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Going to Pot

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In several earlier columns, I suggested that judges are usually poorly placed to make good biomedical policy, not least because the law so rarely offers them direct and cogent guidance. Recently, the U.S. Court of Appeals for the Ninth Circuit proffered a new example of this old problem.

In 1996, California's voters approved Proposition 215. Its "Compassionate Use Act of 1996" provided that a patient "who possesses or cultivates marijuana for the personal medical purposes of the patient upon the written or oral recommendation or approval of a physician" committed no crime.

California's démarche leaves intact federal drug regulation. The Controlled Substances Act (CSA)[1] states: "Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally . . . to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance." And it is "unlawful for any person knowingly or intentionally to possess a controlled substance unless such substance was obtained directly, or pursuant to a valid prescription or order, from a practitioner."

The CSA divides controlled substances into five schedules. Schedule I is the most restrictive. Drugs in it have "a high potential for abuse," "no currently accepted medical use in treatment," and no safe use. Schedule I drugs may be used only for federally approved research. By Congressional direction, marijuana is a Schedule I drug. Drugs on Schedules II-V, however, may be prescribed by doctors registered by the Drug Enforcement Agency. Registration may be revoked if "registration would be inconsistent with the public interest."

Both the Clinton and Bush administrations have insisted that California's legalization of marijuana for medical uses does not alter federal drug laws. In 1998, for example, the United States sued to enjoin an organization distributing marijuana under the aegis of Proposition 215. The organization argued that distribution was medically necessary and that the CSA implicitly authorized such a defense. A panel of Ninth Circuit judges thought this a "legally cognizable defense" that the district court should consider.[2] But in *United States v. Oakland Cannabis Buyers' Cooperative*,[3] the U.S. Supreme Court unanimously disagreed. A necessity defense "traditionally covered the situation where physical forces beyond the actor's control rendered illegal conduct the lesser of two evils," but that was not the Cooperative's situation. And while the Cooperative alleged that marijuana was medically necessary, the CSA itself "reflects a determination that marijuana has no medical benefits worthy of an exception."

In 1997, the government defended the CSA by reiterating its authority to

> 1) prosecute any physician who prescribes or recommends marijuana to patients; 2) prosecute any patient who uses prescribed marijuana; 3) revoke the DEA registration numbers of any physician who prescribes or recommends marijuana to patients; 4) exclude any physician who prescribes or recommends marijuana to patients from the Medicaid and Medicare programs; and 5) enforce all federal sanctions against physicians and patients.[4]

A group of California patients and physicians then sued to enjoin, *inter alia*, Janet Reno and Donna Shalala from implementing this policy. The plaintiffs alleged that the policy violated their first amendment rights. The district court eventually enjoined the government from "(i) revoking any physician class member's DEA registration merely because the doctor makes a recommendation for the use of medical marijuana based on a sincere medical judgment and (ii) from initiating any investigation solely on that ground." On 29 October 2002, in *Conant v. Walters*, a Ninth Circuit panel ratified the injunction because the government's policy struck "at core First Amendment interests of doctors and patients. An integral component of the practice of medicine is the communication between a doctor and a patient."[5]

By the time the Ninth Circuit decided *Conant*, a district court in the District of Columbia Circuit had decided a similar case—*Pearson v. McCaffrey*.[6] That court saw no first amendment problem because the government's policy left doctors and patients free to discuss marijuana's medical qualities until the cows came home:

> It is clear that, short of a prescription or recommendation for marijuana, the federal government will not get involved in communication between doctors, patients, and researchers regarding the potential medical benefits of marijuana use. [7]

The Ninth Circuit is not bound by the D.C. Circuit's decisions, nor is a U.S. Court of Appeals bound by precedents of U.S. District Courts (which are trial courts). However, *Conant*'s treatment of *Pearson* is baffling. *Conant* says *Pearson* withheld an injunction "because the plaintiffs in that case did not factually support their claim that the policy chilled their speech." But *Pearson* says nothing about chills. Rather, it distinguishes "discussion" from "the recom-

mendation and prescription of the drug."

Half a century ago, the Supreme Court flatly denied that the first amendment "extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute."[8] As *Pearson* notes, many crimes are "'committed purely by word of mouth, such as obtaining money by false pretenses, extortion, broadcasting treasonable utterances, and many others.'"[9] *Conant* does not say the CSA is invalid. *Conant* concedes that a prescription for marijuana violates the act. Indeed, it is a crime.[10] In California, a "recommendation" for marijuana is effectively a prescription. Presumably, therefore, it too affronts the CSA. This is just what *Pearson* says: "In these situations, a recommendation is analogous to a prescription, therefore, the federal government will treat it as such."[11]

I wish I could confidently describe *Conant*'s response to this argument. In apparent retort, *Conant* says that, if the physician intended for the patient to use the recommendation to obtain marijuana, "then a physician would be guilty of aiding and abetting the violation of federal law." And *Conant* says that the injunction does not prevent the government from prosecuting physicians for that aiding and abetting. True enough. But so what? If a "recommendation" is a prescription, if it gives patients access to marijuana, then making a recommendation itself contravenes the CSA and therefore is not protected by the first amendment.

Furthermore, the injunction does not bar criminal prosecutions; it bars revoking DEA registrations. The CSA requires revocation where "the public interest" requires it. Congress adopted that broad formula precisely to allow the government to respond not just to physicians' crimes, but also to their failures to obey meticulously the elaborate rules governing drug use and to exercise their authority over drugs responsibly. The government is thus presumably entitled and obliged to consider a physician's advice and acts concerning a drug that Congress declared has no legitimate medical purpose, a declaration the Supreme Court left unmolested in *Oakland Cannabis Buyers' Cooperative*.

More broadly, while doctors and patients have first amendment interests, those interests are not necessarily congruent. The patient's interest is primarily in receiving useful and reliable information, not whatever information a physician may proffer. This is why Judge Reinhardt could write in the assisted-suicide case that, "since doctors are highly-regulated professionals, it should not be difficult for the state or the profession itself to establish rules and procedures that will ensure that the occasional negligent or careless recommendation by a licensed physician will not result in an uninformed or erroneous decision by the patient or his family."[12] And this is why the Supreme Court could say in a pivotal abortion case: "To be sure, the physician's First Amendment rights not to speak are implicated, but only as part of the practice of medicine, subject to reasonable licensing and regulation by the State. We see no constitutional infirmity in the requirement that the physician provide the information mandated by the State here."[13]

Dubious as *Conant*'s prohibition on revoking doctors' DEA registration is, its prohibition on initiating investigations because a doctor has "recommended" marijuana is more so. *Conant* acknowledges that such recommendations may violate the CSA. When the government discovers behavior that may be illegal, surely it may and perhaps must investigate that behavior. What is more, there are separation-of-powers reasons to question a court's authority to prevent the executive branch from initiating investigations, and *Conant* cites no precedent for such an order.

Nor would a contrary result in *Conant* leave California's doctors as flies to the government's wanton boys. *Conant* proffers no evidence that the defendants had abused their authority. Furthermore, they are constrained by battalions of constitutional, statutory, and administrative regulations, and their decisions are subject to judicial review.

I have done my best to summarize *Conant* accurately, but it is so Delphic—dare I say incoherent?—that I may have misrepresented it. And the reader may have found my analysis unsatisfying. In a way, I do myself. Why? Largely because what motivated the government's policy and the plaintiff's suit had nothing to do with the first amendment. First amendment jurisprudence speaks to the issues in the case lamely at best. The real dispute is about the wisdom of the state and federal marijuana policies. But courts lack the authority, information, and expertise to resolve that challenging and controversial issue. Judges who succumb to the temptation to do so through the first amendment are using a butter knife to carve marble—they must bungle the job and mangle the tool.

1. 21 USC § 801 *et seq.*

2. *US v. Oakland Cannabis Buyers' Cooperative*, 190 F3d 1109 (1999). Judge Reinhardt, whose opinion in *Compassion in Dying* (the assisted suicide case) the Supreme Court unanimously rejected, was a panel member.

3. 532 US 483 (2001).

4. *Pearson v. McCaffrey*, 139 FSupp2d 113, 116 (DDC 2001).

5. *Conant v. Walters*, 309 F3d 629 (2002), 2002 WL 31415494. The quotation in the previous sentence is from this opinion. The opinion is by Chief Judge Schroeder, who was also a member of the panel in *Oakland Cannabis Buyers' Cooperative*.

6. *Pearson v. McCaffrey*, 139 FSupp2d 113 (DDC 2001).

7. Id at 121.

8. *Giboney v. Empire Storage & Ice Co.*, 336 US 490, 498 (1949).

9. 139 FSupp2d at 121.

10. "Dispense" means "to deliver a controlled substance to an ultimate user . . . by, or pursuant to the lawful order of, a practitioner, including the prescribing and administering of a controlled substance . . . ." 21 USC 802(10). See *US v. Moore*, 423 US 122 (1975).

11. 139 FSupp2d at 121.

12. *Compassion in Dying v. Washington*, 79 F3d 790, 827 (1996) (citations omitted).

13. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 US 833, 884 (1992).