

PODIUM

CIVIL LIBERTIES *By Harvey A. Silverglate*

States, Feds and Doctors Tangle in Drug War

It must have shocked the medical communities of California and Arizona to learn they had been targeted by the Clinton administration for practicing medicine in a manner not satisfactory to Washington bureaucrats and soldiers in the "war on drugs."

Among high-ranking attackers were Director of the Office of National Drug Control Policy Gen. Barry R. McCaffrey (the "drug czar"), Attorney General Janet Reno, Secretary of Health and Human Services Donna E. Shalala, and head of the Drug Enforcement Agency, Thomas Constantine. Physicians were threatened with losing federal licenses to prescribe controlled drugs and narcotics if, in the process of managing the health of pain-wracked patients, they prescribed marijuana.

The current controversy arose when the citizens of California and Arizona approved, by overwhelming margins, ballot initiatives legalizing the use of marijuana when prescribed by a physician for the alleviation of certain medical conditions. The federal drug war legions reacted as if the barbarians had

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arrived at civilization's gates.

Mr. Constantine of the DEA said in an interview that "we are going to take very, very serious action against" physicians who respect the will of the voters and prescribe marijuana. Attorney General Reno claimed that such physicians would be subject to revocation of their DEA licenses to prescribe all controlled drugs and narcotics, excluded from the Medicare and Medicaid programs, and, in extreme cases, prosecuted under federal anti-drug laws.

The medical community's counter-attack was led by Dr. Jerome P. Kassirer in an editorial in the *New England Journal of Medicine*. He decried the administration's stance and the long-standing "federal policy that prohibits physicians from alleviating suffering by prescribing marijuana for seriously ill patients" as "misguided, heavy-handed, and inhumane." Dr. Kassirer predicted that "some physicians" would have the "courage to challenge the continued proscription of marijuana for the sick," and that it would be up to the courts to choose between them and "the absolute power of bureaucrats whose decisions are based more on reflexive ideology and political correctness than on compassion."

This contest between bureaucrats and medical professionals is not new. In 1988, the Bush administration ordered that medical personnel in federally funded family planning clinics "may not provide counseling concerning the use of abortion as a method of family planning or provide referral for abortion as a method of family planning."

Money Talks

These anti-abortion regulations were attacked by medical professionals as violative of, among other provisions of law, the First Amendment free speech rights of physicians to communicate to patients their recommendations for appropriate treatment. The medical establishment sued. In *Rust v. Sullivan*, 500 U.S. 173 (1991), a closely divided Supreme Court upheld the regulations on the grounds that, since federal money was supporting the clinics, the government could insist that certain methods for family planning be favored and others avoided.

The *Rust* regulations survived because of the government's power to dictate the uses of federal funds. However, federal bureaucrats have dogged the medical profession in other ways when funds were not an issue. For example, the DEA has for years been dictating to

physicians the guidelines distinguishing "good faith medical practice" concerning the prescribing of narcotic drugs for the alleviation of pain, from what the DEA deems to be the criminal distribution of "excessive" narcotics or narcotics not "appropriate" for the patient's condition. Physicians have smarted from having their medical judgments second-guessed by law enforcement agents.

The Clinton administration's threats, however, might have difficulty surviving constitutional attack. The voters in California and Arizona have declared it lawful under state law for physicians to prescribe marijuana to very ill patients. It could be considered not only an abrogation of the physician's speech rights, but

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► Wacky Employment Cases of 1996—oddball as ever!

► Even with a 1st Amendment, speech is not entirely free.

Drug Fight

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an improper interference in the doctor-patient relationship in violation of the Due Process clause of the Fifth Amendment.

The legal issues here could get very sticky. Where for example, does the federal government have constitutional authority to regulate matters normally left to the states? Is there a federal interest, and federal jurisdiction, to insist that physicians not prescribe marijuana when state law allows it? While perhaps federal law would trump state law were anyone actually to try to distribute marijuana to a patient holding a prescription, would the patient himself be subject to federal prosecution for possessing the weed in therapeutic doses pursuant to doctor's orders? And if the feds did prosecute a physician, would they be able to find a jury that would unanimously convict?

After all, the voters of conservative Arizona approved the medical marijuana referendum by a lopsided margin of 65 percent to 35 percent. Could a randomly selected dozen jurors be found who could unanimously convict? (Perhaps this is why the feds' threat to pull physicians' narcotic prescribing licenses is more potent than the specter of criminal prosecution, since local juries would not have to ratify such an administrative action.)

It is not clear how all this is going to play out, but Dr. Kassirer's broadside in the *New England Journal of Medicine* indicates that the profession might not be satisfied to sit back this time and tolerate interference with the professional judgment of physicians, and the voting public does not seem thrilled, either, with this federal interference in what, in other contexts, has been called "the laboratory of the states." It might indeed soon be safe for patients with advanced cancer and AIDS actually to inhale. ☐