

PRISON RESEARCH: A BIOETHICS OR AN ETHICS ISSUE?

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Abstract: The hypothesis of reducing aggressiveness through transcranial direct current stimulation was recently tested on a cohort of inmates in Spain. The experiment, including 1.5 mA electric shocks, was an external research initiative that received the initial acquiescence of the carceral system. An alarm was raised at the time the research was published, encouraging the directorate of prisons to stop the ongoing replication of the experiment. Nevertheless, no (bio)ethics committee, in the universities or among bioethics experts, has questioned the research. In this think piece, we aim to again discuss some ethical approaches to these clinical interventions on crime. After its positivistic period, the field of criminology has been questioning the simple psychobiological approach to crime because of the reductionistic view of this phenomenon and its harmful consequences. Thus, we address academic experimentation under prison governance and the “re” roles of prisons. We argue that the minor disadvantages of such research, if performed with consent, could be positive if the research can minimize the harmfulness of prison itself; thus, penitentiary treatment and science should go together. Prison administrations, in addition to their duty to protect the individuals under their control from ethically biased research, must promote reintegration. We conclude that human rights are over criminal policy and science and that ethics are over narrower bioethics.

Keywords: prison research, bioethics, ethics, prison governance, transcranial stimulation

Investigación en prisión: ¿una cuestión de bioética o de ética?

Resumen: La hipótesis de la reducción de la agresividad por medio de estimulaciones transcraneales ha sido recientemente testada sobre encarcelados en España. El experimento, que incluyó descargas eléctricas de 1.5mA, fue una iniciativa de investigadores externos que encontró la aquiescencia inicial del sistema carcelario. La alarma surgió en el momento en que se publicó la investigación, alentando a la dirección de las prisiones a detener la replicación del experimento. Sin embargo, hasta entonces, ningún comité encontró ningún inconveniente, ni en las universidades ni entre expertos en bioética. En este artículo de reflexión pretendemos argumentar algunos enfoques éticos de estas intervenciones clínicas sobre la delincuencia. De nuevo, ya que la criminología, después de su periodo positivista, ha venido cuestionado el mero enfoque psicobiológico de la delincuencia. Así, abordamos el experimento académico dentro de la gobernanza penitenciaria y los roles “re” de las prisiones. Argumentamos que no es tanto que no se pueda investigar con internos, sino que posibles inconvenientes de tales investigaciones puedan servir, bajo consentimiento, para minimizar los inconvenientes de la misma pena de prisión. La administración, además del deber de proteger a sus individuos de investigaciones éticamente sesgadas ha de fomentar la reintegración. Concluimos que los derechos humanos han de estar por encima de la política criminal y de la ciencia, y la ética por encima de una más limitada bioética.

Palabras clave: investigación en prisiones, bioética, ética, gobernanza penitenciaria, estimulaciones transcraneales

Investigação em contexto prisional: Um questão de bioética ou de ética?

Resumo: A hipótese de diminuir a agressividade através da estimulação elétrica transcraniana foi recentemente testada num grupo de reclusos em Espanha. A experiência, que incluiu choques elétricos de 1,5mA, partiu de uma iniciativa de investigadores externos que encontraram a aquiescência no sistema prisional. O alarme surgiu no momento em que a investigação foi publicada, o que levou a direção administrativa das prisões a interromper a replicação do estudo. No entanto, até ao momento, nenhuma comissão de (bio)ética encontrou qualquer inconveniente, nem nas universidades, nem entre os especialistas em bioética. Com este artigo, pretendemos discutir algumas abordagens éticas dessas intervenções clínicas no crime. A criminologia tem vindo a questionar, após o seu período de investigação positivista, a abordagem psicobiológica do crime, devido à visão redutora desse fenómeno e das suas consequências nefastas. Assim, neste artigo, abordamos a experiência académica dentro da governança prisional e os fins da prisão. Concluimos que as pequenas desvantagens da investigação seriam positivas se pudessem, sob consentimento, minimizar os malefícios da própria prisão, o que significa que o tratamento penitenciário e a ciência deveriam andar ‘de mãos dadas’. A administração das prisões, para além do dever de proteger os indivíduos de estudos que acarretem problemas éticos, deve promover a reintegração. Concluimos, assim, que os direitos humanos estão acima da política e da ciência criminais, e a ética acima da bioética mais restrita.

Palavras-chave: investigação prisional, bioética, ética, governança prisional, estimulação transcraniana

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Introduction

The hypothesis of reducing aggressiveness through transcranial direct current stimulation (tDCS) has been tested in two Spanish prisons since 2016(1). The resulting paper was published in 2019(2).

Certain concerns arose at the time the research was published and encouraged the General Directorate of Prisons, or SGIP, using the Spanish initials(3:323), to stop the ongoing replication of the experiment. At that time, no ethics committee had discovered any problems, either in research universities(2:32) or among the interviewed members of the Spanish Bioethics Committee(4). Eventually, following an ombudsman's recommendations, the SGIP stopped the experiment definitively and announced an order regarding the matter, which we will discuss.

We believe it is convenient to engage in a philosophical reflection on this case, as it has conflicting ethical and bioethical aspects and conflicting academic and carceral aspects. Criminology, after its positivistic period, has been questioning these clinical interventions because of the reductionistic view of criminal dynamics and their harmful consequences. When, despite all, biologists want to become involved in criminal phenomena, they often act "like a bull in a china shop"(5:133). Therefore, as sensitive psychobiological interventions continue in prison, it is necessary to revisit those arguments.

What was the experiment for?

The experiment, which involved 1.5 mA electric shocks, was an external researchers' initiative that received the initial acquiescence of the carceral system. The aim of the research was to test the hypothesis that applying a certain current on the surface of the brain may reduce aggressiveness(2).

The participants, all men, were classified into two groups. The men in the first group, "non-murderers" (n=26), had been sentenced for "robberies with violence, "fights for drug trafficking" and "gender violence". The men in the second group, murderers (n=15), had been sentenced for "robberies with extreme violence [resulting in

murder]" , "fights for drug trafficking resulting in murder", "gender murder" and "murder [...] by offer o[f] reward".

We have some concerns about the methodology and the sampling. A) It is presumed that the violence involved in a crime committed years ago continues in the inmate; in other words, the commission of one violent crime means that the person is permanently violent. B) The methodology makes a distinction between murderers and non-murderers. However, this distinction is unreliable if the study is based on grades of aggressiveness. The difference between murder and attempted murder, for instance, is not an issue of different levels of aggressiveness during the crime but of the result for the victim. For instance, one can be poisoned to death or almost poisoned, with resulting injuries. The energy expended by the offender is the same in both cases. C) The legal meaning of violence in the Spanish Penal Code includes "violence towards things", such as climbing a wall or using a key that is "not allowed"; therefore, in some cases, the definition has nothing to do with "violent people". Regarding "fights for drug trafficking" (there is no legal definition of that crime), the methodology does not take into consideration the social and anthropological implications and tensions for individuals in illicit or subcultural environments. D) Gender violence is, literally, cultural violence. The methodology does not take into account the social, cultural, legal and political content of the legal classification and aetiology of this crime, which may lead to the belief that the aggressiveness of the offender has nothing to do with the cultural environment. E) Regarding murder for reward, we have the following question: is a level of aggressiveness necessary to perpetrate these kinds of crimes? It is wrong to think that higher numbers of contract killings in certain countries may be because the people in these countries have different brains such that they become murderers more easily. Additionally, we have not found any consideration of psychopathy, which may modulate the grade of aggressiveness used in a certain crime, in the methodology.

In the next step, these two groups, murderers and non-murderers, were divided into a real current stimulation group (n=21) and a control sham current stimulation group (n=20). Before and after

the 3-day, 20 min-session current stimulation, questionnaires were circulated to identify self-perceptions of anger, hostility, physical aggression and verbal aggression.

Additionally, we worry that the questionnaires did not distinguish between aggressiveness induced by coercive confinement and the alleged aggressiveness employed during a crime committed years ago. Studies have shown certain “pains of imprisonment, [...] harms inflicted by long term confinement, manifestations of prison distress, and so on” (6:664).

The conclusion of the experiment was that “three consecutive sessions of bilateral prefrontal cortex tDCS reduced self-perceived aggressiveness” (2:38).

The questionnaires were not repeated over the years; therefore, we do not know how long the effect of the stimulation was. We do not even know if there was any follow-up with those inmates, either within the prison system or by external researchers. Individuals in both groups, including the control group under the sham current, reported tingling sensations during the experiments (2:34), which may have led to the belief that the intervention was not very invasive. Nevertheless, some authors have reported negative effects on the brain resulting from these practices (7).

The cancelation of the experiment

The experiment was initially approved by the SGIP —Ministry of Home Affairs— (2:32). The SGIP allowed a researcher to enter a prison to experiment with inmates, but nobody from the prison system was present or observed the process. No member of the prison system was a co-author of the research.

Public concern arose at the time the research was published. The experiment was initiated in 2016, with the acquiescence of the Subdirectorate of Treatment and Reintegration (4) and the Establishment Directive Board but with opposition from the Subdirectorate of Prison Health (8, according to testimonies). In any case, the experiment was conducted independently of *penitentiary*

treatment policies. Here, we can discuss who has the power to control a penitentiary’s policy regarding science and treatment (and what would be most efficient)—every prison/team in isolation or the entire prison/criminal system? We agree with some authors that rational, centralized and validated policies may be most effective (9-12).

The prison system of the Ministry of Home Affairs has executive powers; therefore, it can make decisions on its own. Nevertheless, with the experiment being provisionally suspended, it brought the case to the ombudsman, which is not an advisory body of the administration. The ombudsman opened a case, record 1900448, regarding the matter and described it as being “[i]nitiated by the [SGIP], to receive information about an electrical stimulation experiment carried out with inmates of [two] establishments [...]” (13:6, annex C). The ombudsman ultimately said that the administration should have considered “the special situation of vulnerability in which people deprived of liberty find themselves, and the risk (higher than the general population) of not giving truly free consent” (13:116, volume I). Additionally, these practices should have been controlled by the Subdirectorate of Prison Health.

Here, we ask the following question: is *penitentiary treatment* the *treatment* of a disease? The current misunderstanding of *penitentiary treatment* as *medical treatment* is immense. For instance, the Netherlands was condemned by the European Court of Human Rights in 2016 because the state did not provide *medical* treatment, according to the court (14), to rehabilitate an individual in a manner that could make him more eligible for reintegration. Thus, the recent case law that obliges states to provide means of rehabilitation is somewhat limited, as it is not based on holistic approaches to crime (14).

On inmate autonomy

Some authors have argued that a person in prison custody lacks the autonomy of being free to make a decision (15). That is, no informed consent can be considered valid because the individual is incarcerated.

The idea that an inmate cannot freely consent

because of the inmate's deprivation of freedom implies that a person deprived of the liberty of movement is not free to think, to act, to choose, to participate in a prison program, to decide to marry, or to participate in a questionnaire or in an interview for science, for instance. This may even lead us to think that no *penitentiary treatment* is freely consented to; therefore, the goal of a prison to rehabilitate could be immoral. One of the pillars of the modern prison could fail.

In other words, believing that scientists with no affiliation with the prison could not obtain informed consent may lead to the belief that no internal treatment can be performed by prison staff either, as inmates are deprived of their freedom in both cases. Therefore, the quality of the informed consent is not the problem here because informed consent will be, in any case, more or less biased under coercive confinement.

Inmates have the right to autonomously communicate with members of civil society, including researchers, because their penalty consists only of a restriction of some rights, not all. At this point, we think it is interesting to note that this carceral system restricted the right for inmates to speak with journalists until 2020. Surprisingly, while the experiment was being carried out in one of those prisons, an inmate-journalist interview was being denied in the same establishment. This ended up being considered a violation of the inmate's (and people's) fundamental right to the freedom of expression and of the freedom of the press, according to the Constitutional Court, which eventually ruled against the opinions of three entities: the prison, the Prison Oversight Court, and the Court of Appeal(16).

In summary, there are clinical scientific experiments and social scientific experiments. Both occur in free societies, and it is certain that captive societies are open to them. The key is just that the external researchers did not consider the social, legal and political aspects of the criminal context. The intervention was not performed as penitentiary treatment approved by a treatment board but as research for science. It disregarded the inmate's prisoner status. Science should not be independent from prisons: it must work with and within the prison system.

Weighing pain

The harms of incarceration have been extensively studied(17-25). Being imprisoned is a kind of pain. Being imprisoned a long time implies even more pain. At this point, we can consider the following questions. What would happen if a treatment efficiently designed and implemented by the state because of its duty to seek reintegration could decrease a prisoner's risk of reoffending to zero? What if this low probability of reoffending could lead to the prisoner being allowed more freedoms or even to an early release?

Despite the "minimum period"(3:315), which limits reintegration regardless of the risk of reoffending, an inmate may benefit from science by suffering less pain from imprisonment. Therefore, we should not dismiss the idea of addressing pain. A current stimulation, a methadone dose, stressful restorative action, and so on may minimize the pain from a longer incarceration.

Thus, is it right to investigate and try to find solutions to incarceration? We think so, but it should be done under a democratic scheme designed under a global approach to the problem of crime. Criminologists think of that constantly. Moreover, as we know that the phenomenon of crime is multifactorial and even chaotic(26), we should consider less harmful interventions first. Additionally, we should reconsider the prison system itself(27-30).

Choosing the study sample

Going into prisons as a first option to choose a study sample for a study on aggressiveness and applying current to the subjects prejudices that prisons are places with permanently violent individuals, that violence is constant, that violent crimes necessarily imply aggressiveness, and that crime is a disease. In short, the implication is that criminology would not have evolved since the late-19th century.

We question why the methodology of the research dismissed the idea of finding released or free individuals to partake in the study. There is much aggressiveness in a boxing ring, a traffic jam, and both sides of the battlefield or a riot.

The study states that the experiment followed the Declaration of Helsinki of the World Medical Association. However, as Fernández Caparrós(31) reminds us, art. 20 of the declaration states the following:

“Medical research with a vulnerable group is only justified if the research is responsive to the health needs or priorities of this group, and the research cannot be carried out in a non-vulnerable group. In addition, this group should stand to benefit from the knowledge, practices or interventions that result from the research” (32).

The experiment used men deprived of their freedom for science, not for their treatment. Additionally, the research could have been performed on free ex-convicts, a non-vulnerable group(33,34), instead of prisoners. Therefore, the experiment ignored the Declaration of Helsinki.

Universities have ethics committees, but this prison system does not. Do prison systems need one? We believe that democracy, as a dimension of human rights, should prevail over small ethical committees and deontological discourses(35). Creating ethics committees in prisons may mean another barrier against human rights violations. Nonetheless, it would be newly biased if made up mainly of people who think that the treatment of crime is just a psychobiological intervention on the inmate. Prison psychologists’ “priorities and terms of reference are not always compatible with more sociological, critical and theoretical research”(6:663). Although other academic disciplines would enrich the carceral system, no criminologist has been employed in this system since 1990(36). In contrast, the Catalan prison system has recently and slightly taken criminologists’ views into account(37).

After the experiment

Those inmates who were subjected to the stimulation were not—explicitly—advised of the penitentiary advantages of a reduction of their aggressiveness, if any. Here, Professor Íñigo de Miguel Beriain has smartly questioned the morale of depriving an inmate of obtaining benefits from research: “Is it ethical to deprive a prisoner of the right to benefit from an investigation by the fact

of being a prisoner?”(4).

However, the point is that this experiment was not designed for the inmates. It was not designed under an individualized program of treatment for reintegration—called PIT, using its Spanish initials(3:316)—but for science, in general. According to prison law, a PIT is the mechanism through which the rehabilitation board of the prison should identify rehabilitation needs and create a plan to address them(3:316). However, this was not the case. Science, with such a lack of consideration of inmates’ anthropological role, cannot ethically benefit from such research.

However, are researchers obliged to know the purpose of prison? On the one hand, we can argue that the ultimate responsibility may lie in the prison system. Researchers only want to test science; they are not experts on the criminal justice system. However, prison systems are experts; therefore, states should supervise and control interventions with people under their guardianship. On the other hand, we have to note the following statement in the Helsinki Declaration: “[p]hysicians must consider the ethical, legal and regulatory norms and standards for research involving human subjects in their own countries as well as applicable international norms and standards”(32). Therefore, from this point of view, researchers must have a good understanding of the sociolegal environment in which their studies are performed.

The SGIP eventually signed an order that year(38). “Order [*Instrucción*] 12-19” was signed by the Head of Prisons, who answers to the Ministry of Home Affairs. The order is not a regulation approved by the Council of Ministers, as are the current Spanish 1996 Prison Rules [*Reglamento Penitenciario*]. However, we are concerned about how orders or circulars that may affect fundamental rights can be announced by just one person and not subjected to a greater democratic process.

The order pretends to create a permission procedure for undertaking scientific research in prisons. It states that “any scientific research held in the prison context” must have direct and measurable beneficial advantages for both the inmates

and the prison system(38). First, the order does not distinguish between different kinds of experiments, e.g., social or invasive, for science in general or for an inmate's treatment, or for criminological treatment or just biological treatment. Second, it irrationally constrains the scope of research: any participation in science without "direct benefit to the inmate and the institution" would not be authorized.

In the rule, in cases where "active participation of inmates" are required, the researcher must explain if the research has been previously done with "free people" (What does *active participation* mean? Does it mean answering a questionnaire? Does it mean doing a role-play? Does it mean being a member of a focus group?). Here, the institution mistakenly imposes the obligation to do so in *every* active participation, not just in invasive experiments.

Furthermore, the order stresses that research with inmates will not have "any penitentiary advantage" for them(38:2). This consequently implies that an inmate, having finally had some treatment with a positive impact on desistance or reintegration, paradoxically cannot benefit from being more suitable for early release or prison leave. Here, we can see how distant this prison system considers science to be from its own prison treatment. Under this order, beneficial outcomes for participating inmates are forbidden.

It is true that inmates may think that cooperating with the prison system "might enhance their chances of winning favour with the staff, governor, or even the Sentencing Review or Parole Boards"(6:666). Cooperating in an action solely in hope of receiving potential benefits might spoil the experiment. However, in this case, to preclude this option by law, i.e., by a rule and not through scientific methods, implies an enormous curtailment of the chances of intervention towards reintegration that states are obliged to ease.

This prison system imposes, through this order, extraordinary informed consent requirements for inmates participating in *external* research. However, there are also *internal* actions. We can debate the quality of inmates' informed consent for treatments or actions performed by their own

institutions. We know that it is an inmate's voluntary action to undergo treatment designed by a prison(39,40). Nevertheless, the treatment designed by a prison does not itself provide an informed consent formula, and there should be informed consent(41:14-15). This may lead us to think that there is a relaxation of the consent requirement when an institution looks inwards. Thus, we see two ways to intervene: inwards and outwards. Science and innovation from universities seem to belong to the outside world, while conservatism and control seem to belong to the inner world.

Conclusion

Prison systems should protect their inmate populations from being used as unlimited banks of subjects for experiments. The external treatment of aggressiveness analysed in this article was not within a prison policy program or ethically examined by a committee of experts on penological or criminological matters. It was solely bioethically analysed and disregarded the context of imprisonment.

Consent is possible to give while behind bars, but it must have strong guarantees and not be biased. To deny the autonomy of incarcerated individuals is to deny the individuals themselves.

A certain *pain* could be permissible if it were under a criminal-problem-treatment-program aiming to reduce other *pains of incarceration* such that the inmate would be more suitable for an early release or for a less restrictive incarceration situation. Moreover, states have a duty to work towards reducing all kinds of harm towards victims as well. To do so, making use of science is not only a hobby but also an obligation. Nevertheless, doing so wrongly, as occurred in the analysed case, results in harm to vulnerable inmates when they are used as guinea pigs for science.

To ask for advice on a decision from a bioethics or medical committee is not enough. Human rights as a whole must prevail and democratic guarantees must be provided. Under the extraordinary circumstances of incarceration, ethical, not simply bioethical, debates must be held. Human rights are more important than criminal policy

and science, and ethics are more important than narrower bioethics.

Democratic attributes should be built into gate-keeping dynamics. The ultimate decision to allow scientific research in prisons should not be discretionary. At least, penological committees to evaluate applications for prison research are needed. Under the democratic component of human rights, the reasons and procedures of that committee must be open to public scrutiny.

Conflicts of interest

The author declares autonomy in this work and is not acting pursuant to any interest except the discussion of what is written down. The author thanks Universidad Loyola Andalucía for its support in funding this publication.

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