

Case Three: Collection of Evidence in a Murder Investigation

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A woman is murdered in a small town. At autopsy, the pathologist notes the woman had engaged in sexual relations shortly before her murder. The police department determines the male partner should be considered a person of interest in their investigation. They begin a canvas of the town, asking every male to voluntarily consent to a DNA test. Men refusing to provide the specimen will be publicly listed as potential suspects and perhaps arrested. All 1500 men in the town provide a specimen and none is identified as the sex partner. The DNA results are entered into the FBI's database and made available to every law enforcement agency in the country.

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The case against this investigation rests on the failure to obtain informed consent. *Informed* implies the subject is provided with information and achieves understanding. *Consent* must be voluntary because one cannot be said to consent to something if it is against his will.¹

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A significant challenge to the acquisition of valid informed consent is evaluating to what extent the subject understands the information he has been given. In the case of research subjects, while they may be provided with sufficient information to competently agree to participate, their consent is unlawful if they do not understand.² The requirement for informed consent has traditionally placed the burden on the party seeking consent; this party is obligated to find a way to adequately explain the information and its implications.

Consent is invalid when information is withheld. In obtaining consent, an agent may choose to manipulate the information to present the most compelling case. The agent attempts to balance the subject's right to information and the interests of a third party.³

Another threat to informed consent is involuntary consent in which subjects feel coerced. Information manipulation and coercion combine when a subject who does not understand consents because he fears being perceived as foolish or as "holding up" the process with clarifying questions. Subjects remain uninformed about what they are consenting to. Both inadequate information and the sense of pressure nullify the legitimacy of their informed consent.

In this case, all three challenges to valid informed consent are present. First, it is not clear the men understood the implications. They were not told the results would be recorded and made available throughout the country. This could change the subjects' reactions to the request. The men were not provided essential information.

It may be the information was intentionally withheld or manipulated to avoid resistance. If investigators strategically selected information to coerce their compliance, a further dimension is added to the failure to achieve informed consent. While it may be true the men were more likely to comply if they did not know about the national registry, their compliance as a result of manipulation only stands to demonstrate the critical nature of the information. Not informing the men for this reason could be compared to borrowing money from a friend and deliberately omitting that you have no intention to pay it back on the grounds

that this will make the friend less likely to extend the loan. It may be true, but it certainly does not justify manipulating the friend in this way. In this case the investigators could say that they are acting in the best interest of the victim, or possibly the state, and that this justifies omitting the critical information. Again, while this may be true, it does not change the fact that the consent they elicited could not be accurately described as *informed*. Though this could not have been known at the time, the fact that the testing revealed that none of these men was the woman's partner only stands to support the point that there was no reason to maintain that the interests of the investigation could outweigh the interests of 1500 innocent men, given that in practice, this infringement produced no useful results. A critic of this point might complain that we legitimately withhold information all the time. We cannot be expected to report all of the truth all of the time because this is simply a cumbersome means of communication. However, in this case, the information about public registration of the DNA results is relevant to each man's decision. Because a reasonable person could have predicted that this would matter to the rational judgment of the men, it is crucial information to communicate to those from whom compliance is requested.⁴

Finally, consent of these men was likely involuntary. Given that non-compliance would result in public listing as suspects and possibly being arrested, the men under investigation may have agreed to the test as a result of undue coercion and not

from deliberation and rational choice. Therefore, because the consent was not voluntary, but arrived at out of fear, the investigation failed to act with valid informed consent.

This is a case of noncausal overdetermination, the philosophical idea that a fact can obtain for multiple sufficient reasons.⁵ Any one of these three breaches independently compromises the investigation. Because none of the 1500 men were suspects on any other grounds, they were merely subjects being asked to aid in investigation who were not obligated by the law to comply. For this reason, they should have been respected as rational agents and asked for their informed consent to DNA testing. In this case it is not clear that this was acquired.

ENDNOTES

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