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Jesting Pilate

by Carl E. Schneider

What is Truth? said jesting Pilate; and would not stay for an answer.
—Francis Bacon, *Of Truth*

I have two goals this month. First, to examine a case that's in the news. Second, to counsel skepticism in reading news accounts of cases.

Recently, I was talking with an admirable scholar. He said that transplant surgeons sometimes kill potential donors to obtain their organs efficiently. He added, "This isn't just an urban legend—there's a real case in California."

A little research turned up *California v. Roozrokh*. A little Googling found stories from several reputable news sources. Their headlines indeed intimated that a transplant surgeon had tried to kill a patient to get transplantable organs. CNN.com: "Doctor accused of hastening death for patient's organs." *Time*: "Organ Donation[:] Did a Doctor Speed a Patient's Death?" The *New York Times*: "Surgeon Accused of Speeding a Death to Get Organs." These headlines (and the stories) implied, I thought, that a prosecutor had charged a surgeon with doing something intended to kill a patient and that the patient had consequently died.

I then discovered (with less journalistic help) that there had been a preliminary hearing, a ruling, and a judicial opinion.[1] The opinion revealed that the surgeon had actually been charged with three felonies:

(1) "[D]ependent adult abuse . . . by willfully causing and permitting Ruben Navarro [the patient] to be placed in a situation in which his health was endangered by the prescription of excessive amounts of morphine and Ativan, and/or by the introduction of Betadine into his stomach."

(2) Violating a law that prohibits "willfully mingl[ing] any poison or harmful substance with any food, drink, medicine, or pharmaceutical product or . . . willfully plac[ing] any poison or harmful substance in any spring, well reservoir, or public water supply, where the person knows or should have known that the same would be taken by any human being to his or her injury."

(3) Violating a statute which said that a "prescription for a controlled substance shall only be issued for a legitimate medical purpose."

These were not the homicide charges I had expected. The headlines spoke of "hastening" or "speeding" a death. But "speeding" a death is murder. It does not matter that the victim is dying anyway or that the victim would not have died had he been healthier. Hastening a death means being the proximate cause of the death, and that's murder. So if the surgeon had administered drugs to cause the patient to die, why no murder charge? Because the drugs did not actually kill the patient? Perhaps. But if the surgeon intended that they should kill, then the charge would presumably have been attempted murder.

Reading the opinion brought more surprises. The judge dismissed the second (mingling poison) charge. The statute did "not apply where, as here, the allegedly harmful substance is introduced into a patient as part of a medical procedure, instead of being 'taken by any human being' by voluntarily (and typically unknowingly) ingesting it along with food, drink, or medicine." (In addition, the statute's legislative history "indicate[d] that this law was passed in response to incidents involving the poisoning of innocent victims who unknowingly consumed contaminated water supplies, tainted Halloween treats, or poisoned Tylenol products.")

The judge also dismissed the third (legitimate medical purpose) charge. A "plain reading of the statute" showed that it was inapplicable, since it said, "An order for controlled substances for use by a patient in a . . . licensed hospital shall be exempt from all requirements of this article." (In addition, the legislative history suggested that "the statute was designed to target 'prescription mills' and practitioners operating outside of the hospital setting.")

The court did permit the first (dependent-adult abuse) count to go to trial. That count was markedly less serious than the homicide charge that the press reports had implied. To get a conviction, the prosecutor did not even have to show that the defendant had intended to harm the patient, only that he was "criminally negligent" (that his conduct was "such a departure from what would be the conduct of an ordinarily prudent or careful person . . . as to be incompatible with a proper regard for human life . . . or [to show] an indifference to consequences").

Of course, that's bad enough. So was the surgeon guilty? What had he actually done? The opinion said that for "many years" Mr. Navarro had "suffered from adrenoleukodystrophy, which causes damage to the nervous system and muscular system." On January 29, 2006, respiratory and pulmonary arrest had led to "a severe anoxic brain injury." He was admitted to a hospital comatose and with a "poor" prognosis "for survival." A month later, his mother "gave

consent to withdraw life support from her son" and to make him an organ donor. "Because Mr. Navarro was not brain dead, it was determined that the transplant procedure to be used would be Donation After Cardiac Death (DCD), which requires withdrawal of life support leading to death prior to recovery of the organs." The surgeon "did not make or participate in making any of these decisions."

The court commented that the defendant "was less than one year out of his organ transplant fellowship." He had "observed . . . one DCD procedure" but had never "been the primary surgeon" in one. (The procedure is unusual.) He had been "accompanied" by "the Chief of Kidney Transplant Surgery at Kaiser Permanente," who had "never performed or assisted a DCD procedure." Furthermore, the "transplant coordinator" (apparently a nurse) "had never been a primary transplant coordinator at a DCD procurement." There had "never been a DCD procurement" at the hospital, and "none of the hospital staff who participated . . . had any training or experience in DCD procedures." Finally, the hospital had no "written DCD protocol," and there was no "national DCD protocol."

When the two surgeons arrived, "there was no attending physician . . . caring for Mr. Navarro." There was "no medication for comfort care" in the operating room. And "[w]hen the attending physician finally arrived in the Operating Room, all other participants were already there, and she failed to understand that she was the responsible physician in charge of ordering medications for, and attending to the care of, Ruben Navarro."

At this point, the court's narrative collapses because the evidence becomes contradictory. For example, the transplant coordinator testified that she told the attending physician that she (the physician) would be responsible for the patient's care until he died and that she "understood this." The attending physician denied this testimony.

The confusion about the drugs given the patient was worse. One witness said medications were administered four times, another witness said three times, yet another witness said one time, and the fourth witness said she "was present for one administration, but heard that there had been another." One witness said a total of 180 milligrams of morphine and eighty of Ativan were administered, another witness said the figures were 150 and sixty, a third witness said she didn't know, and the last witness saw fifty milligrams of morphine and twenty of Ativan given. Two witnesses said Betadine had been ordered by a transplant surgeon, but neither witness could say which one. The experienced surgeon said it was not he. Everyone else "in the Operating Room denied observing or hearing about the introduction of Betadine, despite (at least in some cases) their greater involvement." And "no one charted the administration of medications in the Operating Room." Nor was it clear who had actually ordered the morphine and Ativan, partly because a doctor caring for the patient had earlier prescribed those drugs "in quantities of up to 10 mgs. every 15 minutes, on an 'as needed' basis (as determined by hospital nursing staff)."

Whatever drugs were given, the patient (apparently) survived a number of hours after life support was withdrawn. (There was testimony that the patient had been receiving narcotics "for a significant period of time, and likely had developed a tolerance to morphine.")

Even had the evidence been less contradictory, we would not know what actually happened. Preliminary hearings determine whether there is enough evidence to justify a trial; they do not find facts. The defendant did not have to present his own case and (apparently) did not. So the court's story was necessarily partial in both senses—incomplete and one-sided. In particular, "[t]here was no evidence . . . on Defendant's subjective intent." Nor (apparently) did the defendant call expert witnesses. So the defendant's lawyer could plausibly warn that after the trial "a great many people, lay and medical[,] will realize they have been significantly misinformed."

For good reasons and bad, journalism about law is often mistaken and misleading. For example, only one newspaper (the *Wall Street Journal*) accurately described any case I worked on during my year at the Supreme Court. And while some of the reporters who call to ask about legal issues are impressive, many others prefer a good story to good information. Journalists report on the "newsworthy" but ignore the vast bulk of law, and the odder and gaudier the legal development, the more newsworthy it can be. Journalists rarely have training in the law, and they have scant time to educate themselves about an issue. Furthermore, law is hard to cover, not least because it is so fragmented. There are over fifty jurisdictions, each with legions of multifarious legal actors. And most legal events are just chapters in a long saga whose ultimate meaning emerges slowly.

Roozrokh exemplifies many of these problems. As first-year law students quickly learn, even a single fact can transform a case. At this point, the legal system has only begun to gather and analyze evidence. Some of the facts asserted are certainly wrong, and new facts will surely emerge. News accounts of the case seem uncritically to imply, and readers about it seem uncritically to infer, that it fits the most obvious category—a surgeon killing his patient for his organs. Perhaps it does. Yet it could also be, for example, a case about how inexperience, anxiety, and disorder lead to mistakes. After all, error and bungling are far more common than murder. So we need to wait until the case has finished its judicial journey *and* to scrutinize news reports skeptically before we draw legal and social lessons from *Roozrokh*. As Sherlock Holmes warned, "It is a capital mistake to theorize before one has data. Insensibly one begins to twist facts to suit theories, instead of theories to suit facts."

1. Ruling After Preliminary Hearing, Case No F 405885, Superior Court of California, County of San Luis Obispo (March 19, 2008).