

# The Perils of Opioid Prescribing

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Pain management has become a minefield where physicians often walk at their peril between accusations of under-treatment and over-treatment of pain.

Prosecutors in recent years have focused on alleging inappropriate prescribing of opioids, or on over-treatment of pain, which they state leads to addiction, abuse, overdose, and death.

Myths, erroneous perceptions, and ignorance often trump reality, and along with political ambition, drive prosecutors to seek convictions and long prison terms for those whom they assert are responsible for what has been labeled the opioid crisis.

Physicians who find themselves in the crosshairs face a grand jury system that operates without any checks and balances. As pointed out in an article in our journal, authored by our AAPS General Counsel, Andrew Schlafly:

If a grand jury appears reluctant to issue an indictment requested by a prosecutor, then he can simply convene another grand jury, and then another, until he gets the indictment he wants.... [If] a prosecutor wants an indictment against someone, then he will get it.<sup>1</sup>

As Schlafly points out, once indicted, the physician faces a dismal future:

Many victims of overzealous prosecutions in the federal system feel compelled to accept plea bargains or commit suicide, regardless of their guilt, because the odds of conviction in a federal trial are so high, and the prison sentences so long if a jury does not acquit on each and every count of an indictment.... In federal court the likelihood of an acquittal on all counts is only about one percent of all federal prosecutions brought.<sup>1</sup>

### Being No. 1 Makes Physicians a Target

Being no. 1 in pain management is often not good. The top opioid prescriber in your state will inevitably be subjected to increased scrutiny and risk of prosecution alleging inappropriate prescribing or over-prescribing.

Unfortunately, following strict, well-established monitoring and prescribing protocols may not prevent entanglement in the legal system. Those who are committed to obtaining opioids for getting high, or to selling drugs on the street for profit, are often very accomplished at deceiving compassionate physicians.

### Trial by Media

Once a physician is targeted for prosecution, prosecutors

often use media to portray the physician as nothing more than a drug dealer with a degree, who has violated the public trust in a most heinous manner. If the physician has worked hard and accumulated a degree of wealth, luxury cars, vacation homes, or boats, the prosecutors will frequently play class warfare to foment widespread public resentment, making it more likely that a jury will seek to convict the "greedy" doctor. The implication is that a person who has such wealth must have done something wrong, and needs to be held accountable.

The more sensational the charges, the greater the interest and benefit for the prosecutor and compliant media. An indictment containing a large number of charges, highlighted by media, can further condition the public to side with the prosecution. Operating on the concept of where there is smoke there must be fire, the public may ask why the prosecutor would bring so many charges against the doctor if he did nothing wrong? Trial by media, in which a physician is on the front page of the local newspaper and is the lead story on television and radio, makes it very difficult to find impartial jurors.

### Who or What is Responsible for the Opioid Crisis?

According to Dr. Jeffrey A. Singer, a practicing surgeon in Phoenix and a senior fellow at the Cato Institute:

Policymakers in Washington and in state capitals are misdiagnosing the opioid crisis as a doctor-patient problem.... While raids on black market drug dealers continue to net hauls from a seemingly endless sea of diverted, smuggled or counterfeit prescription opioids and heroin, policymakers can't shake free of the myth that the opioid crisis is caused by doctors prescribing opioids to their patients in pain. The numbers show that isn't the case.<sup>2</sup>

A 2010 Cochrane Review found that less than 1 percent of well-screened patients become addicted to their opioids prescribed for chronic non-cancer pain.<sup>3</sup> The vast majority of opioid misuse is not caused by physicians prescribing opioids for patients who have pain. Approximately 75% of opioid abuse stems from individuals who obtained opioids from a friend or family member (including by theft), or from drug dealers and other sources including purchase over the internet.<sup>4</sup>

According to an article posted last year on the *Scientific American* MIND Guest Blog:

Typically, young people who misuse prescription opioids are heavy users of alcohol and other drugs. This type of drug use, not medical treatment with opioids, is by far the greatest risk factor for opioid addiction...<sup>5</sup>

Childhood trauma, mental illness, personality disorder, poverty, unemployment, and social marginalization are also cited as risk factors for opioid addiction and abuse.<sup>5</sup>

The vast majority of opioid-related deaths involve mixtures of various illicit drugs including fentanyl and heroin, and are not due to physicians over-prescribing opioids. According to an article posted on Reason.com blog:

What's true of prescription opioids is also true of heroin: Most "overdoses" involve combinations. The danger is magnified by the unpredictable potency of black-market heroin, which in turn has been magnified by the recent proliferation of fentanyl as a heroin adulterant and substitute.<sup>6</sup>

### Physicians Prosecuted for Patient's Choice to Abuse Drugs

Unfortunately, when a patient fails to follow the instructions and heed warnings provided by the prescribing physician, deciding to combine the drugs with other substances, like alcohol, or crushes, dissolves and injects a medication/drug mixture, and then dies, the physician may be subject to prosecution and conviction for manslaughter.<sup>7</sup> One physician, Dr. James F. Graves, was sentenced to 63 years in prison at age 55 (a life sentence), a sentence later reduced by 17 years due to a sentencing error.

In a letter to the Office of Executive Clemency in Florida, requesting commutation of Dr. Graves's sentence, his son wrote:

Dr. Graves had several patients visit his office that were drug addicts faking symptoms in order to obtain narcotics for the purpose of getting high. Dr. Graves became aware of this and started discharging patients. He wrote a letter to the state attorney general requesting assistance in investigating suspicious patients. It was later discovered that several patients were indeed abusing medications prescribed by Dr. Graves and using them in a manner that was against explicit instructions from Dr. Graves and the pharmacies that filled the prescriptions. Some patients combined the drugs with other substances, like alcohol, while others would crush, dissolve and inject the medications intravenously. Some actually died.... If you are interested in finding out more about my father's case and about similar cases where medical doctors are being held liable for the wrongful behavior of their patients, I suggest you obtain a copy of *The Criminalization of Medicine* written by Ronald T. Libby, a political science professor at the University of North Florida.<sup>8</sup>

In a textbook case of trial by media, a Buffalo, New York, area pain specialist faces charges tied to six patient deaths. As covered in a recent *Buffalo News* story, Dr. Eugene Gosal was said to be "the first local doctor to be charged with such a crime."<sup>9</sup> In the *News* article, the prosecutor refers to "killer drugs," in much the same manner as gun control advocates refer to "killer guns":

We need to stop the abuse of prescription drugs, and one way to do that is stop those doctors who prescribe these killer drugs outside the usual course of their medical practice and not for a legitimate

medical purpose," Acting U.S. Attorney James P. Kennedy said in announcing the new charges.<sup>9</sup>

However, the three physicians who filled in to treat Dr. Gosal's patients when his office closed temporarily last year found something very different from what was portrayed by the prosecutor in the media. According to a 2016 article in the *Buffalo News*: "Three weeks since they arrived, the three fill-in doctors are impressed with Gosal's practice and the safeguards he put in place to spot drug seekers."<sup>10</sup>

Dr. Nancy Nielsen, associate dean for health policy at the University at Buffalo's Jacobs School of Medicine and former president of the American Medical Association, stated: "I thought I was going to see 35-year-old guys on workers' comp who didn't want to go back to work," Nielsen said. "That is not what I have seen."<sup>10</sup>

Another fill-in-physician, Dr. Christopher Kerr, chief medical officer at the Center for Hospice & Palliative Care, stated:

"We were so unknowledgeable. We had to tell the staff to walk us through everything," Kerr said. "I'm more than a little impressed by the quality of the practice. The nurse practitioners—they are really, really good.... A contradiction exists between the way these patients have been characterized and how they actually appear," Kerr said. "What is most impressive is that we have yet to see a case that is not striking in its authenticity.... These patients are struggling with function in the face of adversity. They are trying to be parents, trying to be employed."<sup>10</sup>

The *Buffalo News* article also noted the chilling effect that the prosecution of Dr. Gosal has had on the willingness of local primary care physicians to fill the void and prescribe opioids to Dr. Gosal's patients, who lived in fear of going through withdrawal when his practice was temporarily closed.

The prosecutor in the Gosal case strongly rejected the notion of patient responsibility: When asked whether Dr. Gosal's patients had some level of personal responsibility for their addiction, Kennedy responded, "That's not right. It's time to stop blaming the victims," he said. "They're not the ones profiting from these drugs. In fact, they're the ones dying."<sup>9</sup>

Dr. Gosal's attorney, Joel L. Daniels, held a very different view: "He treated these patients for pain. He's a compassionate guy.... If they wanted to abuse their medication, you can't blame him."<sup>9</sup>

Dr. Gosal's attorney also noted that Dr. Gosal has treated tens of thousands of patients over the years, and the percentage of overdose deaths associated with his practice is well below the national average.<sup>9</sup>

Like Dr. James Graves, if Dr. Gosal is convicted on all charges, he could face a sentence of life in prison.<sup>9</sup>

### Government Intervention: Making the Problem Worse

Government has responded to the opioid crisis by increased laws, regulations, and restrictions affecting physician prescribing of opioids. Prescription drug monitoring programs, intended to stop patients who doctor-shop for

opioids, have not reduced the opioid overdose death rate, which continues to rise. As physicians become more reluctant to prescribe opioids for pain, the supply decreases, and patients seek alternative sources on the street to alleviate their pain and avoid withdrawal. Street drugs are, of course, not subject to any quality control of ingredients or potency. Individuals who use opioids for non-medical purposes also are increasingly driven to the black market, where they risk death, as the supply of prescription opioids contracts.

Meddling legislators, who believe they have the knowledge to micromanage medicine, have passed laws restricting opioid prescriptions to a seven-day supply for acute pain. The patient who still has pain on the eighth day may be expected to suffer. And, a patient who receives a prescription for a 10-day supply of pain medication may not be able to get the prescription filled at all if the patient lives in one of the states that restricts opioid prescriptions to seven days for acute pain. The CDC has also issued guidelines for the prescription of opioids.

According to an article published on Reason.com blog:

The prescription guidelines that the CDC issued last year, which encourage physicians to be stingy with opioids, already have had a noticeable impact on patients' ability to get adequate treatment for their pain.<sup>6</sup>

The President's Commission on Combating Drug Addiction, chaired by New Jersey Gov. Chris Christie, reports that the healthcare system, "with a growing compulsion to detect and treat pain," is to blame for the opioid crisis.<sup>6</sup> In fact:

The commission thinks that patients should no longer be asked about the adequacy of pain treatment in surveys mandated by the Centers for Medicare & Medicaid Services, lest providers "use opioids inappropriately to raise their survey scores." The commission criticizes the campaign to treat pain as "the fifth vital sign," which it blames for encouraging excessive opioid use. It recommends closer and more comprehensive scrutiny of prescription practices.<sup>6</sup>

### Are Physicians Being Treated More Harshly than Terrorists?

In September 2003, Assistant U.S. Attorney Gene Rossi stated to a reporter: "Our office will try our best to root out [certain doctors] like the Taliban. Stay tuned."<sup>11</sup>

In 2003, all six members of the "Lackawanna Six" (Lackawanna, New York, is a suburb of Buffalo), "who attended an Al Qaeda terrorist training camp," pleaded guilty to providing material support to the Al Qaeda terrorist organization, and were sentenced to prison.<sup>12</sup> Sentences ranged from seven to 10 years. All of them are now out of prison.

How does this compare with the situation of physicians sentenced to life in prison for the wrongful behavior of their patients?

### Conclusion

Legislators and government policymakers have misdiagnosed the cause of the opioid crisis and have prescribed solutions to control physician prescribing and

micromanage medicine. These actions have harmed the public, physicians, and the patient-physician relationship.

Patients who have legitimate pain are now faced with increased difficulty getting adequate treatment for their pain because of restrictive and coercive opioid laws and policies and overzealous misguided prosecutions, which have had a chilling effect on the willingness of many physicians to continue to prescribe opioids.

In an environment in which prosecutors believe that someone other than the drug abuser must be responsible for abuse of drugs resulting in death, who should be held responsible for the deaths caused by the "supply side solution" of government intervention that has driven individuals to the street to purchase truly deadly drugs?

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