

Dr. Bonham and Due Process for Doctors: Lessons from Long Ago

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Reflections on Sham Peer Review

As an attorney with the Center for Constitutional Litigation (CCL), a law firm in Washington, D.C. affiliated with the Association of Trial Lawyers of America, I can tell you that trial lawyers are intensely interested in abusive peer review.

Plaintiffs' lawyers are incensed, on a personal level, when a doctor who has testified as an expert in favor of the plaintiff in a medical malpractice case is suddenly faced with denial of hospital privileges, expulsion from medical societies, and even loss of medical license. On a professional level, trial lawyers recognize that the threat of retaliation chills the willingness of doctors to give testimony against a doctor or hospital that may be responsible for careless medical care.

CCL represents a number of physicians who are fighting back against such abuse. For example, one of our clients is Dr. John Fullerton, a geriatrics specialist who was threatened by the Florida Medical Association for giving expert testimony in a malpractice case. Dr. Fullerton has brought his own lawsuit against FMA and those who instigated this action, alleging defamation and witness intimidation. The Florida appellate court recently ruled in favor of Dr. Fullerton, holding that neither state law nor the federal Health Care Quality Improvement Act shields the FMA and the individual doctors from liability. *Fullerton v. Florida Medical Ass'n, Inc.*, 2006 WL 2738878 (Fla. Ct. App., Sept. 27, 2006).

Thinking about these cases and listening to the remarks by Dr. Huntoon and Dr. Barr at the 2006 Semmelweis Congressional Forum on Sham Peer Review in Washington, D.C., I am struck by the extent to which powerful hospitals and professional bodies are able to hijack peer review and disciplinary processes and bend them to their own economic self-interests. It flies in the face of what we have always taken for granted as a basic principle of due process of law: Tribunals judging disputes must be impartial and neutral.

"Due process of law" is a majestic phrase and a fundamental right guaranteed by our Constitution. But the Founding Fathers did not invent it. You might be surprised at its origins.

The Peer Review of Dr. Thomas Bonham

As with most great ideas, its roots run deep. We could start with a showdown in a meadow in England called Runnymede. A gang of disgruntled barons forced King John at sword's point to affix his seal to a list of their demands, including that the king's judges administer justice in accordance with the "law of the land." But the Magna Carta did not become a working document with enforceable rights for English subjects. John quickly disavowed it. Subsequent

sovereigns paid it homage as a statement of worthy principles, marking the end of medievalism. But for the most part it was framed and forgotten.

History moved on, bringing the Black Death, England's emergence as a superpower, and the immortal works of Shakespeare. One of those who may well have been in the audience at the Globe Theater was a newly minted physician, Thomas Bonham. His case, decided by one of the most important judges of the last millennium, would be essential reading among the founders of a new nation an ocean away.

Thomas Bonham was born in 1564 into a middle-class family that lived near London. Thomas was probably not the oldest son, but he was very intelligent. To make his way in the world, he went to the big city, where he was accepted at Cambridge University. He earned a degree of Doctor of Medicine after completing the 11-year course of study, including undergraduate years. He had about 10.5 years more education than most practitioners of the healing arts in England at that time.

In the early 1600s, Dr. Thomas Bonham set up his medical practice in London. Like any new doctor, he befriended the local barbers. Barbers of the day made use of their sharp razors as surgeons, identifying themselves with the barber pole of red and white—blood and bandages. A doctor could stay busy on the referrals alone. The barbers also belonged to a politically influential guild. Bonham's association with them placed him in the crosshairs of another powerful body, the Royal College of Physicians of London.

The Royal College is not entirely the villain of this story. It was established more than 100 years earlier for the most enlightened of purposes. King Henry VIII spent some time in Italy visiting the Pope in an ultimately futile attempt to sort out his marital problems. He was very impressed with the hospital physicians he met there. It is fair to say that the practice of medicine in England and the rest of Europe was abysmal. The neighborhood or village physician most likely learned his trade by watching at the side of an equally uneducated master. Diagnosis and cure was a combination of received folklore, superstition, trial and error, and blind luck. Visits by the doctor were frequently fatal for the patient.

In Italy, however, Henry VIII saw physicians trained in the science of medicine, particularly in anatomy. As surgeons worked, artists, including Leonardo da Vinci, rendered exquisitely detailed drawings of the human body to be studied by medical students. Henry was so impressed with the humanist doctors in Italy that he brought several back to England to serve as court physicians. He also commissioned them to oversee a plan to improve medical practice in London. Thus was born the Royal College of Physicians of London. It was a licensing board. Candidates were examined by leading physicians on the board to ascertain that they were "grave and learned" in the practice of medicine. By royal decree, later confirmed by act of Parliament, no person could practice medicine

within seven miles of the city without a license. The Royal College was empowered to fine and arrest violators.

Another innovation by the College was to sponsor legislation making it a felony to cause the death of a patient by bad medical care. Felonies were hanging offenses at that time. It's something to keep in mind as you write that check for your professional liability insurance. The Royal College was also authorized to imprison those guilty of bad medical practice.

A century later, in Bonham's day, the Royal College was engaged in a heated turf war to hold onto its licensing monopoly. One major threat was the barbers' guild. Another was the assertion by the universities at Oxford and Cambridge that their doctor of medicine degrees were sufficient authorization to practice medicine. There were also some women practicing medicine without a license: midwives. Midwifery was not itself deemed to be medical practice. But it often happened among the working classes that when someone was ill or injured, a family member would be dispatched to seek advice from the only available person who had even a smattering of medical knowledge, the neighborhood midwife.

One such midwife, Mrs. Payne, was brought before the Royal College. In her defense, Mrs. Payne stated that she had done nothing wrong in her treatment of the patient; she merely followed advice she had received from Dr. Thomas Bonham. And so Dr. Bonham, who had no license from the Royal College, was brought before the Board. He was fined and made to promise no longer to practice medicine. Bonham, however, continued as before, and was arrested and fined again. Finally, Bonham appeared before the Board accompanied by his lawyer, a Mr. Smith.

Smith argued essentially this: We will not pay the fine. The Royal College is chartered to protect the public against ignorant and untrained quacks. My client has an M.D. degree from Cambridge. He has had more training than most of the fellows of the Royal College itself. The Board should worry more about protecting the public and less about protecting its own monopoly.

The Board responded by imposing an even larger fine and ordering poor Bonham to be hauled off to Newgate prison, where he undoubtedly harbored second thoughts about the wisdom of retaining Mr. Smith.

A few days later, the Royal College received a letter from the Archbishop of Canterbury. We may surmise that attorney Smith had a lot to do with this letter. The Archbishop advised the Royal College that it had made a mistake. Thomas Bonham was indeed a grave and learned man, able to speak both Latin and Greek, surely the mark of an educated man who should not be languishing in prison. In addition, if the Royal College did not rectify this error, the Archbishop might consult with his good friends in the House of Lords concerning the college's charter.

Bonham was quickly released.

Bonham and his lawyer then took the offensive, filing a lawsuit against the Royal College for false imprisonment. Bonham contended that the College of Physicians had no authority to lock him up. That was a matter that belonged in a regular court. As far as we know, Thomas Bonham was the first doctor ever to demand to be taken to court for medical malpractice.

The next very astute move by Smith on behalf of his client was to get his case heard by the only sitting judge who might actually rule in Bonham's favor: Chief Justice of the Court of Common Pleas, Sir Edward Coke.

Chief Justice Coke Enunciates the Rule of Law

Coke (pronounced "cook") is a fascinating historical figure. He was educated at Cambridge, a fact that did not hurt Bonham's chances. Coke began public life as a prosecutor. He gained notoriety for his aggressive prosecution of Sir Walter Raleigh for treason, and he also led the prosecution of the infamous Gunpowder Plot.

When King James first ascended to the throne, Catholics in England were not happy. A group of 13 young extremists managed to smuggle 36 barrels of gunpowder into the cellar of the Houses of Parliament. Their plan was to detonate the explosives as King James was presiding over the House of Lords. The plot was discovered in time to thwart what would have been a terrorist act of truly historic proportions. The ringleader, Guy Fawkes, was convicted, hanged, drawn, and quartered. The people of England still celebrate Guy Fawkes Day each Nov 5, with fireworks and bonfires on which they throw effigies of the would-be terrorist. To this day, when the Queen makes her annual trip to Parliament for the opening session, an honor guard is dispatched to inspect the cellar.

King James rewarded the tough prosecutor with not merely a judgeship, but the position of Chief Justice of the Court of Common Pleas, where most of the important civil actions were heard. Coke was a lawyer's lawyer. He had an encyclopedic knowledge of the case law long before the West Publishing Company, and then computerized legal research, made such a feat possible for mere mortals. As Chief Justice, the aggressiveness he had displayed in the service of the Crown was now directed into defending and expanding the authority of the judiciary.

Coke heard the arguments presented on behalf of Bonham and of the Royal College. In 1610 he handed down his decision, ruling in favor of Bonham and issuing a written opinion that is one of the most important—and controversial—in Anglo-American jurisprudence.

At the outset, Coke parsed the text of the Act of Parliament that gave the Royal College its enforcement powers. One part authorized the College to fine those who practice without a license. A different section allowed the College to imprison those found to have practiced improper medicine. Bonham was not charged with malpractice, so his imprisonment was obviously illegal. Coke could have stopped there, but he had a farther reaching idea. Half the fine imposed by the Royal College went to His Royal Majesty. The other half went to the Royal College itself. To Coke's way of thinking, this violated a basic principle of the common law: Judges must be neutral. No man can be the judge of his own case, and that includes a case in which the judge has a financial stake in the outcome.

The Royal College argued, why not? We are authorized by statute to impose and collect fines. Who are you to say that an Act of Parliament shall not be carried out? Coke's response is one of the most controversial paragraphs in any judicial opinion in the English language:

"[T]he common law will controul [*sic*] Acts of Parliament, and sometimes adjudge them to be utterly void: for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will controul it, and adjudge such Act to be void."

To our modern eyes, it looks as though the good judge had just invented the doctrine of judicial review—the fundamental

American principle that courts are vested with the power to invalidate legislation that violates the Constitution. In Coke's England, which had no written constitution, the principles of the common law served as an unwritten constitution. Some legal scholars argue that Coke could not have meant that judges could strike down statutes. England had no independent judicial branch. Judges were appointed by and served at the pleasure of the King, as Coke himself would soon learn. Parliament and the Crown were locked in a long struggle for supreme political power. The notion that a Crown judge could invalidate the Parliament's work would have been viewed as both ludicrous and dangerous.

I think Coke meant exactly what he said. His opinion in *Bonham's Case* was no snap ruling from the bench. Coke served as his own court reporter, and his opinion was lengthy, carefully crafted, and drew upon a large number of precedents. Later, Coke expanded his ideas in his great treatise, *Institutes of the Laws of England*. There he traced the principles of the common law back to their source in the Magna Carta, finally giving new life to that neglected document. Those principles, refined and polished over the centuries by countless judges devoted to the law, served as the supreme law of the land. This was certainly an idea that Coke had devoted years to develop.

The most important clue that Coke meant to establish the judicial power to protect common law rights is that the ruling powers at the time recognized the *Bonham* opinion as a serious threat for exactly that reason. One was Coke's arch-rival, Sir Francis Bacon. As Coke was making a name for himself as a prosecutor and judge, Bacon worked his way up to the position of attorney general and close advisor to the King. It is also worth noting that Coke married the woman Bacon had been wooing.

Bacon denounced the opinion in *Bonham's Case* in a party newsletter, and whispered to the King that this bid for independent judicial review was a serious threat to the King's own authority. After all, the authority of the Royal College derived not only from an act of Parliament, but also from the charter bestowed by King Henry himself. Office politics among those surrounding the King were a high-stakes game, and few played it better than Bacon.

Coke was soon summoned to explain himself to His Royal Highness. Coke had, in the meantime, been promoted, or perhaps kicked upstairs, to the King's Bench. No doubt James reminded the judge whose Bench it was. The King asked Coke about this notion of the rule of law. Surely the King, who provides the law for the benefit of all his subjects, is not himself subject to the law. Attached as Coke was to his principles, he also wished to remain attached to his own head. Nevertheless, Coke told the King that he was indeed above everyone else—but that above him was God—and the law. James, one of the last true believers in the divine right of kings, responded, "I am the law. There can be no higher authority." He ordered Coke to rewrite his opinion to reflect that fact. An engraving in the bronze doors at the main entrance of the Supreme Court building in Washington, D.C., commemorates Judge Coke admonishing the king on the supremacy of the law.

Coke eventually made a few minor changes to the opinion, but left the crucial language intact. Not surprisingly, in 1616, he was removed from the bench. He quickly turned his attention to the legislative branch and won a seat in Parliament. Apparently he

remained as stubborn as ever. He spent a year and a half in the Tower of London, along with several other members of Parliament, for resisting the Crown on a legislative matter. There he authored the Right of Petition, which served as the basis for the English Bill of Rights, and was thus a grandfather to the American Bill of Rights.

Coke's opinion in *Bonham's Case* was often cited for the proposition that judges may not have a financial interest in the cases they decide. But the notion of judicial review never took root in England. After the Glorious Revolution of 1688, it was well settled that acts of Parliament are supreme and that judges may not say otherwise.

Bonham's Case in the New World

That is not the end of our story. At least one group of English subjects became intensely interested in the idea that enactments of Parliament that violate their inalienable rights are not valid. They did not live in England, but in the colonies in the New World. A copy of Coke's *Institutes* came over on the Mayflower. The lawyers among the Founding Fathers attended no law schools. They trained as apprentices to established lawyers by reading the law. The law they read was found in the great treatises by William Blackstone and Edward Coke. *Bonham's Case* was often cited in court against unfair enactments of the colonial assemblies, including a Virginia statute that made the native Indians slaves. We know of the argument in that case because it was dutifully set down by the young court reporter, Thomas Jefferson.

In 1765, James Otis relied heavily on *Bonham's Case* when he argued the invalidity of the Stamp Act to the Massachusetts Assembly. John Adams was in the audience and later wrote that, at that moment, the fight for American independence was born. Edward Coke is one of a handful of heroes of the American Revolution, including Edmund Burke and John Wilkes, who never set foot on American soil.

Americans are justly proud of their government by the rule of law, but often unaware of Coke's influence. In 1803 Thomas Jefferson's cousin, Chief Justice of the Supreme Court John Marshall, established in *Marbury v. Madison* the principle of judicial review and the responsibility of the court to strike down acts of Congress that violate the Constitution. We are also indebted to Coke for the "right to a remedy" or "open courts" guarantee, which requires government to provide a legal remedy for violation of every legally protected right. Coke's formulation of that right is incorporated in 38 state constitutions, and has been held by the Supreme Court as implicit in the federal constitution's guarantee of due process of law.

Dr. Thomas Bonham is thought to have died about 1627. We know almost nothing about his later life. We would like to think that he spent those years in the fulfilling practice of medicine, for which he fought so hard. But he did leave a legacy for both doctors and lawyers concerning their responsibility to protect the rights of their patients and clients, regardless of the personal cost.

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