on special meaning, too, given the proportion of minority groups incarcerated in our prisons.

By almost any definition of disadvantaged or minority, the majority of our prisoners are disadvantaged. The problem of the use of racial or other minorities as experimental subjects looms large in our culture also because of our experience with the Nazi concentration camp experiments. It behooves a country that has used the sanctions of law against the Nazi scientists to avoid using the disadvantaged in its own society for scientific experiments in which nonprisoners would not willingly participate.

Also, the use of such drastic "experimental" techniques as psychosurgery ought not to be permitted in prisons until the techniques are adequately developed and determined to be effective with noninstitutional patients. The evidence indicates that the effectiveness of psychosurgery as treatment is not yet known. Hence, it should not be used, even on "consenting" prisoners.

Sentencing Goals

Society has, of course, reasons for imprisoning people and an interest in the fulfillment of sentencing goals. The pool of prospective volunteers should not be developed without regard to possible inconsistencies between the nature of the proposed research and the sentencing goals as they apply concretely to an individual. When there is significant inconsistency in a particular case, the individual should be removed from the potential volunteer pool.

Above all, participation in scientific research should not become a substitute for fulfillment of sentencing goals. Consider this extreme example: A prisoner on death row may be willing to incur great risk of personal harm in a research project in substitution for the death penalty. Should he be permitted to do so? Surely not. Assuming the death penalty in this case is imposed partly as a deterrent to others, it would frustrate this goal to permit the substitution.

Perhaps the nature of the particular sentencing goal should be taken into account, and if that goal is of little importance to society, it may be that we should discount the inconsistency. Consider for example, whether the inmates of a city jail should be used in a controlled experiment involving heroin maintenance. If the purpose of legal confinement of heroin addicts is to treat them, would an administrator of the jail be justified in deciding that a pilot program might be tried? The answer to this question depends on one's theories of heroin addiction, on one's attitude toward the

prevailing ethic of treatment of prisoners, which is under heavy attack, and on one's attitude about the efficacy of the alternatives—jail, methadone treatment, or outright release.

So far nothing has been said about the societal interest in the advancement of scientific knowledge. Were it not for this interest, there could be no justification for research on prisoners. Yet, this is neither a monolithic nor an overriding interest. There are many varieties of knowledge, some worth less than others. In judging research proposals, one should consider the nature of the knowledge involved. Even when it is plain that the research payoff may be great, it hardly follows that this interest should be simply weighed and balanced against any and all other interests that happen to conflict.

A Need for Priority Principles

In my scheme of values, and I hope in that of others, I see a need for priority principles as well as for a balancing calculus. And these are not alternatives. Balancing is simply not appropriate with respect to some conflicting interests. For example, if conditions for genuine assent are significantly absent, the research should not go forward, regardless of the prospective gains in knowledge. Or if the research plainly involves a significant risk of long-term physical or psychological harm, again it should not be permitted, regardless of its importance. Or if the research plainly conflicts in significant ways with relevant sentencing goals, the proposal should be turned down.

These are priority principles, not balancing maxims. Such principles give priority to basic interests. It may be true that balancing is necessary to arrive at priority principles in the first place, but this is an entirely different matter from that of balancing conflicting interests in assessing research proposals case by case. There will be cases where balancing will be appropriate. The priority principles do not control all the cases.

In sum, for decision makers to make sound judgments about the conduct of prison research, we must perform a variety of tasks: We must gather relevant facts about prison conditions, prison populations, research activities, and administrative personnel. Using these facts, we must identify the various interests involved. Then we must evaluate and weigh these interests. The inevitability of conflicting interests in particular cases must be considered and any priority

principles devised. In devising such principles, we will also be determining the proper scope for a balancing approach to the assessment of particular research proposals.

Before closing, I want to underscore the problems of research administration and implementation. Plainly, something should turn on the kind of personnel who are to assess proposals in the first place and the nature of the procedures they are to follow in doing so. We should design procedures that allow for continual review of the research that occurs in prisons; and we should assure that prisoners have full access to courts, commissions, and legislative committees. Furthermore, where the research proposal involves some risks of harm to participants, something should turn on the nature of the safeguards built into the proposal to combat and minimize these risks.

The recently established commission, and any others that may succeed it, are unlikely to provide answers to questions about whether and when prisoners should be used as experimental subjects. We are just beginning the necessary societal inquiry and review. We are likely to find ourselves in a long period of inquiry. This inquiry is long overdue and should have begun when we punished Nazi doctors and scientists at the conclusion of World War II for their crimes against humanity.



Professor Palmer teaches criminal law and procedure and gives a seminar on human experimentation.