Crime and Double Punishment

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In a New Mexico prison, possession of tobacco is a major (category "A") offense. As are possession of a syringe, tattooing, "refusal to move or be restrained," and possession of a key or key pattern. According to New Mexico Corrections Department (NMDC) policy, the penalties for serious offenses can include loss of privileges for 6 months to a year, placement in disciplinary restrictive housing for 30 days, and loss of all "good time." But the NMDC policy fails to list another potential penalty for a major offense: denial of lifesaving treatment for the deadly hepatitis C virus (HCV).

In New Mexico, the number of incarcerated people infected with HCV is alarmingly high. An estimated 2,982 state prisoners have HCV – about 41 percent of the state prison population. To respond, the New Mexico state prison system initiated a Project ECHO program that partners the NMDC and its private health care provider, Centurion, with the University of New Mexico to treat HCV-infected inmates. The New Mexico protocol largely mirrors that of the federal Bureau of Prisons (BOP), by rationing care according to the extent of liver damage suffered by the patient. The state's protocol adds another criterion for treatment, however: the candidate for treatment must have logged no major disciplinary actions for the past year.

As anyone familiar with daily life inside of a prison knows, prisoners are frequently slapped with disciplinary infractions (DIs) for behavior that many would consider minor. For instance, the NMDC's definition of "refusal to move or be restrained" is "[r]efusing to be moved from an area or structure such as a recreation pen, search cell, shower, program area, etc., or refusing to be restrained or un-restrained. Pulling away or attempting to pull away from an officer while under escort." If an inmate appears even remotely resistant to a prison guard's instructions, he or she could easily be cited for this category A offense. Once an inmate receives a misconduct report, conviction likely occurs at a hearing, where the inmate is not entitled to legal representation.

At the National Commission on Correctional Health Care (NCCHC) conference this year, correctional health professionals from New Mexico presented on the prison system's Project ECHO model. The presenters reported that in evaluating candidates for HCV treatment, the "need for treatment is reviewed, cost is calculated, and disciplinary history is reviewed." Candidates could be approved for treatment if, in addition to other criteria, they had not received a major disciplinary action for the past year.

This begs the question: Where in Estelle v. Gamble did the Supreme Court hold that prisoners have

a constitutional right to adequate medical care as long as they have not received a disciplinary report? Some of the behavior giving rise to a major disciplinary action is about as objectionable as speeding or jaywalking. Can you imagine being denied treatment for HCV because you received a citation for a traffic violation?

Of course inmates forfeit some of their rights when they are incarcerated, but NMDC policy already outlines the punishment for each disciplinary offense. When denial or delay of critical medical care is an extra penalty, the NMDC imposes double punishment for a single offense. And in this case, the added punishment actually threatens the health and life of the inmate.

When pressed for answers about why disciplinary history should be a disqualifying factor for treatment, the presenters stated that a DI could be considered more of a “hurdle,” and cited the financial costs of HCV medications. Admittedly, HCV treatment is excessively expensive for state prisons, which cannot receive the discounts available to federal prisons. But in that case, state departments of corrections should be on the frontlines of advocating for more funding to treat more sick inmates, and for legislative changes that would enable states to negotiate prices lower than the Medicaid “best price.” As the saying goes, power yields nothing without demand.

Even without an immediate infusion of funds, New Mexico should amend its protocol and stop basing medical treatment decisions on an inmate’s disciplinary history. Otherwise, it might soon find itself under federal court order to do so.

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