

Constitutional Claim on Behalf of Americans In Pain
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“Men feared witches and burnt women.”
Justice Louis D. Brandeis 1927

The Problem

People in severe pain are unable to mobilize to defend their rights. Chronic pain is a disease and when left untreated sufferers often find it beyond their power to place telephone calls or use computers. These people cannot work, attend to their families, enjoy social or sexual relationships, or participate in holiday celebrations. When pain is overwhelming, they cannot think clearly or even sleep.

50 to 70 million Americans live in chronic disabling pain. According to a 1999 survey, one third described their pain as “almost the worst pain one can possibly imagine.”¹

Over the past twenty years the medical community, in concert with policy makers, worked in good faith within the current legal paradigm attempting to get pain treated. Safe harbor laws were enacted, medical board guidelines drafted, and for a short while, a few doctors began to treat chronic pain with opioids.

In 2001, the United States Department of Justice unleashed a torrent of criminal prosecutions against physicians and called this crackdown the “Oxycontin Action Plan.”

All over the United States conscientious physicians have been prosecuted, jailed, or have lost their licenses to practice medicine. Dr. William Hurwitz, a pioneering pain physician, was tried and convicted of violating the Controlled Substances Act. He is presently serving a 25-year term in federal prison. Dr. Ronald McIver is serving 30 years, and Dr. Freddie Williams is serving a life sentence. There are countless other examples.

¹ Chronic Pain In America: Roadblocks to Relief
http://www.ampainsoc.org/whatsnew/conclude_road.htm

Medical Abandonment Feeds the Prosecutorial Machine

Frightened by this brutal display of executive power, most doctors, including those in the field of pain management, have simply abandoned this sickest and most vulnerable segment of our population. Patients suffering from mild to moderate pain, and requiring low dosages of opioids may still find care, but those patients with high dosage requirements are increasingly shut out of care altogether.

Due to this public health disaster and humanitarian catastrophe, untold numbers of our trusting citizens have been unable to recover from injuries or illnesses that would, with proper treatment, be entirely manageable. Unable to find relief, these pain victims are often driven to suicide. Countless other patients have been provoked by their doctor's meager dosages to visit more than one physician looking for enough medication to allow them a measure of normal functioning, only to find themselves arrested for "doctor shopping." These unintentional criminals are often coerced into confessing to drug crimes and/or providing false testimony against alleged co-conspirators. To avoid long prison sentences, they may be forced to submit to ineffectual and inappropriate treatment for addiction, and face the prospect of unrelieved pain for the rest of their lives.

Civil Rights of Americans in Pain Destroyed

In 2004 it was estimated that there were less than 5000 pain specialists in the United States,² many of whom would not, as a matter of policy, prescribe opioids. Those few medical practices which do treat chronic pain with opioids impose severe restrictions on patients' freedoms. Patients are routinely required to sign unilateral "pain contracts," promising to see only the designated physician for care, relinquishing their rights to visit emergency rooms, and to use more than one pharmacy. Often the patient must agree to waive his right to medical privacy, and permit government agents unlimited review of his medical records in order to be eligible for opioid therapy. One such "contract" required that the patient not "anger any county employee."

Violation of these contractual provisions may result in draconian sanctions imposed by the physician, including the cessation of pain treatment. Patients are forced to sell businesses, give up jobs, and to relinquish custody of their children. As a consequence of being labeled "non-compliant," the abandoned patient will find it nearly impossible to procure replacement care.

² Libby, Ronald T., "Treating Doctors As Drug Dealers: The DEA's War on Prescription Painkillers," Cato Policy Analysis No.545, June 16,2005 <http://www.cato.org/pubs/pas/pa545.pdf>

Spectral Evidence

The root of the problem is the Controlled Substances Act, which defines addiction in a manner that renders willful substance abusers indistinguishable from undertreated pain patients.

The term "addict" means any individual who habitually uses any narcotic drug so as to endanger the public morals, health, safety, or welfare, or who is so far addicted to the use of narcotic drugs as to have lost the power of self-control with reference to his addiction. 21 USCS Section 802 (1996)

The law's apparent aim is to keep substance abusers from being maintained on opioids by physicians who are not in possession of a special maintenance license. Under this scheme, should the pain treating physician fail to divine the true character of a patient's opioid dependency and inadvertently provide maintenance to a substance abuser, this failure may subject the physician to Federal accusation of drug dealing and all that it implies, including forfeiture proceedings, personal ruin, and decades in prison. At trial, patients in pain are obliged to confess addiction and to testify that their doctor "addicted them" in order to provide substantial assistance to the prosecution and thereby escape a lengthy prison term. No corroborating medical testimony is required to establish a patient's self-diagnosis of addiction in a Federal courtroom.

Witchmarks

In response to the enforcement of the CSA, physicians who treat pain have invented a system to ferret out "legitimate patients" from addicts. Common behaviors such as losing a prescription, or asking for more medication are considered "aberrant" and have become self-evident indications of addiction. A patient's display of any of these behaviors is sanctionable by withdrawal of medical care. This system provides the pain-treating physician a way out of continuing treatment that he perceives to threaten his professional and personal existence.

The ability of patients to remain in care is threatened at every turn. Patients in pain are required to attempt to prove to their physicians that they are not addicts or criminals. Patients who have any encounter with law enforcement, or who are turned in to their doctors by spouses or coworkers for taking what these lay associates believe to be too much medicine, find themselves severed from their medications as the doctor attempts to protect himself from potentially damaging future testimony.

The results are discriminatory and racist. Minorities, people with psychiatric disorders, poor people, and Americans who have a history of substance abuse are virtually unable to find care.

Simply put, the Controlled Substances Act is, by every meaningful definition, arbitrary power enforcing its edicts to the injury of persons and property; the very sort of thing the 5th Amendment was enacted to prevent.

The Structure of The CSA is Unconstitutional

The Controlled Substances Act prohibits opioid possession and distribution, and allows for harsh criminal sanctions. Possession and distribution of controlled substances is permissible only when the Attorney General of the United States authorizes such activity.

This criminalizes the pain patient and the physician, requiring both to prove their conduct is authorized. The very structure of the law, therefore, denies people in pain the traditional presumption of innocence that free people enjoy and lifts the burden of proof off of the government and puts it squarely on citizens in pain and those who would treat them.

The Solution

Because the Controlled Substances Act unjustly prejudices the due process rights of patients suffering from chronic pain, the Pain Relief Network seeks to enjoin the DEA from enforcing the Controlled Substances Act against physicians. We anticipate having the CSA declared unconstitutional by arguing that patients in pain have an important liberty interest in not having their “state of being” (opioid dependency) de facto criminalized.

The argument is not that people in pain have any fundamental right to pain treatment or health care. Rather, it is that the majority may not criminalize the activities of an unpopular minority simply because they find a behavior morally offensive.³ A bare desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.⁴

Once the lack of available pain treatment in the United States is perceived as a consequence, however unintended, of the Controlled Substances Act, it will become clear that we cannot continue to further harm sick people and their relationships with their physicians in this manner.

A Patient In Need

Pain Relief Network (PRN) has identified an ideal plaintiff. He is a patient who lives in agony. He is a 30 year-old father of three, a former highly paid executive, who cannot obtain effective pain treatment in Massachusetts or surrounding states. He is so obviously disabled that he was awarded Medicare and Medicaid without the help of an attorney. We have located a physician who would like to treat this patient, but refuses out of fear of Federal prosecution. Were the DEA enjoined, this physician would treat this patient’s pain.

³ Lawrence v. Texas 000 U.S. 02-102 (2003)

⁴ Department of Agriculture v Moreno, 413 U.S. 528 (1973)

Having closed his practice to new patients since Dr. Hurwitz was convicted, this physician is unwilling to incur the additional personal risk represented by taking one more patient who requires opioid therapy. If necessary, several doctors will testify that they refused to see this patient for the same reason.

Pain Relief Network

Pain Relief Network is a not-for-profit organization devoted solely to making effective pain care accessible to the citizens of the United States. To this end, we are participating in the appeals of eight wrongly convicted physicians who are victims of the Controlled Substances Act.

Through our work in these appeals we've discovered that the United States government does not acknowledge that they must prove *mens rea* to convict a physician of drug trafficking, nor do they concede that there is a difference between civil and criminal law in these cases.

We have drawn a great deal of media attention to the issue, and recently participated in a CATO Institute forum addressing the pain issue. This may be viewed at the following link: <http://cato.org/events/050909pf.html>

We are currently working with 60 Minutes on a piece profiling wheelchair-bound multiple sclerosis patient Richard Paey who is serving 25 years in a Florida prison for "trafficking" 1/2 gram of oxycodone. Even the prosecutor concedes that Mr. Paey didn't sell any of the medications in question.

PRN will prepare the attorneys who enjoin the U.S. with all the materials they will need to accomplish this action. In the interests of our plaintiff's safety, and the interest of all the other vulnerable patients who are also unable to access effective treatment, it is important that we move with haste.

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This white paper is the work product of Siobhan Reynolds and is the property of the Pain Relief Network. We produced this document in order to seek a confidential working relationship with an interested law firm so that we could bring this action to fruition.