Science at the mercy of the mob: Dr. Hurwitz's legal problems in perspective

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> Socrates is an evil-doer, and a curious person, who searches into things under the earth and in heaven, and he makes the worse appear the better cause; and he teaches the aforesaid doctrines to others.
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> —Socrates in Plato's *Apology*[1]

As most members of the pain management community are aware, Dr. William Hurwitz's drug-trafficking conviction was recently overturned in the Fourth Circuit, after it was proven that the jury had not been correctly instructed on the issue of "good faith" related to the prescription of controlled substances. This was hailed at the time as a victory for all of us. When the legal implications are examined, however, one can see the victory unearths more problems than it solves.

Mainstream legal thinkers laud the Fourth Circuit's ruling because they expect Dr. Hurwitz's retrial to provide the pain management community with the opportunity to overcome future government accusations by successfully asserting its own medical standards. This didn't occur in the first trial, and those following the case are mistaken if they think the inclusion of a good faith jury instruction will make the difference this time around.

In Dr. Hurwitz's case, as well as in each of the other cases that my organization, Pain Relief Network, has assisted on, the defense teams have presented overwhelming evidence that the accused physician's conduct fell well within the medical standard of care. Regardless of the issuance of a good faith jury instruction, such testimony has had no positive effect on the outcome in any of our other cases. Juries are routinely convinced by the government's accusation—despite what defense experts say to the contrary—that what the doctor did was criminal in nature. This is because the government's characterization is consistent with the layman's view of how opioids ought to be prescribed, i.e., rarely or never.

The average American doesn't view opioids as "real" medicines like antidepressants or insulin. Rather, he or she imagines them to be substances imbued with evil powers that enslave their victims, transforming them into drug-addicted, crime-committing zombies. Such a powerful and irrational image can not be entirely defeated by reason or science. To believe that Dr. Hurwitz's retrial will be fair is to utterly fail to grasp the profound disadvantage that medical science suffers in federal criminal courts under the existing statutory scheme.

The Controlled Substances Act (CSA) was never intended to create a "battle between experts" such as we saw in Dr. Hurwitz's first trial, as well as in all the other cases currently making their way up through the appellate process. Justice Kennedy addressed this issue when he wrote for the majority in *Gonzales v. Oregon*.[2] While this case was ostensibly about physician-assisted suicide, it more importantly defined the limits of the attorney general's authority over medical practice: "The statutory references to 'control' . . . [make] clear that the Attorney General can establish controls against diversion . . . but do not give him authority to define diversion based on his view of legitimate medical practice."

So the arguments currently being had in Federal courts all over the country as to whether or not the medicine practiced by the defendant doctor was "legitimate" or not are, quite simply, badly off point. Kennedy[2] adds further,

> Congress regulates medical practice in so far as it bars doctors from using their prescription-writing powers as a means to engage in illicit drug dealing and trafficking as conventionally understood . . . . [T]he Act [the CSA] manifests no intent to regulate the practice of medicine generally, which is understandable given federalism's structure and limitations.

One might ask how, given these limitations, we arrived at a point so profoundly disadvantageous to the autonomy of medical practitioners, as this was clearly not the intent of the authors of the CSA. As it turns out, the Department of Justice itself added the phrase "legitimate medical purpose" to the federal rule giving force to the CSA, thereby accomplishing an end run around the restrictiveness of the statute they were purporting to merely interpret.

Effectively, government lawyers during the Nixon administration wrote themselves a new power—namely, to criminally prosecute physicians whose practices they believed were inconsistent with how they thought pain management ought to be practiced. In other words, they empowered themselves to establish standards for the practice of medicine based on their own preferences, rather than on medical science or compassion. Blessedly, the Supreme Court in *Gonzales v. Oregon* disallowed the Justice Department's attempt to outlaw physician-assisted suicide, which was premised on the same expansive legal theory. Justice Kennedy devoted quite a bit of his argument to this problem, using extremely strong and precise language in denouncing the government's exercise of its power under these terms[2]:

> By this logic, however, the Attorney General claims extraordinary authority. If the Attorney General's argument were correct, his power to deregister necessarily would include the greater power to criminalize even the actions of registered physicians, whenever they engage in conduct he deems illegitimate. ***This power to criminalize***—unlike his power over registration, which must be exercised only after considering five express statutory factors—***would be unrestrained***. [Italics added for emphasis.] It would be anomalous for Congress to have so painstakingly described the Attorney General's limited authority to deregister a single physician or schedule a single drug, but to have given him, just by implication, authority to declare an entire class of activity outside "the course of professional practice" and therefore a criminal violation of the CSA.

Unfortunately, the court has yet to apply this analysis to delimit the power of federal prosecutors in the cases of pain-treating physicians, and, oddly, mainstream legal thinkers do not seem to perceive the legal connection between the *Gonzales* case and the government's misconduct in its pursuit of pain-treating physicians.

The Fourth's concession that Dr. Hurwitz's good faith was indeed relevant to whether or not he had committed a crime demonstrates just how far down the rabbit hole pain doctors and their patients really are after nearly four decades of case law developed on what amounts to no more than a rhetorical sleight of hand. When we are dependent upon courts to rule that actual innocence might reasonably figure into a jury's deliberations in deciding the fate of a man who no one disputes was practicing medicine in good faith, we have no reason for celebration.

Mainstream legal thinkers in this area need to take off their rose-colored glasses and take a hard look at the CSA and how it actually functions. Because if, as Justice Kennedy noted in the *Gonzales* opinion,[2] "[t]he CSA's structure and operation presume and rely upon a functioning medical profession regulated under the state's police powers," then it is incumbent upon the pain-treating community to ask itself whether working in terror, prescribing "anything but opioids," and allowing patients to deteriorate in order to "stay under the radar" really constitutes a functioning medical profession. Dr. Hurwitz was applying the current science in his ethical practice of clinical medicine to patients in chronic pain, and it was this behavior which provoked the wrath of the mob. That he did so in good faith is not likely to protect him from further punishment.

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REFERENCES

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2. *Gonzales v. Oregon*, 546 US _____ (2006).