Op-Ed

A Blow for Sanity: Guns, Children, and the Courts

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AMONG WEALTHY NATIONS, THE UNITED STATES HAS THE highest rates of deaths related to firearms, and children are not spared. American children, ages 5 to 14, experience firearms-related suicide rates 8 times higher and death rates from gun-related unintentional injuries 10 times greater than these other countries.¹

The American Academy of Pediatrics (AAP) encourages pediatricians to take steps to protect children from guns. As part of this effort, the AAP recommends that pediatricians counsel parents about gun-related dangers. Specifically, the AAP recommends that pediatricians include firearms-related questions in health history discussions and “urge parents who possess guns to prevent access . . . by children” through safe storage and the use of cable locks.

Under the AAP recommendations, gun counseling is part of the DNA of pediatric practice, complementing more than a century of anticipatory guidance and “well child examinations” to prevent illnesses and injuries. As it turns out, such counseling also is constitutionally protected speech according to *Wollschlaeger v. Governor, State of Florida*, decided in February 2017 by the US Court of Appeals for the Eleventh Circuit, which covers Florida, Georgia, and Alabama.² Reversing an earlier decision in the same circuit by a 3-judge panel,³ the full court, sitting *en banc* (a special procedure involving all judges in the circuit and reserved for complex cases of great importance) ruled for the physicians. Declaring the primacy of physicians’ First Amendment protections, *Wollschlaeger* overturned most of the key elements of Florida’s Firearms Owners Privacy Act (FOPA).

Ruling that a core principle of First Amendment free-speech cases is that laws attempting to regulate the content of speech are “presumptively invalid,” the court set aside the normally deferential approach judges follow when examining governmental laws aimed at regulating medical practice. Instead, applying a special “heightened scrutiny” test

that is triggered when First Amendment free-speech rights are at stake, the court closely examined FOPA and found it lacking in nearly every respect, from the evidentiary basis supporting its enactment to its vast overreach in the name of Second Amendment protection and public welfare.

FOPA was passed by the Florida legislature in response to 6 complaints alleging that pediatricians “interrogated” parents about gun ownership, misstating that Medicaid requires information about gun ownership as a condition of eligibility, and in one case, that a pediatrician threatened to discontinue treating the child of a woman who would not answer questions about gun ownership. The legislation itself barred physicians, in the absence of “particularized information about an individual patient,” from either asking patients questions about firearm ownership or the presence of firearms in the home, or from recording answers in their medical records. Violation of these prohibitions could result in disciplinary action by Florida’s state medical board, including heavy fines and license revocation.

Finding first that Florida’s physicians faced a sufficiently serious threat of punishment to have standing—an essential prerequisite to the ability to challenge a law—the court then turned to the threshold question in cases involving constitutionally protected rights: What is the proper standard of judicial review when passing judgment on legislation? In cases involving public welfare laws regulating medical practice, judges normally defer to legislatures; only if no rational basis exists will a law be overturned, a basically insurmountable hurdle for challengers.

But here, the court determined, the law’s recordkeeping and inquiry provisions “expressly limit the ability of . . . doctors and medical professionals to write and speak about” firearm ownership. The judges concluded that although patient communication is intrinsic to medical practice, laws that attempt to regulate what doctors communicate to their patients are no longer about setting broad standards of general conduct (to which deference is given); instead, they attempt to directly curb the content of speech between individual physicians and their patients.

In reaching its conclusion, the court rejected the assertion made by Florida officials that any impact on speech under the law was merely incidental to medical practice regulation. Far from being a general effort at ensuring appropriate professional practice, the law explicitly aimed to control what *specific* doctors communicated to *specific* patients, thereby crossing the line into censorship. In its determination, the court drew on

several prior US Supreme Court cases, including a decision overturning laws barring legal services lawyers from challenging the legality of welfare laws on clients' behalf and the Court's landmark 1963 ruling prohibiting Virginia from preventing the NAACP from attempting to find lawyers to assist plaintiffs in race discrimination cases.

Once it established heightened scrutiny as the proper standard of judicial review, the court closely examined the Florida law and found that the state failed to demonstrate either that there was "substantial governmental interest" to justify its enactment or that the law was drawn in a narrowly tailored manner that would protect constitutional rights while achieving its goals. Insofar as evidence of a problem was concerned, the judges dismissed the state's arguments: "The Florida Legislature . . . relied on six anecdotes and nothing more. . . . Although in some circumstances anecdotal evidence is not shoddy *per se*, the question for us is whether, in a state with more than 18 million people as of 2010, six anecdotes (not all of which address the same concerns) are sufficient to demonstrate [real harm]."

Furthermore, the court concluded the law was anything but carefully crafted. The state offered numerous defenses. It argued that it simply was trying to protect citizens' Second Amendment rights. To this claim, the court responded there was no evidence that physicians had injured those rights, nor could there be, since doctors have no legal authority to remove guns from a home. Furthermore, since 1989 Florida had made it unlawful to fail to secure firearms accessible to minors. Furthermore, even if Second Amendment rights were somehow implicated, the law was a bludgeon, preventing doctors from communicating with patients who *did* want firearms safety counseling.

The state argued that the law was needed to guard patient privacy, but the court noted that state law already protected medical record confidentiality and barred improper disclosure. To the state's argument that the law was designed to prevent discrimination or harassment and guard against physicians using their authority to pressure patients, the court responded that state law already barred patient abandonment. To the state's final argument that the law simply protected the public's health, the court pointed out that, far from outlawing false or misleading assertions about guns, the law, instead, broadly restricted truthful speech based on content, exactly what the First Amendment prohibits.

Finally, the court did uphold the part of the law that bars physicians from arbitrarily withholding or delaying treatment on grounds

of firearms ownership, judging that to be a permissible regulation of conduct rather than speech.

Wollschlaeger—a long-fought battle over the right of physicians to speak frankly to their patients about matters of medical concern—teaches us that states do have broad authority to regulate the practice of medicine. But when regulation becomes speech censorship, state law must give way to the First Amendment.

References

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3. *Wollschlaeger v. Governor of Florida*, No. 13-4429, 2014 WL 4455009 (3d Cir. Sept. 11, 2014).

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