The Opioid Doctors: Is Losing Your License a Sufficient Penalty for Dealing Drugs?

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Imagine that a medical board revokes a doctor's license both because he has been peddling thousands of pills of opioids and also because he was caught with a few grams of cocaine. The doctor is a family physician, not a pain management specialist. Yet, during a one-year period he wrote more than 4,000 prescriptions for opioids—roughly eighteen scripts per day. Patients came from multiple states and from hundreds of miles away to get oxycodone prescriptions. And the doctor prescribed large quantities of opioids—up to 240 pills per month—to patients with no record of previously needing narcotic painkillers. Both federal and state law provides an option to charge the doctor as a drug dealer. When a physician writes a prescription for a controlled substance with no legitimate medical purpose, federal and state law considers it to be the same criminal offense as a street dealer selling drugs in a back alley. Prosecutors, however, did not charge the doctor with dealing opioids. They instead indicted him for possession of the small amount of cocaine and ignored the opioid distribution.[1]

Prosecutors (and physicians) claim that there has been a massive crackdown on doctors for improper opioid prescribing. This Article challenges that claim by detailing dozens of recent cases in which state medical boards revoked doctors' licenses for improper opioid prescribing but in which prosecutors never brought any criminal charges for drug dealing. After detailing the egregious conduct of dozens of opioid prescribers, this Article explains why prosecutors are reticent to bring drug distribution charges against doctors and offers a roadmap for reform.

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1. These facts are from a real case. *See infra* notes 228–233 and accompanying text.

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INTRODUCTION

The opioid crisis has a lot of villains. Pharmaceutical companies peddled dangerous drugs without proper safeguards and encouraged deceptive marketing.[2] The FDA failed to properly regulate.[3] The drug distributors—the giant corporations that physically deliver the drugs—did not adequately monitor and stop excessive drug flow.[4] Pharmacies profited by selling more pills than their local communities could legitimately consume.[5] All of this bad behavior has led to corporate criminal liability and billions of dollars in civil litigation.[6]

But what about the doctors who over-prescribed the oxycodone, fentanyl, and other opioids? Have there been adequate steps taken to punish the doctors who actually put the drugs in the hands of patients? To be sure, federal and state prosecutors have brought more criminal charges against doctors in recent years.[7] And with each arrest, the U.S. Department of Justice and state prosecutors have claimed that they have cracked down on bad doctors.[8]

Indeed, because of high-profile prosecutions some ethical doctors fear losing their licenses[9] or being prosecuted for legitimate prescribing they

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2. *See* BARRY MEIER, PAIN KILLER: AN EMPIRE OF DECEIT AND THE ORIGIN OF AMERICA'S OPIOID EPIDEMIC (2d ed. 2018).

3. *See, e.g.*, Emily Baumgaertner, *F.D.A. Did Not Intervene to Curb Risky Fentanyl Prescriptions*, N.Y. TIMES (Aug. 2, 2018), https://www.nytimes.com/2018/08/02/health/fda-fentanyl-opioid-epidemic-overdose-cancer.html.

4. *See* Danny Hakim, William K. Rashbaum & Roni Caryn Rabin, *The Giants at the Heart of the Opioid Crisis*, N.Y. TIMES (Apr. 22, 2019), https://www.nytimes.com/2019/04/22/health/opioids-lawsuits-distributors.html.

5. *See* Jenn Abelson, Andrew Ba Tran, Beth Reinhard & Aaron C. Davis, *As Overdoses Soared, Nearly 35 Billion Opioids—Half of Distributed Pills—Handled by 15 Percent of Pharmacies*, WASH. POST (Aug. 12, 2019, 7:00 AM), https://www.washingtonpost.com/investigations/the-opioid-crisis-15-percent-of-the-pharmacies-handled-nearly-half-of-the-pills/2019/08/12/b24bd4ee-b3c7-11e9-8f6c-7828e68cb15f_story.html.

6. Pills are not exclusively to blame for the opioid epidemic. Mexican drug cartels and other gangs have flooded the streets with cheap heroin. *See* SAM QUINONES, DREAMLAND: THE TRUE TALE OF AMERICA'S OPIATE EPIDEMIC (2015).

7. In the eighteen months between January 2017 and July 2018, the Department of Justice charged nearly 200 physicians and over 200 other medical personnel with opioid-related crimes. *See* Jeff Sessions, Att'y Gen., U.S. Dep't of Just., Remarks Announcing National Health Care Fraud and Opioid Takedown (June 28, 2018) (transcript available at https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-announcing-national-health-care-fraud-and); *see also* Josh Bowers & Daniel Abrahamson, *Kicking the Habit: The Opioid Crisis, America's Addiction to Punitive Prohibition, and the Promise of Free Heroin*, 80 OHIO ST. L.J. 787, 808–09 (2019) (describing federal efforts to cut opioid prescriptions through increased prosecutions). Federal prosecutors have also become more aggressive in "charging the death" under 21 U.S.C. § 841(b)(1)(C). *See* Rachel L. Rothberg & Kate Stith, *The Opioid Crisis and Federal Criminal Prosecution*, 46 J.L., MED. & ETHICS 292, 296–97 (2018).

8. *See, e.g.*, Sadie Gurman & Sara Randazzo, *Dozens of Medical Professionals Charged in Opioids Sting*, WALL ST. J. (Apr. 17, 2019, 7:07 PM), https://www.wsj.com/articles/dozens-of-medical-professionals-charged-with-illegally-prescribing-opioids-11555533761 (quoting the Department of Justice's criminal division chief as saying that "when medical professionals behave like drug dealers, the Department of Justice is going to treat them like drug dealers").

9. *See* Jayne O'Donnell & Ken Alltucker, *Pain Patients Left in Anguish by Doctors 'Terrified' of Opioid Addiction, Despite CDC Change*, USA TODAY,

believe to be in the best interests of their patients.[10] As one Kentucky doctor colorfully put it, "many well-intended doctors are unfairly arrested 'all the time' in the hunt for those who recklessly contribute to patients' addictions and fatal overdoses . . . [They are] the dolphins that get caught in the tuna net."[11]

Should the "dolphin" doctors be afraid of being prosecuted for writing opioid prescriptions? In a word, "No." While prosecutors have begun bringing more prosecutions for improper prescribing of opioids, there has not been a rash of unjustifiable prosecutions. To the contrary, prosecutors have declined to bring criminal charges against many doctors who have engaged in egregious behavior.[12]

To assess how aggressive prosecutors have been in charging doctors, I reviewed hundreds of news stories over the last few years that reported on medical boards revoking doctors' licenses for improper prescribing of opioids. In the most egregious cases involving pill mills and other outrageous conduct, prosecutors have in fact aggressively brought criminal charges. Although many of these outrageous cases resulted in arguably lenient plea bargains and light sentences, this Article does not focus on the lenient punishment of doctors who were in fact prosecuted. Rather, this Article explores the dozens of cases in which medical boards revoked doctors' licenses for opioid prescribing misconduct, but state and federal prosecutors brought no criminal charges. To be clear, this Article does not argue that prosecutors would have airtight cases against every single doctor who lost their medical licenses. Many cases, however, involved flagrant misconduct for which federal and state prosecutors plausibly could have brought criminal charges for drug distribution. This Article details cases in which doctors prescribed outrageous numbers of pills, failed to perform any medical examinations, wrote prescriptions to ordinary patients for opioids approved only for cancer patients while taking money from the drug manufacturer, prescribed opioids to patients clearly exhibiting drug-seeking and addictive behavior, and prescribed opioids in exchange for sex.

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https://www.usatoday.com/story/news/health/2019/06/24/pain-patients-left-anguish-doctors-who-fear-opioid-addiction/1379636001/ (June 30, 2019).

10. *See, e.g.*, Kelly K. Dineen & James M. DuBois, *Between a Rock and a Hard Place: Can Physicians Prescribe Opioids to Treat Pain Adequately While Avoiding Legal Sanction?*, 42 AM. J.L. & MED. 7, 35 (2016) ("There are continued concerns about the chilling effect of investigations on legitimate physician prescribing."); M.M. Reidenberg & O. Willis, *Prosecution of Physicians for Prescribing Opioids to Patients*, 81 CLINICAL PHARMACOLOGY & THERAPEUTICS 903, 903, 905 (2007) (contending that physicians are scared of criminal prosecution even though the study indicated the risk of regulatory or criminal punishment was "very small"); Beth Warren, *Doctors Who Fear Being Arrested for Treating Pain to Get Unusual Help*, LOUISVILLE COURIER J. (Aug. 2, 2018), https://www.courier-journal.com/story/news/crime/2018/08/02/kentucky-doctors-fear-arrest-treating-pain-opioids-amid-clinic-raids/863407002/.

11. Warren, *supra* note 10.

12. *See infra* Part III.

This misconduct was egregious enough for doctors to lose their medical licenses but supposedly not serious enough for criminal prosecutions.[13]

Rather than a story of excessive criminal prosecutions, these cases seem to indicate that prosecutors are relying on medical boards to protect the public and discipline doctors who have engaged in outrageous behavior. On one level, the use of civil rather than criminal remedies makes sense. Revoking a medical license is a civil action that is subject to a much lower standard of proof than a criminal prosecution.[14]

On the other hand, there are reasons we should expect to see criminal prosecutions when a medical board has revoked a doctor's license for improper prescribing. First, the standard for criminally prosecuting a doctor for illegally dealing drugs—a showing that the prescription was not for "a legitimate medical purpose" and that the doctor was not acting "in the usual course of his professional practice"[15]—is often similar to the reasons why a medical board has revoked a doctor's license.[16] Second, and practically speaking, it is rare for medical boards to revoke doctors' licenses.[17] Proceedings to suspend or revoke medical licenses are lengthy and complicated endeavors involving medical experts and lawyers.[18] Medical boards are composed of doctors who seem cautious about revoking the licenses of their colleagues.[19] It is therefore not surprising that when doctors have lost their licenses for improperly prescribing opioids, the conduct has been egregious. Given the flagrant misconduct, we should expect to see accompanying criminal prosecutions in many of those cases. Yet, in dozens of cases, there have been no criminal charges following the license revocations.

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13. In other cases, prosecutors have charged the doctors with Medicaid fraud or health care fraud, but not brought charges related to prescribing practices. In still other cases, doctors were prosecuted but received extremely light sentences. *See infra* Part IV.A.

14. *See* Dineen & DuBois, *supra* note 10, at 32 ("[T]he standard for criminality is at least two steps beyond that which would satisfy the breach requirement in malpractice: from a mistaken doctor (one breach in otherwise careful practice) to a bad doctor (pattern indicating carelessness) to a criminal doctor (pattern indicating knowledge or intention to violate law)."); *see also infra* Part II (detailing how doctors can be held criminally liable under the Controlled Substances Act).

15. *See infra* notes 74–77 and accompanying text.

16. *See infra* note 29 and accompanying text.

17. *See* SIDNEY M. WOLFE, CYNTHIA WILLIAMS & ALEX ZASLOW, PUB. CITIZEN'S HEALTH RESEARCH GROUP RANKING OF THE RATE OF STATE MEDICAL BOARDS' SERIOUS DISCIPLINARY ACTIONS, 2009–2011, at 1 (2012), https://www.citizen.org/wp-content/uploads/migration/2034.pdf (explaining that medical boards impose serious discipline on less than one-half of one percent of physicians).

18. *See infra* notes 46–51 and accompanying text.

19. Just like other group members, doctors are likely susceptible to in-group bias that makes them more prone to under-estimate misconduct by other doctors. *See, e.g.*, Jacques-Philippe Leyens, Paola M. Paladino, Ramon Rodriguez-Torres, Jeroen Vaes, Stéphanie Demoulin, Armando Rodriguez-Perez & Ruth Gaunt, *The Emotional Side of Prejudice: The Attribution of Secondary Emotions to Ingroups and Outgroups*, 4 PERSONALITY & SOC. PSYCH. REV. 186, 187 (2000) ("People . . . interpret more leniently an ambiguous behavior performed by an ingroup member than by an outgroup member [and] they excuse more readily antinormative behaviors committed by an ingrouper than by an outgrouper . . . .") (citations omitted).

This Article proceeds as follows. Part I explains the lengthy and demanding process for revoking a doctor's medical license and the resulting rarity of it occurring. Part II then reviews the criminal statutes and regulations that allow prosecutors to bring controlled substances distribution charges against doctors who have inappropriately prescribed opioids and other drugs. Part III is the heart of the Article. It describes more than two dozen recent cases in which state medical boards suspended or revoked doctors' licenses for egregious opioid prescribing behavior, but for which there has been no federal or state criminal prosecution. Part III describes cases in which doctors: (A) prescribed inappropriate types of drugs; (B) prescribed excessively large quantities of drugs; (C) conducted no physical examinations or laboratory tests before prescribing drugs; (D) appeared to take kickbacks in exchange for prescribing dangerous opioids; (E) prescribed opioids to patients who clearly exhibited addictive and drug-seeking behavior; and (F) traded drugs for sex. Part IV then considers cases in which prosecutors brought less serious criminal charges against doctors but either declined to charge drug dealing or agreed to very mild sentences. Part V seeks to explain the reasons why prosecutors fail to be as aggressive as they could be in charging doctors for opioid drug dealing. Part V explores the availability of easier-to-prove charges, the downside to a vague statutory scheme, the lack of prosecution resources, the prestige of physicians in society, as well as the effect of the recent movement to treat pain as the fifth vital sign. Finally, Part VI proposes targeted funding grants to medical boards and prosecutors to support more rigorous investigation and prosecution.

I. THE CHALLENGE AND RARITY OF SUSPENDING OR REVOKING DOCTORS' MEDICAL LICENSES

On paper, the standard for revoking a doctor's medical license is not insurmountably high. Most states have a laundry list of behavior—including fraud,[20] willfully making false records,[21] prescribing to known drug abusers,[22] pre-signing prescription pads,[23] failing to conform to the standards of acceptable and prevailing medical practice,[24] and delegating prescribing tasks to a person not licensed to do so[25]—that can authorize a medical board to revoke a license. For instance, Virginia lists twenty-three reasons why its medical board can reprimand, fine, suspend, or revoke a doctor's license.[26] Some of the reasons are extremely broad, for instance "[c]onducting his practice in a manner contrary to the standards of ethics of his branch of the

20. *See, e.g.*, CONN. GEN. STAT. ANN. § 20-45 (West 2020).
21. *See, e.g.*, VT. STAT. ANN. tit. 26, § 1354(8) (West 2020).
22. *See, e.g.*, 22 TEX. ADMIN. CODE § 190.14 (2020).
23. *See, e.g.*, GA. COMP. R. & REGS. 360-3-.02(4) (2020).
24. *See, e.g.*, W. VA. CODE R. § 11-1A-12.1.j. (2020).
25. *See id.* § 11-1A-12.1.aa.
26. VA. CODE ANN. § 54.1-2915 (West 2020).

healing arts"[27] or "[i]ntentional or negligent conduct in the practice of any branch of the healing arts that causes or is likely to cause injury to a patient or patients."[28]

If a doctor is running a pill mill or otherwise misprescribing opioids, there are typically numerous reasons for a medical board to revoke her license.[29] For example, imagine a scenario that does not rise to the level of a pill mill, but which is nevertheless far afield from standard medical practice. Let's say that our hypothetical doctor is a general family physician who is running a very busy practice and seeing one patient every ten minutes. While she is maintaining medical records for the visits and having her staff check patients' vital signs, the doctor is conducting little to no physical or diagnostic examinations. Nevertheless, she falsely documents examination results in the patients' charts. At the busiest times of the day, the doctor permits her nurses or staff to use her prescription pad to write a few of the prescriptions. While the doctor is certainly not selling pills for cash, she is aware that some of her patients are engaged in drug-seeking behavior because they have come from hundreds of miles away, they failed earlier drug tests, or they are seeking early refills for suspicious reasons.[30] And the doctor is writing a lot of prescriptions for opioids. Although she is a general family physician, she is writing a dozen prescriptions for opioids per day.

Our hypothetical doctor has engaged in misconduct by failing to conduct adequate physical examinations, by falsifying patients' charts to hide the lack of examination, by prescribing drugs to those likely to abuse them, and by allowing an unauthorized individual to write prescriptions on her pad. The doctor's behavior is not the most egregious misconduct imaginable, but it is certainly improper.

Are there grounds to revoke our hypothetical doctor's medical license? Absolutely. Consider what could happen in New Jersey, which as we shall see in Part III below, has publicized its efforts to revoke the licenses of numerous physicians engaged in improper opioid prescribing. Under the New Jersey licensing rules, the medical board can point to at least half a dozen reasons to revoke our hypothetical doctor's license, including that she:

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27. *Id*. § (A)(12).

28. *Id*. § (A)(3).

29. In an earlier study, Professor James DuBois and his colleagues studied 100 cases of improper prescribing and categorized the character traits of the doctors. Although that study did not involve a qualitative assessment analyzing the facts of the individual cases, the authors noted that 94% of the doctors in their sample lost their licenses for a period of time and 64% received criminal punishment. *See* James DuBois, John T. Chibnall, Emily E. Anderson, Michelle Eggers, Kari Baldwin & Meghan Vasher, *A Mixed-Method Analysis of Reports on 100 Cases of Improper Prescribing of Controlled Substances*, 46 J. DRUG ISSUES 457, 463 (2016).

30. It is well known, for instance, that patients who make multiple claims that their prescriptions were lost or stolen are often engaged in drug-seeking behavior. *See* 3 DAN J. TENNENHOUSE, ATTORNEYS MEDICAL DESKBOOK § 33:10.70 (4th ed. 2018).

- Has engaged in the use or employment of dishonesty, fraud, deception, misrepresentation, false promise or false pretense;
- Has engaged in gross negligence, gross malpractice or gross incompetence which damaged or endangered the life, health, welfare, safety or property of any person;
- Has engaged in repeated acts of negligence, malpractice or incompetence;
- Has engaged in professional or occupational misconduct as may be determined by the board;
- Has prescribed or dispensed controlled dangerous substances indiscriminately or without good cause, or where the applicant or holder knew or should have known that the substances were to be used for unauthorized consumption or distribution; [or]
- Has permitted an unlicensed person or entity to perform an act for which a license or certificate of registration or certification is required by the board, or aided and abetted an unlicensed person or entity in performing such an act.[31]

In short, on paper it would seem relatively easy to revoke the medical license of our hypothetical doctor.

In reality, however, revoking a doctor's license is not easy and happens relatively rarely. On average, medical boards impose serious discipline (revocations, surrenders, suspensions, and restrictions) on about 3 of every 1,000 doctors in a given year.[32] Moreover, in some states the numbers are far lower.[33] Even when hospitals restrict doctors' clinical privileges, state medical boards often fail to take action. In a study of over 10,000 doctors who lost hospital clinical privileges between 1990 and 2009, nearly 6,000 had "no state medical board action," even though many of those doctors also had a history of medical malpractice payments.[34] An investigation by *USA Today* summarized the situation as follows:

> [T]he nation's state medical boards continue to allow thousands of physicians to keep practicing medicine after findings of serious misconduct that puts patients at risk . . . . Many of the doctors have been barred by hospitals or other medical facilities; hundreds have paid millions of dollars to resolve malpractice claims. Yet their medical licenses—and their ability to inflict harm—remain intact.[35]

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31. N.J. STAT. ANN. § 45:1-21(b)–(e), (m)–(n) (West 2020).

32. *See* WOLFE ET AL., *supra* note 17, at 1.

33. A recent study found that doctors in Delaware are disciplined four times more often than doctors in Massachusetts. *See* John Alexander Harris & Elena Byhoff, *Variations by State in Physician Disciplinary Actions by US Medical Licensure Boards*, 26 BRITISH MED. J. QUALITY & SAFETY 200, 204 (2017).

34. ALAN LEVINE, ROBERT OSHEL & SIDNEY WOLFE, PUB. CITIZEN, STATE MEDICAL BOARDS FAIL TO DISCIPLINE DOCTORS WITH HOSPITAL ACTIONS AGAINST THEM 1–2 (2011), https://mkus3lurbh3lbztg254fzode-wpengine.netdna-ssl.com/wp-content/uploads/1937.pdf.

35. Peter Eisler & Barbara Hansen, *Thousands of Doctors Practicing Despite Errors, Misconduct*, USA TODAY (Aug. 20, 2013, 7:06 PM), https://www.usatoday.com/story/news/nation/2013/08/20/doctors-licenses-medical-boards/2655513/.

In short, conventional wisdom in the medical community is that medical boards are under-disciplining physicians.[36]

There are multiple reasons for inadequate medical board discipline. First, medical boards must recognize that a doctor is engaged in problematic behavior. As in many fields, information flow in the medical regulatory community is poor.[37] Thus, in many cases, if there is no complaint filed about a doctor by a patient or another physician, the medical board will have nothing to investigate.[38]

Second, just like lawyers, some doctors have licenses in multiple states. If a doctor's license is suspended or revoked in one state, the doctor may simply start practicing in another state. A 2018 investigation by the *Milwaukee Journal Sentinel* and other media outlets found "at least 500 physicians who've been publicly disciplined, chastised or barred from practicing by one state medical board, but are allowed to practice elsewhere with a clean license."[39] In 250 instances, doctors who surrendered their license entirely in one state were able to practice in another state.[40] While the federal government maintains the National Practitioner Data Bank, which tracks the professional and criminal history of doctors, medical boards in some states regularly fail to search the database.[41] A recent study found that some states with significant opioid problems—for instance, Missouri—almost never query the database.[42]

Third, and related, as some cases progress through the disciplinary process, doctors will voluntarily surrender their licenses knowing that they have a good chance of simply moving to another state and practicing there without restrictions. According to a recent investigation, "laws in several states—including Ohio and Maryland—require [surrender] information be kept confidential. In others, including Wisconsin, [the fact that a doctor voluntarily surrendered his license] may only be available through a formal open records request."[43] While boards are required to report on voluntary surrenders that

36. *See* WOLFE ET AL., *supra* note 17, at 4.

37. *See, e.g.*, Andy Marso, *This Tool Can Help State Medical Boards Spot Problem Doctors. Why Do So Few Use It?*, KAN. CITY STAR, https://www.kansascity.com/news/business/health-care/article231444518.html (June 24, 2019).

38. Indeed, scholars have observed that the most likely thing to trigger a serious medical board action against a physician is a prior criminal prosecution. *See* Dineen & DuBois, *supra* note 10, at 25.

39. *See* John Fauber & Matt Wynn, *7 Takeaways from Our Year-Long Investigation into the Country's Broken Medical License System*, USA TODAY (Nov. 30, 2018, 9:30 AM), https://www.usatoday.com/story/news/2018/11/30/medical-board-license-discipline-failures-7-takeaways-investigation/2092321002/; John Fauber, Matt Wynn & Kristina Fiore, *Prescription for Secrecy*, MILWAUKEE J. SENTINEL (Feb. 28, 2018), https://projects.jsonline.com/news/2018/2/28/is-your-doctor-banned-from-practicing-in-other-states.html.

40. *See* John Fauber & Matt Wynn, *Doctors Who Surrender a Medical License in One State Can Practice in Another—And You Might Never Know*, MILWAUKEE J. SENTINEL, https://www.jsonline.com/story/news/investigations/2018/11/30/doctor-good-record-might-have-troubled-history-given-up-medical-license-elsewhere/2048657002/ (Dec. 31, 2018).

41. *See* Marso, *supra* note 37.

42. *See id.*

43. John Fauber & Matt Wynn, *Doctors with Bad Records Can Often Still Practice on Patients; Here's What Needs to Happen to Fix This*, MILWAUKEE J. SENTINEL, https://www.jsonline.com/story/news/

happen in lieu of discipline, at least one critic argues that "[m]any medical boards . . . work out deals or arrangements that get around the requirement."[44]

Fourth, state medical boards have limited budgets and must sift through huge numbers of complaints. In a 2006 study of state medical boards, the average medical board received 100 complaints for every 1,000 doctors.[45] On average, each board staff member handled seventy complaints per year.[46] The heavy caseload burden makes it difficult for medical boards to build a successful case against dangerous physicians.

Fifth, the process for suspending or revoking a medical license involves numerous stages, multiple investigators and decision-makers, and carries procedural protections for the doctors that can make it time-consuming and arduous. After receiving a complaint about a doctor's conduct, the medical board must investigate.[47] In many cases, the board must obtain medical records for a sample group of patients—this can be time-consuming because complainants may be reluctant to share their records and because accused doctors (especially those represented by attorneys) may resist cooperating with the medical board investigators.[48] After obtaining the medical records, the medical board will often seek out and assign independent doctors to review those records to provide expert assessment.[49] The accused doctors can also retain their own experts. A hearing with witnesses and exhibits follows.[50] In the past, "hearings could be quite informal, but today such adjudicative hearings more closely resemble a non-jury trial in a civil court."[51] In some states, the hearing occurs before an administrative law judge who makes findings and sends a proposed decision to the state medical board.[52] The board then makes a decision whether to revoke the doctor's license. Thereafter, the doctor may be able to challenge the revocation in court.[53]

The revocation process is rife with challenges. A report by the U.S. Department of Health and Human Services on the efficacy of state medical boards noted that "Board staff must overcome barriers to obtaining medical

investigations/2018/12/20/how-database-doctor-records-should-fixed-help-patients/2356705002/ (Dec. 31, 2018).

44. *Id.*

45. RANDALL R. BOVBJERG, PABLO ALIAGA & JOSEPHINE GITTLER, U.S. DEP'T OF HEALTH & HUM. SERVS., STATE DISCIPLINE OF PHYSICIANS: ASSESSING STATE MEDICAL BOARDS THROUGH CASE STUDIES 22 (2006), https://aspe.hhs.gov/system/files/pdf/74616/stdiscp.pdf.

46. *Id.*

47. *See id.* at 24–28.

48. *See id.* at 36–37.

49. *See, e.g.*, *Enforcement Process*, TEX. MED. BD., http://www.tmb.state.tx.us/page/enforcement (last visited Feb. 25, 2021).

50. *See* BOVBJERG ET AL., *supra* note 45, at 27.

51. *Id.*

52. *See, e.g.*, *Disciplinary Process*, MED. BD. OF CAL., http://www.mbc.ca.gov/Enforcement/Disciplinary_Process.aspx (last visited Feb. 25, 2021).

53. *See, e.g.*, Leone v. Med. Bd. of Cal., 995 P.2d 191 (Cal. 2000).

records from physicians, [and] their own understaffing."[54] Because of the need for experts and testimony, a fully-contested revocation proceeding can cost more than $100,000.[55] Because of the steep costs of proving that a doctor failed to meet the standard of care, boards often focus on less serious offenses—such as failure to report information—that are easier to prove.[56]

Sixth, even when medical boards can navigate the process, there is still the problem of in-group bias and leniency toward colleagues. Medical boards are often comprised of physicians, and there is reason to believe that professionals are reluctant to rigorously discipline their colleagues. Studies of lawyers indicate that they are reluctant to turn in colleagues for ethics violations.[57] Critics make the same argument with respect to doctors, and with good reason.[58] A research study of doctors disciplined for criminal activity found that 67% of insurance fraud convictions and 36% of convictions related to controlled substances were associated with only non-severe discipline by medical boards.[59]

Think back to our hypothetical doctor, who was failing to conduct adequate examinations, falsifying patient charts, allowing others to use her prescription pad, and writing prescriptions to those engaged in drug-seeking behavior.[60] Although there are grounds in the New Jersey regulations to revoke her license, do you think that the medical board would do so? Based on the obstacles described above,[61] it seems more likely that our hypothetical doctor will keep her license.

To put it in a real-world context, consider the somewhat analogous case of Dr. Bruce Coplin of New Jersey. Undercover federal and state investigators posed as patients and video-recorded Dr. Coplin giving them opioids in spite of red flags.[62] The investigators found that Dr. Coplin would falsely record physical examinations that did not occur and would ignore patients' failure to complete x-rays he had ordered.[63] On two occasions, he "blithely ignored

54. BOVBJERG ET AL., *supra* note 45, at vii.

55. *See id.* at 40–41.

56. *See id.* at vii.

57. *See* Adam M. Gershowitz, *The Challenge of Convincing Ethical Prosecutors That Their Profession Has a* Brady *Problem*, 16 OHIO ST. J. CRIM. L. 307, 314–20 (2019); Adam M. Gershowitz, *Prosecutorial Shaming: Naming Attorneys to Reduce Prosecutorial Misconduct*, 42 U.C. DAVIS L. REV. 1059, 1084–88 (2009).

58. Fauber & Wynn, *supra* note 43 ("Physician Sidney Wolfe, a longtime critic of lax discipline by state boards, noted the panels are often made up largely of doctors, who can be sympathetic to those facing discipline.").

59. WOLFE ET AL., *supra* note 17, at 4; Paul Jung, Peter Lurie & Sidney M. Wolfe, *U.S. Physicians Disciplined for Criminal Activity*, 16 HEALTH MATRIX 335, 342 (2006).

60. *See supra* note 29 and accompanying text.

61. *See supra* notes 36–57 and accompanying text.

62. *See* Bruce Coplin, Order Imposing Temporary Limitations on Practice 4, 5 n.5 (N.J. Dep't of L. & Pub. Safety, Div. of Consumer Affs., State Bd. of Med. Examiners, Aug. 22, 2018), https://www.njconsumeraffairs.gov/Actions/20180822_25MA05198300.pdf.

63. *Id.* at 7.

direct statements made to him by undercover investigators that revealed that the 'patients' had engaged in diversion of pills."[64] For instance, Dr. Coplin ignored the undercover agent's statement that she had "sold some of her pills for rent money."[65] Additional investigation revealed that Dr. Coplin increased the quantity of opioids without conducting physical examinations and based only on the patients' subjective statements or requests for higher doses.[66] Dr. Coplin charged some patients $350 in cash for an initial visit and $125 for "extraordinarily short follow-up visits,"[67] which is a warning sign for improper prescribing. He also pre-signed prescription pads so that staff could fill in prescriptions for him.[68]

In light of this and additional evidence, the New Jersey Department of Consumer Affairs and the state Attorney General asked for Dr. Coplin's medical license to be temporarily suspended immediately.[69] As noted above, the New Jersey licensing rules provide numerous grounds for revoking a license under these circumstances.[70] The medical board agreed that he was a "clear and imminent danger"[71] but would only go so far as to forbid him from prescribing controlled substances.[72] Over the objections of the state Attorney General, the medical board allowed Dr. Coplin to continue practicing medicine.[73]

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In sum, medical boards have considerable regulatory authority to revoke the licenses of doctors engaged in misconduct. Yet, medical boards appear to take serious disciplinary action relatively rarely. Thus, when state medical boards revoke doctors' licenses for inappropriately prescribing opioids, there is likely a very strong case that the doctors have been prescribing dangerous drugs outside the usual course of professional practice and without a legitimate medical purpose. While criminal prosecution may not be appropriate in all of those cases, it is likely appropriate in many of them. As we shall see in Part III below, however, in many egregious cases in which medical boards revoked doctors' licenses for improper prescribing of opioids, prosecutors declined to bring charges against the doctors for unlawfully distributing controlled substances. Before turning to those cases though, Part II explores the law that allows doctors to *lawfully* distribute controlled substances, and the statutes and

64. *Id.*
65. *Id.*
66. *Id.* at 6.
67. *Id.* at 6 n.7.
68. *Id.* at 10 n.9.
69. *Id.* at 13–14.
70. *See supra* note 31 and accompanying text.
71. Bruce Coplin, *supra* note 62, at 8.
72. *Id.* at 13.
73. *See* S.P. Sullivan, *AG Cries Foul After N.J. Doctor Accused in Opioid Sting Keeps License*, NJ.COM, https://www.nj.com/politics/2018/09/ag_cries_foul_after_doctor_accused_in_sting_keeps.html (Jan. 29, 2019).

regulations that permit prosecutors to bring criminal charges against doctors for failing to comply with their statutory obligations.

II. THE CRIMINAL LAW AUTHORIZING PROSECUTION OF DOCTORS FOR INAPPROPRIATELY PRESCRIBING CONTROLLED SUBSTANCES

Although doctors are licensed to prescribe controlled substances, it is possible for them to do so in a way that violates federal and state criminal law.

The federal Controlled Substances Act makes it unlawful "for any person knowingly or intentionally . . . to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance."[74] However, another section of the federal criminal code specifies that

> Persons registered by the Attorney General under this subchapter to manufacture, distribute, or dispense controlled substances . . . are authorized to possess, manufacture, distribute, or dispense such substances or chemicals (including any such activity in the conduct of research) to the extent authorized by their registration and in conformity with the other provisions of this subchapter.[75]

Thus, if doctors are properly registered, they may possess and distribute drugs that ordinary citizens cannot.

Physicians' unique authority to prescribe drugs does not mean they are not subject to restrictions however. Federal regulations provide that for "[a] prescription for a controlled substance to be effective [it] must be issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice."[76] The federal regulations further provide that "[a]n order purporting to be a prescription issued not in the usual course of professional treatment or in legitimate and authorized research is not a prescription," and the person issuing it "shall be subject to the penalties provided for violations of the provisions of law relating to controlled substances."[77]

On their face, the regulations therefore indicate that doctors can be subject to criminal liability for drug distribution if they knowingly issue a prescription without a legitimate medical purpose outside the course of professional practice.[78] The Supreme Court embraced this interpretation over forty years ago in *United States v. Moore*.[79] In that case, a physician contended that his registration exempted him from criminal liability altogether under 21

74. 21 U.S.C. § 841(a).
75. 21 U.S.C. § 822(b).
76. 21 C.F.R. § 1306.04(a) (2020).
77. *Id.*
78. *See* Dineen & DuBois, *supra* note 10, at 30.
79. United States v. Moore, 423 U.S. 122 (1975).

U.S.C. § 841(a) (the primary section of the Controlled Substances Act), but the Court disagreed and held that registration only protected "lawful acts."[80]

In short, if doctors knowingly write prescriptions that are not for a legitimate medical purpose, they are subject to criminal liability. States have similar criminal liability regimes.[81] Of course, the term "legitimate medical purpose" is open-ended and far from clear.[82] Nevertheless, in the aftermath of *Moore*, courts have upheld § 841(a) drug distribution convictions when:

> the physician sells prescriptions; the prescriptions are issued without any prior, or an inadequate, physical examination of the patient; the prescription is written by physician to a fictitious patient or to a patient not present at the time the prescription was written; the physician is aware that the medication is not or will not be used for a medical purpose; the physician writes prescriptions for a patient too frequently; and the physician writes prescriptions for a large amount of controlled substances to an individual patient.[83]

Some observers have suggested that the defenses that physicians have asserted to drug distribution charges in the past seem to be less successful in recent cases. Two health lawyers have argued that "[r]isky prescribing without actively verifying patient suitability for controlled substances and without remaining vigilant throughout the course of treatment can result in [criminal liability]. . . . Physicians can no longer rely on the defenses of good faith, willful ignorance, trusting the patient, calculated risk, or lack of foreseeability" to avoid criminal liability.[84]

Some scholars have been critical of the more aggressive prosecutions of doctors under the Controlled Substances Act. For instance, Professor Deborah Hellman has argued that prosecutors' ability to bring criminal cases by asserting that physicians have been willfully blind forces doctors to choose between their professional duty to trust patients and a fear of criminal liability.[85] Over a decade ago, Professor Diane Hoffmann forcefully argued

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80. *Id.* at 131.

81. *See* Michael C. Barnes & Stacey L. Sklaver, *Active Verification and Vigilance: A Method to Avoid Civil and Criminal Liability When Prescribing Controlled Substances*, 15 DEPAUL J. HEALTH CARE L. 93, 103 (2013); Dineen & DuBois, *supra* note 10, at 30.

82. *See* Deborah Hellman, *Prosecuting Doctors for Trusting Patients*, 16 GEO. MASON L. REV. 701, 707 (2009) (noting that the federal regulations are "problematic in application because of the failure to provide clear standards to determine when a doctor is practicing medicine and when he is not"); Katherine Goodman, Note, *Prosecution of Physicians as Drug Traffickers: The United States' Failed Protection of Legitimate Opioid Prescription Under the Controlled Substances Act and South Australia's Alternative Regulatory Approach*, 47 COLUM. J. TRANSNAT'L L. 210, 225–26 (2008).

83. Danielle M. Nunziato, Note, *Preventing Prescription Drug Overdose in the Twenty-First Century: Is the Controlled Substances Act Enough?,* 38 HOFSTRA L. REV. 1261, 1285–86 (2010) (footnotes omitted).

84. Barnes & Sklaver, *supra* note 81, at 143–44 (footnotes omitted). Physicians can still invoke a good faith defense, but the law is unsettled on the scope of the good faith defense. *See* Goodman, *supra* note 82, at 231–35, 243 (reviewing court decisions and arguing that an objective test "impermissibly lowers the criminal standard into a finding of little more than medical malpractice").

85. *See* Hellman, *supra* note 82, at 702.

that prosecutors were too aggressive in bringing criminal charges against doctors who prescribed opioids.[86] She explained that allowing a physician to be convicted for prescribing without a legitimate medical purpose and outside the usual course of her professional practice:

> harms not only the physicians who are arguably wrongly accused but also the patients of these physicians and other individuals who suffer from chronic pain. Because many physicians fear criminal sanctions for prescribing opioids, pain sufferers may not be able to receive adequate pain care. The law enforcement climate surrounding prescribing opioid analgesics appears to be causing some physicians to stop prescribing opioids or stop treating chronic pain patients, reducing an already very small number of physicians willing to treat these needy patients. As a result, the physicians who continue to see patients with chronic pain also make themselves an easy target for law enforcement officials.[87]

Since Professor Hoffmann's article in 2008, the opioid crisis has exploded beyond what anyone could have predicted. Although hard numbers are difficult to come by, it appears that as greater attention to the crisis has increased, so too have prosecutions.[88] Nevertheless, this does not mean that prosecutors have been overly aggressive or even sufficiently aggressive in targeting doctors who have misprescribed opioids. As Part III details below, there have been many instances in which state medical boards suspended or revoked doctors' licenses but in which prosecutors did not bring criminal charges.

III. REVOKING DOCTORS' LICENSES BUT NOT PROSECUTING

Over the last few years, state medical boards[89] have revoked the licenses of scores of doctors because of the way they prescribed opioids. In many of these revocations it seems clear that the state medical boards believed that the doctors misprescribed opioids and therefore did not act with a legitimate medical purpose in the usual course of professional practice. State medical boards have revoked doctors' licenses for, inter alia, prescribing too many pills,[90] prescribing pills without physical examinations,[91] prescribing

86. Diane E. Hoffmann, *Treating Pain v. Reducing Drug Diversion and Abuse: Recalibrating the Balance in Our Drug Control Laws and Policies*, 1 ST. LOUIS U. J. HEALTH L. & POL'Y 231, 235 (2008) [hereinafter Hoffmann, *Treating* Pain]; *see also* Diane E. Hoffmann, *Physicians Who Break the Law*, 53 ST. LOUIS U. L.J. 1049, 1070 (2009) (criticizing some prosecutions and law enforcement tactics).

87. Hoffmann, *Treating Pain*, *supra* note 86, at 235 (footnote omitted).

88. *See* Alyssa M. McClure, Note, *Illegitimate Overprescription: How* Burrage v. United States *Is Hindering Punishment of Physicians and Bolstering the Opioid Epidemic*, 93 NOTRE DAME L. REV. 1747, 1748 (2018).

89. States have a variety of names for the administrative bodies that license and discipline doctors. For ease of exposition, when not talking about a specific entity, I simply use the term "medical board."

90. *See supra* Part III.A.

91. *See supra* Part III.B.

inappropriate types of opioids,[92] and for selling pills for cash or sex,[93] to name just a few common scenarios. In many cases where the medical boards revoked licenses, there also appears to be a compelling basis upon which prosecutors could bring criminal charges for distributing controlled substances.

This Part analyzes more than two dozen recent cases in which medical boards revoked or suspended doctors' licenses but for which there was no criminal prosecution. To be clear, this is not an exhaustive list of cases. In some states, it is very difficult to discover when doctors have been disciplined for improper prescribing. Thus, there are likely many cases of doctors being disciplined for opioid prescribing that are not publicly known. The cases that follow are those that have been the subject of media reporting.

To offer a baseline, I begin in Part III.A with cases in which the medical boards seemingly revoked the doctors' license for negligence and for which a criminal prosecution for controlled substances distribution would therefore have been inappropriate. Thereafter, I move to more worrisome cases in which a prosecutor could have considered a criminal prosecution. As in the rest of the criminal justice system, the strength of the cases varies. In some, the actions of the doctors are so egregious that they seem to cry out for criminal prosecutions. In others, it would be more challenging for prosecutors to convince a jury that the doctors knowingly issued a prescription without a legitimate medical purpose outside the course of professional practice. My point here is not to argue that all of these cases would be slam dunk criminal prosecutions. There are likely reasons—both apparent from the news reports and unknown to the general public—that some of the cases described below would be difficult to prosecute. Thus, to be very clear, I am not suggesting that every one of the doctors below should have been criminally prosecuted. Nor am I arguing that prosecutors never mistakenly bring charges against defendants who should not have been swept up in the criminal justice system. Instead, I am seeking to make a descriptive claim at a broad level: The cases detailed below indicate that, as a general matter, prosecutors are erring on the side of non-prosecution for doctors involved in the opioid crisis.

A. NEGLIGENT MEDICAL PRACTICE

Before delving into the cases with more egregious facts, I want to pause to distinguish "traditional" medical negligence cases. It may offer some perspective to consider a few cases in which doctors lost their licenses for being sloppy or exercising poor medical judgment. To put matters simply, these cases seem not as bad as the behavior of the doctors in the Subparts below. As such, it is not surprising that we do not see criminal prosecutions arising out of these cases.

92. *See supra* Part III.C.
93. *See supra* Part III.E.

For instance, in 2017, the Kentucky Medical Board revoked Dr. David Swan's medical license in large part because he was prescribing inappropriately high doses of Suboxone, specifically the drug buprenorphine.[94] That drug is a partial agonist that blocks opioid receptors in the brain.[95] At twenty-four milligrams, all of the receptors in the brain will be blocked and thus additional dosing is fruitless and poses an unnecessary danger.[96] Yet, Dr. Swan prescribed patients thirty-two milligrams of the drug.[97] A doctor who consulted for the Kentucky Medical Board described Dr. Swan's dosing of the drug to show "gross ignorance of the applicable standards."[98] However, nothing in the Medical Board's lengthy order revoking Dr. Swan's license indicated criminal activity.

Even when deaths occurred, it is possible that the cases merit action by the medical board but not prosecutors. For example, the State of Washington suspended the license of Dr. Ann Kammeyer because she was improperly prescribing opioids in potentially lethal doses and in dangerous combinations of drugs.[99] In fact, two of her patients died.[100] Although, Dr. Kammeyer was a family physician rather than a pain management specialist, over fifty percent of her patients saw her for pain.[101] The state medical commission found that Dr. Kammeyer was "prescribing pain medications to patients with insufficient and often missing diagnoses, treatment plans, charting, monitoring, pain management referrals and insufficient safeguards to minimize the risk of drug diversion and abuse."[102] The medical board's findings paint a picture of a doctor who was negligently prescribing opioids, but not one who was knowingly prescribing drugs with no legitimate medical purpose.[103]

These cases are frightening but probably not criminal. While the doctors should not have been writing the opioid prescriptions they issued, there is no evidence that they knew there was no legitimate medical purpose for the prescriptions. The cases detailed below present factual situations that would more easily lend themselves to criminal prosecution.

94. *See* David S. Swan, M.D., Order of Revocation Case No. 1746, at 7 (Ky. Bd. of Med. Licensure, Feb. 17, 2017), http://www.state.ky.us/agencies/kbml/finalorders/15641.pdf.

95. *Id.*

96. *Id.* at 7–8.

97. *Id.* at 15.

98. *Id.*

99. *See* Jennifer Sullivan, *Marysville Doctor's License Suspended After 2 Patient Deaths*, SEATTLE TIMES (Sept. 12, 2015), https://www.seattletimes.com/seattle-news/health/marysville-doctor/.

100. *Id.*

101. *Id.*

102. Sharon Salyer, *Marysville Doctor Loses License over Opioid Prescriptions*, HERALDNET (Feb. 8, 2016, 9:44 PM), https://www.heraldnet.com/news/marysville-doctor-loses-license-over-opioid-prescriptions/.

103. *See* 21 C.F.R. § 1306.04(a) (2020).

B. PRESCRIBING INAPPROPRIATE QUANTITIES OF DRUGS

In many cases, doctors were caught prescribing far too many pills or prescribing doses that far exceeded the standard of care. Yet, in a number of recent cases, prosecutors have declined to bring charges even though medical boards have revoked doctors' licenses.

Dr. Joel Glass—a psychiatrist—lost his medical license after prescribing massive quantities of opioids.[104] The New Jersey State Medical Board found that he prescribed more than 33,000 oxycodone pills to a single patient in a period of roughly two years without conducting any physical examinations.[105] That amounts to roughly forty pain pills per day. In another case, he prescribed over 42,000 pills to one patient over a five-year period without conducting a physical examination or any diagnostic tests.[106]

The Drug Enforcement Administration (DEA) was involved in the investigation of Dr. Glass, and the New Jersey Attorney General commented that a patient "could not have taken all the drugs allegedly prescribed to him by this doctor and survived."[107] Despite the DEA's involvement and the strong statement from the state Attorney General, there appears not to have been any federal or state criminal prosecution for controlled substances distribution.[108]

In another New Jersey case, the medical board revoked the license of Dr. Eddie Gamao for consistently prescribing excessive doses of opioids to more than 100 patients.[109] During a one-year period, he prescribed more than 150,000 units of OxyContin and exceeded recommended doses in 80% of the prescriptions.[110] Over a "one-year period, he prescribed more than 9,000 oxycodone pills in the strongest available" dosage to an 88-year-old woman and two members of her family.[111] The doses were more than triple what was recommended by the CDC.[112] There appears not to have been any state or federal prosecution.[113]

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104. *See* Celeste E. Whittaker, *Marlton Doctor's License Permanently Revoked*, COURIER POST (Nov. 16, 2017), https://www.courierpostonline.com/story/news/crime/2017/11/16/marlton-doctor-has-licensed-permanently-revoked-board-medical-examiners-permanently-revokes-license/871160001/.

105. *Id.*

106. *Id.*

107. Tom Davis, *South Jersey Doctor 32nd NJ Physician to Lose Job in Statewide Opioid Crackdown*, PATCH (May 24, 2017), https://patch.com/new-jersey/oceancity/32nd-n-j-doctor-loses-jobs-statewide-opioid-crackdown.

108. A search of federal and state criminal court dockets did not turn up criminal charges.

109. *See* Nick Muscavage, *Piscataway Doctor Loses Medical License for Overprescribing Painkillers*, MYCENTRALJERSEY.COM (Nov. 30, 2018, 3:04 PM), https://www.mycentraljersey.com/story/news/health/2018/11/30/dr-eddie-gamao-loses-medical-license-painkillers/2164068002/.

110. *Id.*

111. *Id.*

112. *Id.*

113. A search of federal and state criminal court dockets did not turn up criminal charges.

The Florida Medical Board eventually revoked the license of Dr. Mark Kantzler after a patient died during experimental stem cell treatments.[114] Previously, there had been medical malpractice lawsuits against him for accusations that he "overprescribed pain medication" to three patients who overdosed and died.[115] He was not prosecuted.[116]

In Tennessee, Dr. Michael Tittle—a dentist—agreed to give up his medical license after "admitting to giving about 200 opioid prescriptions to a handful of patients despite questionable justification in his medical records."[117] Dr. Tittle had written seventy-one opioid prescriptions—each with an average of ten pills—to a single patient in the span of six months.[118] In another case, Dr. Tittle had allegedly prescribed 110 tablets of opioids to an individual, even though there was "no documentation of the patient ever being seen in the office."[119] It appears he was not prosecuted.[120]

In Michigan, the Department of Licensing and Regulatory Affairs temporarily suspended the medical license of Dr. Zeyn Nez Seabron.[121] The regulatory body found that Dr. Seabron was at the very top of prescribers for oxycodone and oxymorphone in the entire state of Michigan.[122] During a nine-month period, he wrote 5,809 prescriptions for controlled substances, of which 99.19% were for oxycodone and oxymorphone.[123] Assuming a five-day work week, that amounts to roughly thirty prescriptions of opioids per day. During that time period, patients paid cash for 27.11% of the prescriptions, which is "several times the state average of approximately 10% for cash payment and suggests that prescriptions were filled for illegitimate purposes."[124] The drugs oxycodone and oxymorphone are often diverted.[125] Neither federal nor state prosecutors have brought charges against Dr. Seabron.[126]

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114. Stephen Hobbs, *Florida Takes Away License of Doctor with Troubled Past*, S. FLA. SUN SENTINEL (Nov. 17, 2017, 3:20 PM), https://www.sun-sentinel.com/health/fl-doctor-discipline-kantzler-20171117-story.html.

115. *Id.*

116. A search of federal and state criminal court dockets did not turn up criminal charges.

117. Brett Kelman, *Tennessee Dentist Wrote 71 Opioid Prescriptions to a Single Patient in Just Six Months*, TENNESSEAN (Nov. 15, 2018, 12:17 PM), https://www.tennessean.com/story/money/2018/11/15/opioids-tennessee-dentist-prescription-abuse/2011601002/.

118. *Id.*

119. *Id.*

120. A search of federal and state criminal court dockets did not turn up criminal charges.

121. Zeyn Nez Seabron, M.D., Order of Summary Suspension (Mich. Dep't of Licensing & Regulatory Affs., Bureau of Pro. Licensing, Bd. of Med., Disciplinary Subcomm., June 21, 2018), https://www.michigan.gov/documents/lara/Seabron_626409_7.pdf.

122. *Id.* at 3–4.

123. *Id.* at 3.

124. *Id.*

125. *See* Jacob A. Lebin, David L. Murphy, Stevan Geoffrey Severtson, Gabrielle E. Bau, Nabarun Dasgupta & Richard C. Dart, *Scoring the Best Deal: Quantity Discounts and Street Price Variation of Diverted Oxycodone and Oxymorphone*, 28 PHARMACOEPIDEMIOLOGY & DRUG SAFETY 25, 25–26 (2019).

126. A search of federal and state criminal court dockets did not turn up criminal charges.

The Arkansas Medical Board suspended the license of two pain clinic doctors who at one time practiced together.[127] In a search warrant for their office, the DEA alleged that the two doctors wrote a combined total of two million doses of opioids in just a two-year period.[128] Dr. Donald Hinderliter prescribed more than 800,000 doses of opioids to just 462 patients.[129] Worse yet, Dr. Cecil Gaby prescribed more than 1.1 million doses of opioids to only 347 patients. Four of their patients died from overdoses.[130] According to a news report, a former patient of Dr. Gaby said that he "runs a pill mill . . . a person can obtain any amount of pharmaceutical narcotics. This is known to everyone in the pill world."[131] Wal-Mart pharmacies had placed both doctors on a "Do Not Fill List."[132] Although the DEA executed a search warrant, which was unsealed in November 2018, and Dr. Gaby had his license suspended,[133] to date there have been no criminal charges.[134]

C. PRESCRIBING INAPPROPRIATE TYPES OF DRUGS

The tragedy of the opioid crisis is not just patients with no need for opioids receiving them. For many patients in severe pain, opioids may have been appropriate. But there are different types of opioid drugs.[135] Some painkillers are incredibly powerful and are not intended for traditional pain.[136] Nevertheless, drug companies pushed these powerful painkillers for the mainstream marketplace even though they were not approved for that purpose.[137] To help them, the pharmaceutical companies hired doctors as speakers and thought leaders.[138] These doctors became top prescribers of the powerful opioids and doled them out to patients who likely did not need such powerful and dangerous drugs.[139]

The case of Dr. Kenneth Sun is a good example of a doctor who seemingly could have been prosecuted by either state or federal prosecutors for distributing the wrong type of controlled substance. Between 2012 and 2016,

127. *See* Dave Hughes, *2nd Arkansas Doctor in Pain-Pill Case Loses His License*, ARK. DEMOCRAT GAZETTE (Feb. 14, 2019, 4:30 AM), https://www.arkansasonline.com/news/2019/feb/14/2nd-physician-in-pain-pill-case-loses-h/.

128. *Id.*

129. *Id.*

130. *Id.*

131. *Federal Investigators Claim Local Doctors Over Prescribed Opioids, Causing 4 Patient Deaths*, KFSM 5NEWS (Nov. 27, 2018), https://5newsonline.com/2018/11/27/federal-investigators-claim-local-doctors-over-prescribed-opioids-causing-4-patient-deaths/.

132. *Id.*

133. *Id.*

134. *Id.* A search of federal and state criminal court dockets did not turn up criminal charges.

135. *See* Evan Hughes, *The Pain Hustlers*, N.Y. TIMES MAG. (May 2, 2018), https://www.nytimes.com/interactive/2018/05/02/magazine/money-issue-insys-opioids-kickbacks.html.

136. *See id.*

137. *See id.*

138. *See id.* (describing how Insys, an Arizona pharmaceutical company whose only product was Subsys, a highly potent opioid, pursued and hired doctors to be speakers).

139. *See id.*

Dr. Sun prescribed Subsys—an extremely powerful fentanyl-based opioid painkiller approved only for cancer patients—to nearly 800 patients who did not have cancer.[140] Subsys is so powerful that it "is up to 100 times more potent than morphine."[141] It simply should not be used for patients suffering traditional pain. In a review of the medical records for eight of Dr. Sun's patients, the medical board found that:

> Sun failed to periodically make reasonable effort to stop the use of the prescribed opioid or to take any other steps in an effort to reduce the potential for abuse or the development of physical or psychological dependence. Moreover, Respondent failed to keep accurate and complete medical records for each of the eight Subsys patients at issue, and in some instances maintained within his patient record documentation which mischaracterized the patients' diagnoses and/or the etiology of their pain.[142]

The nearly 800 Subsys prescriptions generated almost $5 million in revenue for the drug's manufacturer.[143] At the same time, the manufacturer paid Dr. Sun over $117,000 in speaking and consulting fees related to the drug.[144]

The medical board temporarily suspended Dr. Sun's license in December 2016, and nearly two years later, it revoked his license altogether.[145] In New Jersey, the civil arm of the Attorney General's Office appeared before the medical board to advocate for discipline, and the Attorney General repeatedly commented about Dr. Sun's case. Nearly a year before Dr. Sun's license was permanently revoked, the Attorney General said "[t]his kind of profit-based drug dispensing is what you'd expect from a street-corner dealer, not a trusted health care provider."[146] And at the time of the license revocation, the Attorney General's office patted itself on the back by explaining, "Dr. Sun pushed a dangerous opioid painkiller on patients who didn't need it and weren't approved to receive it. The revocation of Dr. Sun's license is simply the latest in a growing list of actions we are taking against the doctors who have fueled this public health crisis."[147]

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140. Press Release, N.J. Off. of the Att'y Gen., NJ Board of Medical Examiners Revokes License of Doctor Who Accepted $117,000 from Drug Maker to Prescribe Highly-Restricted Painkiller "Subsys" to Patients for Whom the Drug Was Not Intended (Sept. 10, 2018), https://nj.gov/oag/newsreleases18/pr20180910b.html.

141. Gabrielle Emanuel & Katie Thomas, *Top Executives of Insys, an Opioid Company, Are Found Guilty of Racketeering*, N.Y. TIMES (May 2, 2018), https://www.nytimes.com/2019/05/02/health/insys-trial-verdict-kapoor.html.

142. Press Release, *supra* note 140.

143. *Id.*

144. *Id.*

145. *Id.*

146. S.P. Sullivan, *'Keep Them Rolling': N.J. Doctor Accused of Pushing Dangerous Painkiller on Patients*, N.J.COM, https://www.nj.com/politics/2017/10/keep_them_rolling_nj_doctor_accused_of_pushing_dan.html (Jan. 16, 2019).

147. *See* Press Release, *supra* note 140.

Yet, despite taking credit for revoking the licenses of dangerous doctors like Dr. Sun, the New Jersey Attorney General never brought a criminal prosecution for controlled substances violations against him. Nor did federal prosecutors.[148] The only criminal charges brought against Dr. Sun was a June 2019 indictment for taking bribes and kickbacks from the manufacturer of the opioid Dr. Sun prescribed.[149]

Nor was Dr. Sun the only New Jersey doctor to prescribe inappropriate drugs. Indeed, some doctors prescribed opioids even though they did not see patients for pain management. For instance, the New Jersey State Board of Medical Examiners suspended the license of a podiatrist after discovering that he had prescribed medication unrelated to podiatry to thirteen patients.[150] Dr. James Ludden prescribed large quantities of fentanyl and other drugs to a patient, and he also wrote prescriptions for the patient's 93-year-old mother, even though Dr. Ludden never examined her.[151] Fentanyl is an incredibly powerful opioid that is thirty to fifty times more powerful than heroin.[152] In 2016, fentanyl was responsible for one-third of the nearly 65,000 fatal opioid overdoses in the United States.[153] Fentanyl was, most famously, responsible for the overdose deaths of musicians Tom Petty and Prince.[154] Dr. Ludden's patient, who was prescribed fentanyl, was later found dead in a hotel room at his son's wedding.[155] Neither federal nor state prosecutors brought criminal charges against the podiatrist for improperly prescribing one of the most powerful opioids on the market.[156]

D. PRESCRIBING OPIOIDS TO PATIENTS WHO EXHIBITED DRUG-SEEKING BEHAVIOR

Doctors must be cautious not to give drugs to patients who will "divert" them or otherwise abuse the drugs. For instance, if a doctor believes that a patient is selling the drugs to other individuals, the physician should obviously

148. A search of federal and state criminal court dockets did not turn up criminal charges.

149. *New Jersey/Pennsylvania Doctor Indicted for Accepting Bribes and Kickbacks from Pharmaceutical Company in Exchange for Prescribing Powerful Fentanyl Drug*, U.S. DEP'T OF JUST. (June 25, 2019), https://www.justice.gov/opa/pr/new-jerseypennsylvania-doctor-indicted-accepting-bribes-and-kickbacks-pharmaceutical-company. Dr. Sun plead guilty to these charges in November 2019. *New Jersey/Pennsylvania Doctor Pleads Guilty to Accepting Bribes and Kickbacks in Exchange for Prescribing Powerful Fentanyl Drug*, U.S. DEP'T OF JUST. (Nov. 22, 2019), https://www.justice.gov/opa/pr/new-jerseypennsylvania-doctor-pleads-guilty-accepting-bribes-and-kickbacks-exchange.

150. James Ludden, D.P.M., Consent Order of Temporary Suspension of License and NJ CDS Registration 2 (N.J. Dep't of L. & Pub. Safety, Div. of Consumer Affs., State Bd. of Med. Examiners, Oct. 28, 2016), https://www.njconsumeraffairs.gov/Actions/20161028_25MD00212700.pdf.

151. *Id.*

152. David Browne, *Music's Fentanyl Crisis: Inside the Drug that Killed Prince and Tom Petty*, ROLLING STONE (June 20, 2018, 2:51 PM), https://www.rollingstone.com/music/music-features/musics-fentanyl-crisis-inside-the-drug-that-killed-prince-and-tom-petty-666019/.

153. *Id.*

154. *See id.*

155. *See* James Ludden, D.P.M., *supra* note 150.

156. A search of federal and state criminal court dockets did not turn up criminal charges.

not issue another prescription. Similarly, if the doctor believes a patient is addicted and is not following dosing instructions, the doctor should not continue to write prescriptions. Medical boards have revoked the licenses of doctors who prescribed opioids to patients exhibiting diversionary or drug-seeking behavior. Prosecutors, in some cases, have declined to bring criminal charges.[157]

The Virginia Board of Medicine revoked the license of Dr. Brian Bittner because he continued to prescribe drugs to patients who exhibited addictive behavior.[158] For instance, a patient repeatedly and unconvincingly claimed that her OxyContin prescription had been stolen, yet Dr. Bittner continued to write her further pain medicine prescriptions.[159] For another patient with indications of substance abuse problems, Dr. Bittner "continued to prescribe abusable controlled substances . . . after [the patient] had been voluntarily committed or self-admitted for inpatient and outpatient substance abuse."[160] In a review of seventeen patient files, the medical board documented numerous other instances in which Dr. Bittner prescribed opioids to patients who had implausible claims that their previous prescriptions were lost, stolen, or that their medication otherwise ran out prematurely.[161] Neither federal nor state prosecutors brought criminal charges.[162]

In Oklahoma, the State Board of Medical Licensure and Supervision revoked the license of Dr. Tamerlane Rozsa, who was the state's number one prescriber of promethazine and codeine.[163] Codeine is an opiate and, when mixed with soda, is known on the street as "lean."[164] Dr. Rozsa was known as the "Queen of Lean."[165] The evidence presented during her license revocation hearing demonstrated that she "supplied drug dealers and drug abusers with prescriptions."[166] The evidence supported the conclusion that Dr. Rozsa

157. Some scholars would applaud the lack of criminal charges in this Subpart because they believe doctors should not be prosecuted for trusting their patients. For instance, Professor Deborah Hellman has argued that these cases often involve negligence by the doctor or a prosecution theory of willful blindness and that holding doctors criminally responsible for distribution under those circumstances is unfair. *See* Hellman, *supra* note 82, at 704; *see also* Dineen & DuBois, supra note 10, at 17 ("Labeling physicians as misprescribers for merely being fooled is improper.").

158. Michael Thompson, *Hanover Doctor's License Ordered to Be Revoked*, RICHMOND TIMES-DISPATCH (Nov. 7, 2016), https://richmond.com/news/local/hanover/article_5959111a-12f6-572b-8e56-77fe742a8c23.html.

159. *See id.*

160. *Id.*

161. Brian Christopher Bittner, M.D., Order Case Nos. 160076, 170834 & 171883 (Va. Bd. of Med., Oct. 31, 2016), http://www.dhp.virginia.gov/Notices/Medicine/0101230106/0101230106Order10312016.pdf.

162. A search of federal and state criminal court dockets did not turn up criminal charges.

163. Randy Ellis, *Court Upholds License Revocation for Tulsa Doctor Accused of Overprescribing*, OKLAHOMAN (Sept. 18, 2017, 5:00 AM), https://oklahoman.com/article/5564308/court-upholds-license-revocation-for-tulsa-doctor-accused-of-overprescribing.

164. *See id.*; Roy Cherian, Marisa Westbrook, Danielle Ramo & Urmimala Sarkar, *Representations of Codeine Misuse of Instagram: Content Analysis*, 4 JMIR PUB. HEALTH & SURVEILLANCE, 2018, at 1, 4.

165. Ellis, *supra* note 163.

166. *Id.*

"disregarded urine samples indicating patients with prescriptions were not taking their prescriptions but were using them for other purposes."[167] According to a news report, Dr. Rozsa "saw patients at all hours of the night and prescribed potentially lethal dosages of what patients requested, not what was medically necessary. She accepted only cash."[168] Although her license was revoked, prosecutors did not bring criminal charges.[169]

E. SEX WITH PATIENTS

Physicians across the country have lost their licenses for having sex with patients.[170] Some of these doctors were simultaneously prescribing opioids while engaging in sexual relationships with patients.

In Maryland, Dr. Joseph Randall surrendered his medical license (rather than contest the medical board charges) after allegations from multiple women that he exchanged opioid prescriptions for sex.[171] A patient with a history of drug abuse told investigators that Dr. Randall "demanded sex in exchange for writing prescriptions for controlled dangerous substances" and that "[p]harmacy records show[ed] that Randall continued to write the woman more than 40 prescriptions for controlled dangerous substances between October 2012 and October 2014, even after the woman had been discharged from the practice."[172] In addition to demanding sex from women in exchange for narcotics, the medical board also accused Dr. Randall of "over-prescribing controlled-dangerous substances, keeping inadequate records, and not adequately recommending alternate forms of pain management such as physical therapy."[173] No criminal charges were filed based on his opioid prescribing.[174]

In Tennessee, Dr. Frederick Hodges lost his license for having sex with patients and writing improper opioid prescriptions. According to the local newspaper, "Hodges' actions violated the Tennessee Medical Practice Act, which prohibits dispensing controlled substances not in the course of

167. *Id.*

168. Shannon Muchmore, *Tulsa Doctor's License Suspended After Dangerous Prescribing Methods Found*, TULSA WORLD, https://tulsaworld.com/news/local/tulsa-doctor-s-license-suspended-after-dangerous-prescribing-methods-found/article_ce0184cb-1aa8-56be-9b0b-6698aa6d45ef.html (Feb. 13, 2019).

169. A search of federal and state criminal court dockets did not turn up criminal charges.

170. *See* Michael R. Flaherty, Annotation, *Improper or Immoral Sexually Related Conduct Toward Patient as Ground for Disciplinary Action Against Physician, Dentist, or Other Licensed Healer*, 59 A.L.R.4th 1104 (1988 & Supp. 2020).

171. Daniel Leaderman, *Md. Doctor Surrenders License After Sex-for-Drugs Claims*, DAILY REC. (Aug. 29, 2016), https://thedailyrecord.com/2016/08/29/md-doctor-surrenders-license-after-sex-for-drugs-claims.

172. *Id.*

173. *Id.*

174. *See id.* A search of federal and state criminal court dockets since that time did not turn up criminal charges.

professional treatment and not keeping proper records."[175] He was not prosecuted.[176]

F. PRESCRIBING DRUGS WITHOUT EXAMINATION

Some doctors have prescribed opioids without conducting any physical examinations or diagnostic imaging tests. In some cases, it appears the doctors were simply selling drugs out of their offices—patients would pay a fee (ostensibly for the office visit) and leave with an opioid prescription. In other instances, doctors were generally running reputable medical practices but over-prescribing to some patients.

For instance, in July 2014, Dr. Binod Sinha was caught on video selling an opioid prescription to an undercover investigator for $200 in cash.[177] Thereafter, when investigators sought information on that patient, Dr. Sinha created a fake medical record.[178] Eventually, in December 2017—more than three years after being caught on tape—the New Jersey Board of Medical Examiners revoked his license.[179] The medical board found that he had engaged in "egregious misconduct" and "wildly indiscriminate prescribing."[180] While the board ordered Dr. Sinha to pay over $200,000 in civil fines and reimbursements,[181] it does not appear that state or federal prosecutors brought any criminal charges.[182]

As detailed in Part III.G below (which discusses doctors engaging in multiple types of misprescribing), the failure to conduct any physical or diagnostic examination runs hand-in-hand with other serious violations of the standard of care. For instance, doctors who fail to conduct physical examinations also often prescribe too many pills or allow nurses and staff to write prescriptions on their behalf. Part III.H below describes these multi-factored cases.

G. NUMEROUS INAPPROPRIATE ACTS, INCLUDING PRESCRIBING INAPPROPRIATE QUANTITIES AND TYPES OF DRUGS AND CONDUCTING NO EXAMINATIONS

Some doctors have violated the standard of care in so many ways that their cases defy categorization. This Subpart combines those cases together

175. Ron Maxey, *Whitehaven OB/GYN Loses License for Having Sex with More Than 10 Patients*, COM. APPEAL (Nov. 17, 2017), https://www.commercialappeal.com/story/news/2017/11/17/whitehaven-ob-gyn-loses-license-having-sex-more-than-10-patients/875802001/.

176. A search of federal and state criminal court dockets did not turn up criminal charges.

177. Susan Loyer, *Middlesex County Pain Management Doctor's License Revoked*, MY CENTRAL JERSEY (Dec. 22, 2017, 2:02 PM), https://www.mycentraljersey.com/story/news/crime/2017/12/22/middlesex-county-pain-management-doctors-license-revoked/976408001/.

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.*

182. A search of federal and state criminal court dockets did not turn up criminal charges.

under the heading of "numerous inappropriate acts." Notably the number of doctors engaged in numerous inappropriate acts far exceeds the number of cases in the other categories discussed above.

The case of Judson Somerville is particularly egregious. Dr. Somerville operated pain clinics in Laredo and Corpus Christi, Texas, though he failed to properly register the clinics with the state medical board.[183] In an audit of Dr. Somerville's records, the Texas Medical Board found that 201 of 219 patients seen at the Corpus Christi location in June 2013 received a prescription for opioids or other pain drugs.[184] Dr. Somerville authorized and permitted his employees to use pre-signed prescription pads to issue Schedule II controlled substances while he was on vacation.[185] Records from Wal-Mart and Walgreens demonstrated that those pharmacies "filled dozens of prescriptions issued and refills authorized in [Dr. Somerville's] name, most of them for opioids and other pain medications during weeks . . . when [Dr. Somerville] was on vacation and away from his clinics."[186] The medical board's investigation found that Dr. Somerville failed to conduct adequate medical histories of his patients and failed to perform any physical examinations on patients after their first visits, "even when they reported new locations or triggers for the pain."[187] He diagnosed some patients with lumbar disc disorders with myelopathy (essentially, a spinal cord injury)[188] without doing imaging studies.[189] The board further found that Dr. Somerville "made diagnoses that did not seem to correspond to any of the chief complaints or physical examination findings."[190]

In an audit of sixteen patients, the board found that Dr. Somerville had prescribed "large doses of potent opioids to nearly every patient, at nearly every visit."[191] Although the standard of care required chronic pain patients to be seen at least monthly, patients went several months between visits.[192] Dr. Somerville instead did much of his prescribing by phone, making it impossible to tell how phoned-in prescriptions related to patients' treatment plans.[193]

The board also found that Dr. Somerville "habitually increased medications and/or dosages even though there was little evidence that opioid

183. Judson Jeffrey Somerville, M.D., Final Order 2 (Tex. Med. Bd., Aug. 25, 2017), https://public.tmb.state.tx.us/BoardOrders/ViewBoardOrders.aspx?ID_NUM=313217&SESSION_ID=101907 2360 (follow "8/25/2017" hyperlink).

184. *Id.* at 3.

185. *Id.*

186. *Id.* at 4.

187. *Id.* at 6–7.

188. "Myelopathy is an injury to the spinal cord due to severe compression that may result from trauma, congenital stenosis, degenerative disease or disc herniation." *Myelopathy*, JOHNS HOPKINS MED., https://www.hopkinsmedicine.org/health/conditions-and-diseases/myelopathy (last visited Feb. 25, 2021).

189. *See* Judson Jeffrey Somerville, M.D., *supra* note 183, at 7.

190. *Id.*

191. *Id.* at 8.

192. *Id.*

193. *Id.*

therapy was effective at relieving their pain and improving their functions."[194] Dr. Somerville "prescribed doses of some pain medications that were so high they posed a serious risk of toxicity and overdose to his patients."[195] For instance, in one of the audited patient files, Dr. Somerville prescribed 550 doses of injectable Demerol over a five-month period even though Demerol is so dangerous and addictive that some emergency rooms will not use it.[196]

The medical board found additional shocking facts. For instance, four of the sixteen patients reported that their medications had been stolen and requested early refills, which is a sign of drug abuse.[197] Five of the sixteen patients reviewed by the medical board "traveled long distances" to see him, which the board concluded "is a sign of potential abuse or diversion."[198] Finally, three of Dr. Somerville's patients died of drug overdoses within days of receiving prescriptions from him.[199]

At the same time that Dr. Somerville was engaged in all of the violations detailed above, he was paid $67,000 by the maker of Subsys[200]—the same powerful and addictive opioid for cancer treatment that contributed to revocation of other physicians' licenses.[201] Not surprisingly, Dr. Somerville was a top prescriber of Subsys.[202]

The Texas Medical Board revoked Dr. Somerville's license in 2017.[203] Despite the excessive prescribing, pre-signed prescription pads, three patient deaths, and numerous other violations, it does not appear that federal or state prosecutors have brought criminal charges.[204]

Other physicians have lost their licenses for prescribing inappropriate types and quantities of drugs. For instance, according to news reports, Dr. Mahmood Ahmad lost his Alaska medical license for inappropriately prescribing Subsys and for prescribing too many pills.[205] Dr. Ahmad dramatically increased his prescriptions of Subsys from fifty in total to 1,450 over a two-year period after being "wined and dined" and receiving large speaker fees from the manufacturer.[206] Dr. Ahmad had medical licenses in multiple locations and was spending one week a month in Alaska. The medical

194. *Id.* at 9.

195. *Id.*

196. *Id.*

197. *Id.* at 11.

198. *Id.* at 10.

199. *Id.*

200. *See* Katie Thomas, *Using Doctors with Troubled Pasts to Market a Painkiller*, N.Y. TIMES (Nov. 27, 2014), https://www.nytimes.com/2014/11/28/business/drug-maker-gave-large-payments-to-doctors-with-troubled-track-records.html#:~:text=Dr.,drug%20companies%20make%20to%20physicians.

201. *See supra* notes 140–144 and accompanying text.

202. *See* Thomas, *supra* note 200.

203. Judson Jeffrey Somerville, M.D., *supra* note 183.

204. A search of federal and state criminal court dockets did not turn up criminal charges.

205. Jill Riepenhoff, *Case Study: Dr. Mahmood Ahmad*, WAFF 48, https://www.waff.com/2018/08/22/case-study-dr-mahmood-ahmad/ (Aug. 22, 2018).

206. *Id.*

board alleged that he wrote 179 prescriptions in a three-day visit to Alaska.[207] Dr. Ahmad was not criminally prosecuted.[208]

The West Virginia Medical Board initially suspended and then three years later revoked the license of Dr. Phillip Fisher, who treated seven patients who fatally overdosed.[209] The medical board alleged that he was involved in sexual relationships with three women who he was prescribing drugs to.[210] One woman who lived with Fisher allegedly overdosed from a fentanyl patch that another patient had returned to Dr. Fisher.[211] The board also contended that Dr. Fisher prescribed multiple opioids to a woman "without monitoring her or ever giving her a urine drug screen or doing a pill count."[212] The board found that Dr. Fisher "developed and maintained a romantic relationship with that woman while she was his patient."[213] The board found that Dr. Fisher continued to prescribe opioids to patients who he knew were misusing the drugs.[214] In the case of another patient who died, the board found that Dr. Fisher prescribed opioids even though the patient missed several appointments and "was obtaining multiple prescriptions for controlled substances from other providers and using different pharmacies to fill them."[215] In yet another case, the board concluded that Dr. Fisher was prescribing drugs to a patient who he had not seen in almost a year and while knowing that the patient was obtaining painkillers from multiple doctors.[216] There is no record of a criminal prosecution against Dr. Fisher.[217]

The Illinois disciplinary board charged with overseeing physicians suspended the license of Dr. Raman Popli after a lengthy DEA investigation.[218] Investigators found that Dr. Popli prescribed more than 350,000 units of controlled substances over a two-year period.[219] When two undercover agents came to Dr. Popli's office complaining of soreness, he prescribed opioids to

207. Alex DeMarban, *Pain Doctor Defends His Practice in Effort to Save His License*, ANCHORAGE DAILY NEWS, https://www.adn.com/alaska-news/crime-justice/2016/05/27/pain-doctor-defends-his-practice-in-effort-to-save-his-license/ (June 27, 2016).

208. A search of federal and state criminal court dockets did not turn up criminal charges.

209. Natalie Belville, *WV Pain Clinic Physician Barred from Resuming Practice*, STATE J. (June 9, 2016), https://www.wvnews.com/statejournal/news/wv-pain-clinic-physician-barred-from-resuming-practice/article_5e51a1f2-81e8-5c39-81c1-886bf9853210.html.

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.*

214. *See id.*

215. *Id.*

216. *See id.*

217. A search of federal and state criminal court dockets did not turn up criminal charges.

218. Jordyn Reiland, *McHenry Doctor Has License Suspended After Federal Investigation Alleges He Overprescribed Pain Medication*, NORTHWEST HERALD (Mar. 15, 2017, 12:42 AM), https://www.nwherald.com/2017/03/14/mchenry-doctor-has-license-suspended-after-federal-investigation-alleges-he-overprescribed-pain-medication/ahlkjis/.

219. *Id.*

both of them without conducting a thorough examination or taking x-rays.[220] He also prescribed pain medications to 250 patients from out of state, which is a warning sign of improper prescribing.[221] There appears to be no record of state or federal prosecution against him.[222]

In 2017, the Oklahoma State Board of Medical Licensure and Supervision requested a hearing on Dr. Jan Rosnow—a pediatric anesthesiologist who was nevertheless collecting a salary in excess of $300,000 per year by working in pain management and hospice medicine.[223] The medical board alleged that Dr. Rosnow allowed office staff to write prescriptions for her without examining the patients.[224] The medical board alleged a slew of additional violations, including that Dr. Rosnow had written false or fictitious prescriptions for narcotics and indiscriminate and excessive prescribing of narcotics.[225] Rather than contest the allegations, Dr. Rosnow conceded that she lacked the ability to practice medicine and voluntarily surrendered her license.[226] It does not appear that prosecutors brought any criminal charges.[227]

In New Jersey, the medical board agreed to a consent order with Dr. Moishe Starkman in which he agreed to stop practicing medicine in exchange for avoiding monetary fines.[228] A twenty-two-year-old patient died after Dr. Starkman "prescribed Xanax and up to 240 pain pills per month over a three-year period without ever reassessing the man's dosage."[229] In the initial complaint seeking to revoke his license, the medical board noted that Dr. Starkman "routinely prescribed hundreds of opioid pills to patients—even to those who showed signs they may have been addicted to the drugs or were diverting them for illegal use."[230] The medical board contended that Dr. Starkman "gave one woman prescriptions to take one oxycodone pill every hour for an entire month, or 720 pills total."[231]

The acting director of the Consumer Affairs Division (an arm of the civil side of the Attorney General's Office) explained that "[i]f ever a case called for

220. *Id.*

221. *Id.*

222. A search of federal and state criminal court dockets did not turn up criminal charges.

223. Jan Marie Rosnow, M.D., Amended Verified Complaint Case No. 15-10-5226, at 2, 6 (Okla. State Bd. of Med. Licensure and Supervision, May 30, 2017), https://secure.okmedicalboard.org/subscriber/disc_pdfs/27462_2017_05_30_Jan_Rosnow_(2)_MD.pdf.

224. *Id.*

225. *Id.* at 5.

226. Jan Marie Rosnow, M.D., Voluntary Surrender of License in Lieu of Prosecution with Waiver of Right to Reapply Case No. 15-10-5226 (Okla. State Bd. of Med. Licensure and Supervision, July 25, 2017), https://secure.okmedicalboard.org/subscriber/disc_pdfs/27462_2017_07_24_Jan_Rosnow_MD.pdf.

227. A search of federal and state criminal court dockets did not turn up criminal charges.

228. *Doctor Gives Up License After Opioid Allegations*, CHERRY HILL COURIER-POST, https://www.courierpostonline.com/story/news/local/south-jersey/2018/04/17/opioid-doctor-moishe-starkman-bordentown-nj-loses-license/523395002/ (Apr. 20, 2018).

229. *Id.*

230. *Id.*

231. *Id.*

a permanent license revocation, it's this one."[232] The criminal side of the Attorney General's Office did not bring charges.[233]

In New Mexico, the medical board suspended (and eventually entered into an agreed voluntary license surrender) the license of Dr. John Flores.[234] The board alleged that over a one-year period he wrote prescriptions for more than 500,000 oxycodone pills.[235] Although located in Silver City, New Mexico (far from the borders of Arizona and Texas), he wrote prescriptions for patients in nine states that were filled in over 100 pharmacies.[236] In 2015, four of his patients who were prescribed large quantities of controlled substances died.[237] Neither state nor federal prosecutors appear to have brought criminal charges for controlled substances violations.[238]

Perhaps most emblematic of the failure to prosecute doctors for opioid drug distribution is the case of Dr. John Carl Ferrell, who practiced family medicine in Frisco, Texas, near Dallas.[239] On New Year's Day of 2018, police responded to a domestic disturbance call and found Dr. Ferrell and "a female patient who was partially undressed and incoherent."[240] Police also found 3.15 grams of cocaine and 1.5 grams of ecstasy and Dr. Ferrell claimed ownership of the drugs.[241] Nine months later, the Texas Medical Board suspended Dr. Ferrell's license.[242] The medical board focused in part on his arrest for the cocaine and ecstasy but gave considerably more attention to his misprescribing of opioids.[243] The board noted that although Dr. Ferrell was a family physician, he was effectively operating an unlicensed pain management clinic.[244] In a

232. *Id.*

233. A search of federal and state criminal court dockets did not turn up criminal charges.

234. John A. Flores, M.D., Stipulation and Order for Voluntary Surrender of License Case No. 2016-020 (N.M. Med. Bd., May 22, 2017), http://docfinder.docboard.org/nm_orders/Flores,%20John%20A.pdf.

235. John A. Flores, M.D., Notice of Summary Suspension Case No. 2016-020, at 1 (N.M. Med. Bd., May 12, 2016), http://docfinder.docboard.org/nm_orders/Flores,%20John%20A.pdf.

236. *Id.* at 2.

237. *Id.*

238. A search of federal and state criminal court dockets did not turn up criminal charges.

239. *See* John Carl Ferrell, M.D., Order of Temporary Suspension (Tex. Med. Bd., Sept. 14, 2018), https://profile.tmb.state.tx.us/Search.aspx?bbaa736e-7a25-40a6-b447-a080ef4f09d5 (type "Ferrell" in "Last Name" search bar and "Carl" in "First Name" search bar and click "Search"; then click "Ferrell, John Carl" hyperlink; then choose "Current Board Action"; then click "Complete Board Action History" hyperlink; then choose "Web Documents"; then click "9/14/2018" hyperlink).

240. Valerie Wigglesworth, *Frisco Doctor Suspended Over 'Continuing Threat' After Drug Arrest, High Number of Opioid Prescriptions*, DALLAS MORNING NEWS (Sept. 18, 2018, 6:37 PM), https://www.dallasnews.com/news/crime/2018/09/18/frisco-doctor-suspended-over-continuing-threat-after-drug-arrest-high-number-of-opioid-prescriptions/.

241. *Id.*

242. *Id.* A few months later, Dr. Ferrell agreed to permanently surrender his license rather than contest the disciplinary process. John Carl Ferrell, M.D., Agreed Order of Voluntary Surrender (Tex. Med. Bd., Dec. 7, 2018), https://profile.tmb.state.tx.us/Search.aspx?bbaa736e-7a25-40a6-b447-a080ef4f09d5 (type "Ferrell" in "Last Name" search bar and "Carl" in "First Name" search bar and click "Search"; then click "Ferrell, John Carl" hyperlink; then choose "Current Board Action"; then click "12/7/2018" hyperlink).

243. *See* John Carl Ferrell, M.D., *supra* note 239.

244. *See id.* at 3.

one-year period, Dr. Ferrell wrote 4,891 prescriptions for controlled substances, of which 92% were opioids.[245] Assuming 250 working days a year, that amounts to roughly eighteen opioid prescriptions per day being issued by a family physician. In an indication of drug-seeking behavior, patients were allegedly coming to see Dr. Ferrell from as far away as Oklahoma and Louisiana.[246] The board noted that "patients were coming to see [Dr. Ferrell] for the purpose of obtaining prescriptions for controlled substances from cities and towns located hundreds of miles from Frisco, Texas."[247] Based on the cocaine found during the domestic dispute, local prosecutors charged Dr. Ferrell with possession of a controlled substance.[248] Neither state nor federal prosecutors brought charges for the opioid distribution however.[249]

* * *

The more than two dozen cases described above are not the worst of the worst from the opioid crisis. Other physicians ran pill mills that distributed far greater numbers of pills and served hundreds of obviously addicted individuals.[250] Other doctors engaged in crystal clear transactions in which they sold opioids for cash as if they were operating a convenience store.[251] While the cases highlighted above are surely not as egregious as the worst offenders, neither can we deny that some of them involved drug dealing. In many of the cases described above, doctors clearly handed out prescriptions for dangerous, addictive drugs for which there was no legitimate medical purpose.

IV. LESS AGGRESSIVE PROSECUTIONS AGAINST DOCTORS

Over the last few years, prosecutors have brought many criminal cases against doctors. Some, as noted above, are aggressive prosecutions in which

245. *Id.* at 2.

246. *Id.*

247. *Id.* at 3.

248. Wigglesworth, *supra* note 240.

249. A search of federal and state criminal court dockets did not turn up criminal charges.

Another category of misconduct is doctors improperly prescribing drugs to family. Some of these cases have arisen in the opioid epidemic and not resulted in prosecution. For instance, the Alabama medical board temporarily suspended the license of Dr. Barry Lumpkins for, inter alia, prescribing controlled substances to his girlfriend and close family members. *See* Al Whitaker, *Shoals Doctor Has Medical License Suspended; State Board Says He Tested Positive for Oxycodone, Kept 'Home Stock' of Demerol*, WHNT NEWS 19 (Jan. 24, 2017), https://whnt.com/2017/01/24/shoals-doctor-has-medical-license-suspended-state-board-says-he-tested-positive-for-oxycodone-kept-home-stock-of-demerol/. The Pennsylvania medical board suspended the medical license of Dr. Daljit Singh because he prescribed numerous drugs including the opioid hydrocodone to a nurse he worked with and began dating. Dr. Singh also prescribed drugs to his girlfriend's daughter. *See* Theresa Clift, *Board Cites Prescriptions for Girlfriend in Suspending Pittsburgh Doctor*, TRIB LIVE (Aug. 1, 2017, 5:33 PM), https://archive.triblive.com/news/pittsburgh-allegheny/board-cites-prescriptions-for-girlfriend-in-suspending-pittsburgh-doctor/.

250. *See, e.g.*, Del Quentin Wilber, *12 Million Pills and 700 Deaths: How a Few Pill Mills Helped Fan the U.S. Opioid Inferno*, L.A. TIMES (June 14, 2019, 4:00 AM), https://www.latimes.com/nation/la-na-pol-pill-mills-linked-to-hundreds-of-deaths-20190614-story.html.

251. *See, e.g.*, Terry Spencer, *Florida 'Pill Mills' Were 'Gas on the Fire' of Opioid Crisis*, ASSOC. PRESS (July 20, 2019), https://apnews.com/article/0ced46b203864d8fa6b8fda6bd97b60e (discussing on-site pharmacies at pill mills that sold oxycodone at $10 per pill).

prosecutors threw the book at the doctors. In these cases, prosecutors brought numerous counts of distributing controlled substances and sought stiff sentences.[252] Other prosecutions are much less aggressive. As described below in Part IV.A, prosecutors have secured guilty pleas for drug distribution but agreed to plea bargains with light sentences. In other instances, as detailed in Part IV.B, prosecutors have taken the easier avenue of allowing defendants to plead to white-collar charges such as forgery, health care fraud, structuring, and tax crimes, rather than pressing forward and pursuing more serious drug distribution charges.

A. CONVICTIONS (BUT LIGHT PUNISHMENTS) FOR DEALING CONTROLLED SUBSTANCES

In the more egregious cases, prosecutors have brought charges against doctors for controlled substances violations. Even when the facts have been egregious and juries have convicted though, that does not mean there were lengthy sentences. In some cases, the punishments seem quite light and grossly out of line with the sentences for defendants peddling equally dangerous drugs on the street.

For instance, in Kokomo, Indiana, it was well known that the Waggoner Medical Clinic—owned by Dr. Donald and Dr. Marilyn Waggoner—was the place to go for opioids.[253] According to a prosecutor, "[i]f you wanted pills, you went to Waggoners. It was common knowledge."[254] Investigators found that many patients were receiving opioid prescriptions that were larger than necessary, and that twenty-seven patients linked to the clinic died from drugs.[255] Prosecutors brought a slew of charges—including controlled substances dealing charges—against four doctors and three physician assistants.[256] While multiple defendants were convicted, only Dr. Donald Waggoner received a prison sentence.[257] His sentence was only two years, and "[w]ith good time credit, the sentence amounted to a year in prison, but he was released with less than a year served."[258]

In Illinois, prosecutors brought charges of Medicare fraud and illegally prescribing controlled substances, including oxycodone, against Dr. Sathish

252. *See, e.g.*, Press Release, U.S. Att'y's Off., W. Dist. of Va., Virginia Doctor Convicted on 861 Federal Counts of Drug Distribution, Including Distribution Resulting in Death: Faces Mandatory Minimum of 20 Years in Prison (May 9, 2019), https://www.justice.gov/usao-wdva/pr/virginia-doctor-convicted-861-federal-counts-drug-distribution-including-distribution.

253. *See* Devin Zimmerman, *Wagoner Case Closes*, KOKOMO PERSP. (June 20, 2017), http://kokomoperspective.com/kp/news/wagoner-case-closes/article_81bb272e-552f-11e7-b648-4fefb5c9dcf4.html.

254. *Id.*

255. *Id.*

256. *Id.*

257. Other defendants received probation or house-arrest. *Id.*

258. *Id.*

Narayanappa Babu.[259] Dr. Babu did not actually see or examine patients and instead permitted staff to fill out prescriptions and order refills.[260] He was sentenced to eighteen months.[261]

In New Jersey, Dr. Alan Faustino—who had treated celebrities such as Billy Idol and Paula Abdul—pleaded guilty to distributing controlled substances.[262] In exchange for $300, he would write an opioid prescription without conducting a physical examination.[263] According to prosecutors, he "led a drug ring that put more than 1,200 pills on the street each day."[264] Under a plea deal, Dr. Faustino received a sentence of only four years and he was paroled after serving less than seven months.[265] Notably, the sentencing judge could have imposed a sentence of up to ten years but decided to hand down the lighter four-year sentence because Dr. Faustino would lose his medical license.[266]

B. ALLOWING DOCTORS TO PLEAD GUILTY TO WHITE COLLAR CRIMES IN LIEU OF DRUG DEALING CHARGES

In some cases, doctors lost their medical licenses and were convicted of serious crimes, but prosecutors dropped the controlled substances charges. For instance, consider the case of Dr. Paul DiLorenzo who wrote prescriptions for massive amounts of oxycodone and collected more than $2 million cash payments from his patients.[267] The New Jersey Board of Medical Examiners alleged that Dr. DiLorenzo "demanded cash from his patients"[268] and that he would "charge people $500 for an initial visit and $300 for follow-up visits, giving them 240 tablets of oxycodone each time without a medical examination."[269] On at least thirty-five occasions, he allegedly received more than $10,000 per day in cash from patients.[270] Prosecutors initially brought

259. *See* Geoff Ziezulewicz, *Bolingbrook Doctor Gets 18 Months in Prison*, CHI. TRIB. (Feb 24, 2015, 6:19 PM), https://www.chicagotribune.com/suburbs/ct-bol-physician-drug-sentencing-tl-0305-20150224-story.html.

260. *See id.*

261. *Id.*

262. Molly Bilinski, *Atlantic County 'Doctor to the Stars' Sentenced to 4 Years for Drug Trafficking*, PRESS OF ATL. CITY (July 5, 2018), https://www.pressofatlanticcity.com/news/crime/atlantic-county-doctor-to-the-stars-sentenced-to-years-for/article_93f7d7fb-e7c3-5970-8fbc-bca9c0c26ca0.html.

263. *See* Lynda Cohen, *Abescon Doctor Who Led Drug Ring Free After Seven Months*, BREAKINGAC (Feb. 14, 2019, 8:11 PM), https://www.breakingac.com/2019/02/absecon-doctor-who-led-drug-ring-free/.

264. *Id.*

265. *Id.*

266. *See* Bilinski, *supra* note 262.

267. *See* Andrew Ford, *Ocean Doctor Dodges Drug Rap, Imprisoned on Taxes*, ASHBURY PARK PRESS (Mar. 8, 2015, 10:14 AM), https://www.app.com/story/news/crime/jersey-mayhem/2015/03/08/ocean-doctor-dodges-drug-rap-imprisoned-taxes/24604759/.

268. *Id.*

269. Susan K. Livio, *N.J. Revokes License of Doctor Called "Major Contributor to Opiate Abuse Crisis"*, NJ.COM, https://www.nj.com/healthfit/2015/03/nj_revokes_license_of_doctor_called_major_contribu.html (Mar. 29, 2019).

270. Ford, *supra* note 267.

drug distribution charges for violating the Controlled Substances Act but ultimately agreed to let him plead guilty to the crime of structuring.[271] He was sentenced to forty-six months on the white-collar charges, rather than the much more severe penalties associated with drug distribution charges.[272]

Similarly, in Maryland, prosecutors originally indicted Dr. Kofi Shaw-Taylor—a urologist—on hundreds of counts of drug dealing for his role in a pill mill.[273] Prosecutors alleged that patients were paying upwards of $500 for an office visit and receiving opioid prescriptions in exchange.[274] Two patients allegedly died as a result of prescriptions from Dr. Shaw-Taylor and he originally faced two life sentences.[275] Prosecutors, however, did not hold firm on the drug distribution charges. They agreed to a guilty plea on Medicaid fraud charges and Dr. Shaw-Taylor received two concurrent five-year sentences.[276] After deducting pre-trial detention when he was under house-arrest, his sentence will amount to less than four years.[277]

Over a four-year period, Dr. Mihir Bhatt prescribed more than 1.8 million oxycodone pills to longshoremen in Brooklyn and Staten Island, New York.[278] He wrote nearly 12,000 prescriptions in two years and netted more than $12 million in proceeds.[279] Dr. Bhatt would dispense pills from his home in New Jersey, while claiming to have examined the patients in his New York office.[280] According to the DEA,

> Patients paid for the alleged pain management services by using their insurance and received prescriptions for oxycodone based upon perfunctory or nonexistent treatment rendered by Bhatt . . . .
>
> . . . .

271. *See id.* Structuring is the act of breaking financial transactions into smaller parts in order to evade bank reporting requirements. *See* 31 U.S.C. § 5324.

272. *See* Ford, *supra* note 267.

273. *See* Tim Prudente, *Two Maryland Doctors Indicted on Drug Charges After Allegedly Writing Prescriptions for More than a Quarter-Million Doses*, BALT. SUN (Aug. 10, 2017, 12:35 PM), https://www.baltimoresun.com/news/crime/bs-md-doctors-indicted-20170810-story.html.

274. Indictment at 4, State v. Shaw-Taylor, No. 17-7002-00078-1 (Md. Cir. Ct., Aug. 4, 2017), http://www.marylandattorneygeneral.gov/news%20documents/SHAW_TAYLOR_Indictment.pdf.

275. *See* Prudente, *supra* note 273.

276. *See* Joshua Stewart, *Doctor in Painkiller 'Pill Mill' Case Sentenced to Five Years*, CAP. GAZETTE (Aug. 3, 2018, 10:25 AM), https://www.capitalgazette.com/news/crime/ac-cn-shaw-opioid-sentencing-0803-story.html.

277. *See id.*

278. Frank Donnelly, *Doctor Who 'Helped Fuel' Borough Drug Crisis Sentenced in Pill-Mill Scheme*, SILIVE.COM, https://www.silive.com/news/2017/04/doctor_who_helped_fuel_borough.html (Apr. 7, 2017).

279. *See* Press Release, Drug Enforcement Admin., U.S. Dep't of Just., Medical Professionals Performed Perfunctory Exams on Longshoremen and Filled Scripts for Narcotics in Elaborate Scheme to Rip Off Insurance Companies (Dec. 18, 2013), https://www.dea.gov/press-releases/2013/12/18/medical-professionals-performed-perfunctory-exams-longshoremen-and-filled.

280. *See* Donnelly, *supra* note 278.

> Participating patients would call to get prescriptions for oxycodone and would receive them in return for billable office visits that did not occur, or which were perfunctory and lasted only an average 3–5 minutes.[281]

Dr. Bhatt was convicted for his role in the opioid prescribing scheme—but not for distributing controlled substances.[282] Prosecutors agreed to let him plead guilty to insurance fraud and he received a sentence of six months in jail and five years of probation.[283]

Indiana prosecutors brought charges against Dr. William Hedrick for forgery and registration violations.[284] The charges were based on Dr. Hedrick and his staff using the prescription pads and registration numbers of other people to prescribe narcotics.[285] The DEA became aware of misconduct at Dr. Hedrick's practice after:

> [P]harmacies informed the DEA that the total volume of "controlled substance prescriptions being prescribed out of [Hedrick's] . . . medical practice" was alarming. The pharmacies indicated that Hedrick's clinic was prescribing "dangerous combinations of controlled substances," *i.e.*, "narcotics . . . with anti-depressant." Some other pharmacies had altogether stopped filling prescriptions from Hedrick and his practice.[286]

The over-prescribing at Dr. Hedrick's practice allegedly led to the death of eight patients.[287] Yet, it does not appear that prosecutors brought charges for drug dealing. They charged him only with the less serious white-collar crimes of forgery and registration violations.[288]

In Michigan, prosecutors charged Dr. Steven Owen for Medicaid fraud after he allegedly prescribed opioids to undercover investigators who did not complain of pain.[289] One of the investigators apparently told Dr. Owen that she wanted the drugs because she "liked to 'party and drink alcohol' with her medication."[290] Dr. Owen allegedly responded "Oh, God, yeah man" and wrote the prescription.[291] An expert who reviewed a patient file concluded that Dr. Owen did not try to determine the cause of the patient's pain and instead

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281. Press Release, *supra* note 279.

282. *See* Donnelly, *supra* note 278.

283. *See id.*

284. *See* Hedrick v. State, 124 N.E.3d 1273, 1278 (Ind. Ct. App. 2019).

285. *See id.* at 1276–77.

286. *Id.* at 1277 (alterations in original) (citations omitted).

287. Assoc. Press, *Pain Doctor's Sentence Upheld in Prescription Case*, WWTV: CBS 4 (June 4, 2019, 7:58 AM), https://cbs4indy.com/news/pain-doctors-sentence-upheld-in-prescription-case.

288. *See Hedrick*, 124 N.E.3d at 1278.

289. *See* Ken Palmer, *Mason Doctor Faces Fraud Charges After Investigation Involving Opioids*, LANSING ST. J. (Apr. 9, 2019), https://www.lansingstatejournal.com/story/news/local/2019/04/09/mason-doctor-faces-fraud-charges-after-investigation-involving-opioids/3412461002/.

290. Ken Palmer, *State Suspends License of Mason Doctor for Over Prescribing Opioids, Other Controlled Substances*, LANSING ST. J., https://www.lansingstatejournal.com/story/news/local/2019/03/04/state-suspends-license-mason-doctor-over-prescribing-opioids/3058230002/ (Mar. 5, 2019).

291. *Id.*

"fabricated diagnoses to justify prescribing controlled substances."[292] While Medicaid fraud charges are serious and carry prison time, the possible punishment is far less than the possible punishment for distributing a controlled substance.[293]

* * *

The light punishment cases discussed in Part IV.A and the lesser white-collar offense cases in Part IV.B are surely not an exhaustive list. If local media fails to capture a criminal prosecution—especially a guilty plea in which the defendant waived his appeals—it is incredibly difficult to unearth the case. As such, the prosecutions discussed above are likely just a subset of a much larger group of cases in which prosecutors agreed to light sentences for opioid drug distribution or forewent the drug distribution charges altogether.

V. REASONS WHY PROSECUTORS HAVE BEEN LESS AGGRESSIVE IN CHARGING DOCTORS WITH DRUG DISTRIBUTION

Prosecutors have certainly not shirked their duties when it comes to bringing charges against the most egregious pill mill doctors. As discussed above, prosecutors have brought drug distribution charges against the worst of the worst offenders. Failing to do so would be politically unwise for local elected prosecutors and embarrassing for federal prosecutors.[294] This Article maintains, however, that both federal and state prosecutors have *not* been aggressive about bringing opioid distribution charges against doctors who occupy the next rung down in the chain—doctors who were engaged in less egregious but still arguable criminal misconduct. When doctors lost their licenses for knowingly misprescribing opioids (albeit not at the level of a pill mill), prosecutors have sometimes given a pass on criminal charges. There are many possible reasons why prosecutors have declined to bring charges. This Part discusses the legal, resource, litigation, and psychological challenges that lead to under-prosecution.

First, there are particular characteristics of physician defendants that make them harder to prosecute. On average, doctors are wealthier than most criminal defendants.[295] This means they can retain talented defense attorneys and fund the litigation maneuvering that retained lawyers bring to the table. Although drug distribution cases are not traditional white-collar cases, they nevertheless are more complex and paper-intensive than street drug deal

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292. *Id.*

293. In the federal system, conviction for a single count of distributing a schedule I or II controlled substance carries a sentence of up to twenty years. *See* 21 U.S.C. § 841(c).

294. Professors Dan Richman and Bill Stuntz recognized that certain crimes are "politically mandatory" and simply must be prosecuted because they are important to voters. Daniel C. Richman & William J. Stuntz, Essay, *Al Capone's Revenge: An Essay on the Political Economy of Pretextual Prosecution*, 105 COLUM. L. REV. 583, 600 (2005).

295. *See* Courtney Connley, *The 25 Highest-Paying Jobs in America*, CNBC (Aug. 16, 2018), https://www.cnbc.com/2018/08/16/the-25-highest-paying-jobs-in-america.html (listing physician as the highest paid profession with a median salary of about $195,000).

cases.[296] Engaged and highly competent attorneys can file motions, retain experts, and use a host of other tactics that make it harder for prosecutors to win. Prosecutors—particularly overburdened state prosecutors[297]—may thus turn their attention to other defendants who would be easier to convict.[298]

In addition to their wealth, doctors as a class may be more difficult to convict in the courtroom because of their high-prestige status. Americans rank the job of physician as the highest prestige job in the United States.[299] Not surprisingly, in the civil context, physicians are likely to win medical malpractice lawsuits.[300] Prosecutors can, of course, "flip the script" and tell a jury that the physician defendant has abused his vaulted position as a trusted healer. But talented defense lawyers will have the opportunity to convince the jury of all the schooling and hard work a doctor undertook so that he could spend years helping the community. And if a physician was doing more than simply running a pill mill, he will be able to point to patients whose lives he materially improved. The defense can present the testimony of some patients who were suffering tremendous pain and who benefitted from the opioids prescribed by the doctor. The defense may even be able to identify patients whose lives were saved by the doctor.

The fact that doctors are well-resourced and can tell positive stories about the patients they helped obviously would not preclude prosecutors from bringing drug distribution charges. But, at the margins, these factors make prosecutions less likely.

A second reason that may deter prosecutors from bringing opioid distribution charges against doctors is the recent American understanding of pain as the fifth vital sign. In the 1990s, some doctors as well as the American Pain Society began to push the idea that pain should be treated with the same attention as the four basic vital signs: pulse rate, temperature, respiration rate, and blood pressure.[301] By 2001, the Joint Commission, a not-for-profit entity that accredits more than 20,000 health care organizations, insisted that doctors

296. Observers have long recognized that prosecutors bring fewer white-collar cases because they are resource intensive. *See, e.g.*, Rebecca A. Pinto, *The Public Interest and Private Financing of Criminal Prosecutions*, 77 WASH. U. L.Q. 1343, 1363–64 (1999).

297. *See* Adam M. Gershowitz & Laura R. Killinger, Essay, *The State (Never) Rests: How Excessive Prosecutorial Caseloads Harm Criminal Defendants*, 105 NW. U. L. REV. 261, 264 (2011).

298. *See* Ellen S. Podgor, *White Collar Shortcuts*, 2018 U. ILL. L. REV. 925, 968 (2018) ("When a government prosecutor can rack up easier statistics with crimes of perjury, mail fraud, or obstruction of justice, it is difficult to imagine him or her spending significant time investigating and analyzing such computer-related conduct. . . . The shortcut crimes will certainly be easier to pursue . . . .").

299. *See, e.g.*, Jacquelyn Smith, *The 10 Most Prestigious Jobs in America*, BUS. INSIDER (Nov. 14, 2014), https://www.businessinsider.in/The-10-Most-Prestigious-Jobs-In-America/articleshow/45141171.cms.

300. *See* Philip G. Peters, Jr., *Twenty Years of Evidence on the Outcomes of Malpractice Claims*, 467 CLINICAL ORTHOPAEDICS & RELATED RSCH. 352, 352 (2009) ("Physicians win 80% to 90% of the jury trials with weak evidence of medical negligence, approximately 70% of the borderline cases, and even 50% of the trials in cases with strong evidence of medical negligence.").

301. *See* Ben A. Rich, *The Politics of Pain: Rhetoric or Reform?*, 8 DEPAUL J. HEALTH CARE L. 519, 537–38 (2005).

conduct detailed assessments of pain for each patient.[302] Because governmental bodies require Joint Commission accreditation to receive Medicare reimbursement, hospitals and other health care organizations also adopted the idea of pain as a fifth vital sign.[303] In short order, the concept slipped into the American consciousness. Now, in almost every hospital room (as well as some doctor's offices) people are accustomed to seeing pain scales with smiling and scowling faces on the wall.[304]

The development of pain as the fifth vital sign likely bears some responsibility for the opioid crisis.[305] And it may contribute to the difficulty of prosecuting doctors. Americans have grown accustomed to the idea that patients should have their pain immediately remedied. Prosecutors thus surely know that doctors who are accused of over-prescribing will respond with an emotional appeal that will resonate with jurors—they were only trying to decrease the type of suffering that Americans have grown accustomed to having treated. Put simply, in a world where pain management is as important to patients as heart rate and blood pressure, it is more difficult to put doctors on trial for prescribing too much pain medication.

A third factor that may make prosecutors reluctant to bring opioid drug dealing charges is the availability of medical board discipline.[306] Revoking a medical license serves incapacitative, retributive, and general deterrence purposes. Doctors who over-prescribe drugs are dangerous because they are licensed to practice medicine and can distribute controlled substances to patients. If those doctors' licenses are revoked, the doctors are no longer dangerous to the community—they are incapacitated by the administrative revocation of their licenses.

Further, prosecutors may conclude that losing a license is retributive because the doctors are losing their livelihood. Physicians are well-paid and, as noted above, their profession carries enormous prestige. When medical boards revoke physicians' licenses, the doctors will suffer, even if they are not incarcerated. Indeed, prosecutors likely recognize that it is rare for doctors to lose their licenses, so that may even increase the feeling that the doctor has

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302. Benjamin Pomerance, *Yet Another War: Battling for Reasoned Responses for Veterans Amid the Opioid Crisis*, 11 ALB. GOV'T L. REV. 147, 151 (2017).

303. *Id.* at 152.

304. *See e.g.*, *Using the Pain Scale*, SPECIALISTS HOSP. SHREVEPORT, https://specialistshospitalshreveport.com/patient-resources/using-the-pain-scale/ (last visited Feb. 25, 2021).

305. *See* Troy Brown, *New Attitudes Toward Pain Amid the Opioid Crisis*, MEDSCAPE (Mar. 19, 2018), https://www.medscape.com/viewarticle/893926; Teresa A. Rummans, Caroline Burton & Nancy L. Dawson, *How Good Intentions Contributed to Bad Outcomes: The Opioid Crisis*, 93 MAYO CLINIC PROC. 344, 344 (2018).

306. As two experts have remarked, "[m]any prosecutors have been willing to rely on [state medical boards] to determine appropriate physician behavior." Dineen & DuBois, *supra* note 10, at 36; *accord* Stephen J. Ziegler & Nicholas P. Lovrich, Jr., *Pain Relief, Prescription Drugs, and Prosecution: A Four-State Survey of Chief Prosecutors*, 31 J.L. MED. & ETHICS 75, 90–91 (2003) (surveying state prosecutors and finding, albeit before the opioid crisis that in the case of over-prescribing opioids most would refer the matter to the state medical board rather than pursue a criminal investigation).

already been severely punished. Additionally, some (though certainly not all) prosecutors might factor in the subjective experience of punishment when thinking about the significance of losing a medical license.[307] Many doctors have grown accustomed to wealth and prestige, and taking away that success may hit them harder than other "non-elite" individuals who lose access to a particular profession.

Additionally, when a medical board revokes a doctor's license, prosecutors might see it as serving the same general deterrence function that we normally turn to the criminal law for. License revocations often result in media stories,[308] which are surely widely distributed in the medical community. Medical board decisions to revoke licenses may thus deter other doctors from over-prescribing opioids in the same way that convictions and incarceration would.

A fourth disincentive to prosecutors bringing drug distribution charges against opioid prescribers is the availability of other, easier-to-prove charges.[309] Prosecutors sometimes forego drug distribution charges and instead charge health care fraud and related offenses.[310] As detailed in Part II, prosecutors can bring federal controlled substances charges against a licensed physician when he writes a prescription without a "legitimate medical purpose . . . in the usual course of his professional practice." This standard is not clear.[311] A defendant caught red-handed dealing cocaine will have a hard time convincing a jury to acquit him. By contrast, a doctor prescribing opioids can argue that (1) there was a legitimate medical purpose for the prescriptions; and (2) even if there were no such purpose that the doctor *believed* there was such a purpose.

On the first point, the doctor can take the witness stand and explain to the jury about his experience treating pain and how opioids serve a legitimate purpose. In lieu of testifying (or in addition to testifying), the doctor can hire an expert witness to make the same argument.

On the second point, the doctor can make a scienter argument that he lacked the knowledge mens rea in the controlled substances statute because he did not know the prescription was unauthorized or that he did not realize that it was for an illegitimate medical purpose.[312] Courts also have interpreted the statute to afford doctors a good faith exception.[313]

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307. *See generally* Adam J. Kolber, Essay, *The Subjective Experience of Punishment*, 109 COLUM. L. REV. 182 (2009) (explaining United States' sentencing practices and arguing that the subjective experience of punishment should be factored into sentencing).

308. *See, e.g.*, *supra* Part III.

309. *See* Podgor, *supra* note 298, at 967 (explaining how prosecutors are drawn to easier-to-prove charges in white collar cases).

310. *See supra* Part IV.A.

311. *See* Hellman, *supra* note 82, at 707.

312. *See id.* at 713 ("Though they rarely address this question directly, most courts seem to require the prosecutor to show that the defendant knew something beyond merely the fact that he was dispensing a controlled substance."). Surprisingly, the question of what the mens rea of "knowledge" modifies is unsettled.

As Professor Deborah Hellman and other scholars have observed, the ambiguity of the criminal statute when applied to doctors creates the risk that doctors will be prosecuted unfairly for conduct that was not clearly indicated in advance to be illegal.[314] On the other hand, however, the ambiguity may serve to make it difficult for a prosecutor to tell a jury exactly what a doctor has done wrong. The term "legitimate medical purpose" could be broadly interpreted by jurors to focus on the good things a doctor has done for a patient or a group of patients, while minimizing the doctor's misconduct. Unlike street dealers, who cannot point to legitimate activity when they dispense illegal drugs, doctors can point to some cases in which opioid prescriptions served a legitimate medical purpose. These legitimate acts for some patients may distract jurors from other cases in which there was no legitimate medical purpose to give a patient the type or quantity of opioids prescribed. In short, it is likely somewhat difficult to convince a jury that a defendant should be found guilty for prescribing drugs with no legitimate medical purpose when a visible part of the doctor's practice did involve legitimate medical activity. When we add that prosecutors will have to win a "battle of the experts," prosecutors may simply conclude that it is easier to bring other criminal charges—such as health care fraud, structuring, or tax evasion—for which the elements are clearer and the existence of a paper trail makes it easier to prove.

* * *

There are a number of reasons—including doctors' prestige and resources, the development of pain as the fifth vital sign, the availability of easier-to-prove charges, and a vague statutory scheme that can be interpreted in an overly generous fashion—that make it less likely for doctors to be prosecuted for improperly distributing opioids.[315] The next question is how legislatures should deal with the under-prosecution problem.

As Professor Hellman explains, "Some courts find that the mens rea requirement of 'knowingly or intentionally' for the 'distributing' and 'controlled substance' elements also applies to the fact that distribution in that context is unauthorized. Alternatively, other courts read the mens rea requirement into their interpretation of what constitutes a 'legitimate medical purpose.'" *Id.* (footnote omitted).

313. *See, e.g.*, United States v. Hurwitz, 459 F.3d 463, 476 (4th Cir. 2006).

314. *See* Hellman, *supra* note 82, at 715.

315. One final reason—an explanation that is hard to prove—could also be at play in limiting doctor prosecutions. It is possible that there is a norm that doctors who voluntarily surrender their licenses during the medical board disciplinary process will be less likely to face criminal charges. It is possible that prosecutors' offices give signals—and in turn that medical boards reiterate these signals to physicians—that voluntary license surrenders will be looked upon favorably by prosecutors in making charging decisions. This explanation intuitively makes sense given the large number of voluntary license surrenders. For instance, a study of physicians disciplined in California found 375 disciplined and another 73 doctors who voluntarily surrendered their licenses. James Morrison & Peter Wickersham, *Physicians Disciplined by a State Medical Board*, 279 JAMA 1889, 1890 (1998). On the other hand, there may be other factors that explain the voluntary surrenders. For instance, doctors might surrender their licenses rather than deal with the cost or potentially damaging admissions involved in a disciplinary proceeding.

VI. LEGISLATURES SHOULD BETTER FUND STATE MEDICAL BOARDS, FEDERAL AND STATE PROSECUTORS, AND MEDICAL EXPERTS

The under-prosecution of doctors in the opioid crisis raises the question of what actions legislatures can take to ensure dangerous physicians are criminally prosecuted. This Part explores two solutions—one wise and the other less so—that legislatures could embrace to punish over-prescribing doctors.

A. AVOIDING THE TEMPTATION TO EXPAND THE STATUTE

This Article has taken the view that some doctors have improperly escaped criminal liability for their role in the opioid crisis. It is therefore tempting to suggest that federal and state legislatures broaden their criminal statutes, perhaps by lowering the mens rea or expanding the liability standard. That temptation is dangerous however. Criminal justice scholars have long criticized how legislatures have given prosecutors vast power by creating too many criminal statutes and by drafting statutes that are too broad.[316] A large menu of charges and broad statutes gives prosecutors tremendous power.[317] Scholars have also criticized how prosecutors have wielded that power in some cases in an overly aggressive fashion to lock up too many people.[318] Broader laws to prosecute doctors—even for outrageous opioid prescribing—would raise the same concerns about excessive prosecutorial power and over-reaching prosecutions.

Moreover, broader criminal liability runs the risk of over-deterring law-abiding doctors. We already know that some doctors are reluctant to prescribe pain medication out of fear of civil and criminal liability.[319] Moreover, social science research tells us that law-abiding individuals are less likely to engage in risky behavior.[320] A more expansive criminal liability standard may therefore cause some doctors who should be willing to prescribe legitimate pain medicine to be over-deterred. That could yield the tragic result of patients who are in tremendous pain being unable to find physicians to help them. In turn, individuals in chronic pain may be pushed onto the streets to acquire

316. Most famously, see William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505 (2001). Academics have paid less attention to the under-enforcement of criminal law. For a notable exception, see Alexandra Natapoff, *Underenforcement*, 75 FORDHAM L. REV. 1715 (2006).

317. *See* Stuntz, *supra* note 316, at 519. My colleague Jeff Bellin has recently challenged this view, arguing that academics have failed to appreciate the power of legislators and police. *See* Jeffrey Bellin, *The Power of Prosecutors*, 94 N.Y.U. L. REV. 171 (2019).

318. *See, e.g.*, MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010).

319. *See supra* notes 9–10 and accompanying text.

320. *See* Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2464, 2509 (2004).

heroin.[321] Put simply, it is important not to put doctors in a position that will cause them to over-correct.[322]

Finally, it does not appear that the statutory language of the Controlled Substances Act is the primary obstacle hindering prosecution. In a number of cases described in Parts III and IV above, it seems quite possible to demonstrate that the doctors were prescribing opioids without a legitimate medical purpose and outside the usual course of professional practice. When doctors are writing prescriptions without conducting examinations, exchanging sex for prescriptions, or distributing opioids designed for cancer patients to other types of patients while taking money from the drug manufacturers, it would seem possible for prosecutors to satisfy the statutory obligation of proving the doctors were knowingly acting without a legitimate medical purpose.

Something other than the statutory language is likely the primary obstacle preventing prosecutors from bringing criminal cases. Thus, rather than changing the statutory language, it may be more fruitful to approach the problem by empowering the medical boards and prosecutors who we ask to ferret out the improper prescribing.

B. TARGETED RESOURCES FOR STATE MEDICAL BOARDS AND PROSECUTORS' OFFICES

The best way for legislatures to remedy the under-prosecution problem is to enhance resources for both state medical boards and local prosecutors.

Even though they are not criminal agencies, state medical boards can be a crucial partner in the prosecution of misprescribing doctors. State medical boards are empowered to open disciplinary cases at an early stage based on referrals from patients and other doctors.[323] State medical boards can conduct an investigation by reviewing patient files, interviewing witnesses, and consulting with medical experts. The factual findings of the board are then preserved in written reports accompanying the orders suspending or revoking the doctors' licenses. In short, state medical boards gather the same type of evidence that prosecutors must acquire to prove a doctor was prescribing opioids without a legitimate medical purpose and outside the course of professional practice. And because most prosecutors' offices have extremely

321. *See* Bowers & Abrahamson, *supra* note 7, at 807 (noting that "current enforcement efforts have succeeded only in minimizing prescription drug use and the diversion of prescription drugs into illicit markets" and that "prescription drug users have been redirected into those same markets"); Kelly K. Dineen, *Definitions Matter: A Taxonomy of Inappropriate Prescribing to Shape Effective Opioid Policy and Reduce Patient Harm*, 67 U. KAN. L. REV. 961, 974–76 (2019); *see also* QUINONES, *supra* note 6 (detailing the history of America's opioid epidemic).

322. *See* Dineen, *supra* note 321, at 990. This is not to say that the current statutory framework is without problems. As Professor Deborah Hellman and others have observed, the ambiguity of the mens rea portion of the statutory scheme is so vague that it allows prosecutors to bring criminal charges in cases where doctors were naïve or fooled into trusting patients they should not have. *See* Hellman, *supra* note 82, at 715–33.

323. *See supra* Part I.

limited resources to hire medical experts, the state medical boards could simultaneously be providing a roadmap for prosecutors to use in subsequently bringing criminal charges.[324]

Unfortunately, state medical boards are under-staffed and over-worked. Because they receive thousands of referrals each year, staff members must juggle large caseloads.[325] Some cases are therefore not adequately investigated and the factual record against bad doctors is not developed as robustly as it could be. A study of criminal prosecutions of doctors (albeit from before the opioid crisis) found that the vast majority of criminal convictions occurred *before* medical boards made a final judgment.[326] If state medical boards were robustly ferreting out doctors engaged in misconduct, we would expect the opposite turn of events—state medical board disciplinary action occurring first. Instead, it appears that state medical boards are following prosecutors, rather than leading them. Increased staffing of medical boards could therefore help both in the discipline of doctors[327] and also in laying a factual predicate that could be later used in criminal prosecutions.

The same logic applies to the staffing of prosecutors' offices. Despite having enormous power in individual cases, many local prosecutors' offices are severely handicapped by excessive caseloads.[328] Elected prosecutors are under political pressure to devote most of their resources to violent crime and street drug cases that the public has come to see as the bread-and-butter of state prosecution.[329] It is therefore not surprising that the average local prosecutor's office does not have a robust white-collar division.[330] White-collar cases take considerable time and resources that local prosecutors' offices simply lack.[331] And while distribution of a controlled substance is not typically thought of as a white-collar charge, when it involves doctors who are running something short of a pill mill, it takes on all the characteristics of a white-collar case. Prosecutors have to mine patient files and other paper records and they must piece together a case through multiple witnesses. And because doctors are often affluent, prosecutors must deal with talented and well-resourced defense attorneys. All of these factors make it less likely that prosecutors will pursue

324. *See* Gershowitz & Killinger, *supra* note 297, at 294.

325. *See* BOVBJERG ET AL., *supra* note 45, at 22.

326. *See* Reidenberg & Willis, *supra* note 10, at 904 (noting that of 47 prosecutions studied, "[i]n only two of these cases did a state medical board make a judgment before criminal action").

327. *See* BOVBJERG ET AL., *supra* note 45, at 55–56 (discussing benefits of staff increases).

328. *See* Gershowitz & Killinger, *supra* note 297.

329. *See* Richman & Stuntz, *supra* note 294, at 601.

330. *See id.* at 601–02 ("[C]riminal litigation must be rationed not only based on political necessity but also based on cost. . . . That is why high-end white-collar crime is (with a few rare exceptions) a federal preserve; only the feds have the manpower to deal with the long, intricate paper trails, and only the feds can afford to initiate and pursue major investigations without being certain that those investigations will turn up evidence of serious crimes." (footnote omitted)).

331. *See id.*

drug dealing charges when the defendants are not the worst of the worst offenders.

State legislatures should therefore provide additional funding not for prosecutors' offices in general but for specialty prosecutors who can handle opioid prosecutions in particular. The idea of funding specialty prosecutors is not new. State legislatures have regularly appropriated funds to hire prosecutors to handle specific types of cases from drunk driving prosecutions to elder abuse cases.[332] States could take the same approach and fund opioid prosecutors, particularly in counties that have been hardest hit by the opioid epidemic.

There is an even bigger role for the federal government to play in funding opioid prosecutors. Many opioid misprescribing cases are prosecuted by U.S. Attorneys' offices around the country.[333] Those offices also have limited resources and could bring more doctor prosecutions if they had the attorneys to handle the cases. Accordingly, Congress could appropriate money specifically for opioid prosecutions and target the funding to U.S. Attorneys' offices located in districts that have suffered the most in the opioid epidemic.

Federal funding for targeted federal prosecutions is also not a new concept. For instance, after the success of Project Exile in Richmond, Virginia, which moved state gun arrests to federal court to make them easier to prosecute, Congress appropriated money to expand the program around the country.[334] Congress provided funding for 114 new prosecutors (and hundreds of ATF agents) to specifically bring federal gun prosecutions.[335]

In addition to state funding for state opioid prosecutors and federal funding for federal opioid prosecutors, we should look to Congress to provide federal grant funding for state and local prosecutors. A model to follow is the Violence Against Women Act, which has long provided federal grant funding to hire state prosecutors to specifically handle domestic violence cases[336] as

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332. *See, e.g.*, OR. DEP'T OF JUST., 2021–23 AGENCY REQUEST BUDGET: CRIMINAL JUSTICE DIVISION 1 (2021), https://www.doj.state.or.us/wp-content/uploads/2020/09/21-23_doj_arb_criminal_justice_division.pdf; Ellen Klem, *How the Oregon Attorney General's Office Tackles Elder Abuse*, NAT'L ASS'N OF ATT'YS GEN. (May 31, 2018), https://www.naag.org/consumer-protection/attorney-general-journal/how-the-oregon-attorney-generals-office-tackles-elder-abuse/.

333. *See supra* note 7.

334. *See* Daniel C. Richman, *"Project Exile" and the Allocation of Federal Law Enforcement Authority*, 43 ARIZ. L. REV. 369, 370–71 (2001).

335. *See id.* at 393 (discussing Act for Effective National Firearms Objectives for Responsible, Common-Sense Enforcement of 2000, 106 H.R. 4066 (2000)).

336. *See* Lisa R. Pruitt, *Place Matters: Domestic Violence and Rural Difference*, 23 WIS. J.L. GENDER & SOC'Y 347, 386–87 (2008) ("Responding to deficits in prosecutorial services, Iowa used VAWA funding to hire a special prosecutor. The prosecutor covered three counties, providing technical assistance to law enforcement agencies and domestic violence advocates. Within a year, the counties served by the special prosecutor had increased their conviction rates for domestic abuse cases to exceed the state average." (footnote omitted)); OFF. ON VIOLENCE AGAINST WOMEN, U.S. DEP'T OF JUST., 2016 BIENNIAL REPORT TO CONGRESS ON THE EFFECTIVENESS OF GRANT PROGRAMS UNDER THE VIOLENCE AGAINST WOMEN ACT, at xi, 23–24 (2016), https://www.justice.gov/ovw/page/file/933886/download.

well as to hire experts to train other prosecutors.[337] Similarly, the Department of Justice's Project Safe Neighborhoods has provided more than $75 million in funding to hire 600 state prosecutors to handle gun violence cases.[338] Other examples include local district attorneys using federal highway grant funds to hire prosecutors to handle driving under the influence cases,[339] and the use of federal funds to hire local prosecutors specifically focused on community drug prosecution.[340] Following these prior successes, Congress could appropriate federal grant funding to help states hire the staff necessary to prosecute doctors (and other actors) responsible for the opioid crisis.

In providing resources, Congress and state legislatures should pay particular attention not just to hiring prosecutors but also to the experts those prosecutors will need to bring successful cases. In determining which doctors should be disciplined, both medical boards and prosecutors' offices need the assistance of medical experts who can analyze prescribing practices and help the prosecutors and medical boards figure out which cases to pursue. These medical experts are very expensive, sometimes costing $500 or more per hour.[341] At present, because of these high costs and limited budgets, prosecutors and medical boards are not able to retain medical experts as often as they need. Grant funding for experts would thus be extremely valuable.

The idea of federal funding for doctor prosecutions should be feasible, both practically and politically. On a practical level, the Justice Department has already been actively funding state and local governments in an effort to stem the opioid crisis. For instance, in October 2018, the Department announced that it would make almost $320 million in grants to combat the opioid crisis.[342] The following month, it allotted an additional $70 million.[343] Although this funding has been granted to worthy causes such as treatment programs,

337. *See* Symposium, *Panel Three: The Impact of VAWA: Billions (Yes, with a B) for Prevention, Victim Services, Law Enforcement, Underserved Populations and the Courts, and Looking Ahead to VAWA IV*, 11 GEO. J. GENDER & L. 571, 586 (2010) (describing how a Michigan prosecutor was funded and helped to train prosecutors and other actors in the criminal justice system).

338. Dana Slavin, *Faith in Justice: Attorney General John D. Ashcroft*, 48 FED. LAW., Oct. 2001, at 18, 24. Project Safe Neighborhoods also funded 100 federal prosecutors to prosecute illegal gun use. *Id.*

339. *See* Ronald F. Wright, *Persistent Localism in the Prosecutor Services of North Carolina*, 41 CRIME & JUST. 211, 227 (2012).

340. *See* Ashley Lutheran, *Possible Loss of Federal Grants Puts Milwaukee's Popular Community Prosecutor Program at Risk*, MILWAUKEE J. SENTINEL (July 10, 2017), https://www.jsonline.com/story/news/crime/2017/07/10/prosecutors-who-work-neighborhoods-risk-federal-grant-cuts/458946001.

341. *See* Victoria Negron, *2018 Expert Witness Fee Report: National Trends*, EXPERT INST., https://www.expertinstitute.com/resources/insights/2018-expert-witness-fee-report-national-trends/ (June 25, 2020) (providing national and state averages of costs for medical experts across specialties).

342. Press Release, U.S. Dep't of Just., Justice Department Is Awarding Almost $320 Million to Combat Opioid Crisis (Oct. 1, 2018), https://www.justice.gov/opa/pr/justice-department-awarding-almost-320-million-combat-opioid-crisis.

343. *See* John E. Wyand, M. Victoria Cram & Charles T. Brereton, *Justice Department Allots Additional US$70 Million to Battle Opioid Crisis*, NAT'L L. REV. (Nov. 7, 2018), https://www.natlawreview.com/article/justice-department-allots-additional-us70-million-to-battle-opioid-crisis.

improving prescription monitoring, and law enforcement training,[344] it does not appear that much, if any, of the funding has been earmarked for hiring prosecutors and medical experts to pursue cases against the doctors who over-prescribed the opioids.[345]

Providing additional funding to hire opioid prosecutors and retain medical experts should not be an insurmountable political battle either. Solving the opioid crisis (and preventing something similar from happening again) is one of the few bipartisan issues in our otherwise divided politics. For instance, in late 2018, both houses of Congress passed a bipartisan bill that contained law enforcement and public health measures and which aimed to block deadly fentanyl from being imported through the mail.[346] To the extent that the two political parties differ, it is over the amount of money to spend in attacking the crisis. Democrats believe the crisis merits tens or even hundreds of billions of dollars in federal funding, while Republicans have proposed less expensive solutions.[347] While Republicans will likely continue to be reluctant to agree to massive federal funding, the Republican party is historically very supportive of law enforcement, and thus, less likely to object to funding for prosecutors and law enforcement initiatives. Moreover, in the grand scheme of funding to deal with the opioid crisis, the amount of money needed to support prosecutors and medical experts—likely in the tens of millions of dollars—is quite modest compared to the billions of dollars being debated for treatment initiatives and other costly programs. In short, federal funding to support the hiring of prosecutors and medical experts should not be politically impossible.

CONCLUSION

Prosecutors have brought criminal charges against doctors for their role in the opioid crisis. Some doctors have even faced serious charges, including drug dealing, health care fraud, structuring, tax evasion, and even manslaughter and murder. High-profile prosecutions of doctors who were running pill mills or who were responsible for the deaths of multiple patients can leave a deceiving impression however. A substantial portion of the public may believe that prosecutors are aggressively pursuing all of the doctors who have misprescribed opioids, in the same way that prosecutors aggressively charge street dealers of heroin. And ethical doctors may be afraid that an aggressive prosecution agenda could lead to them being unfairly prosecuted for mistakenly prescribing opioids to patients who deceived them.

While prosecutors are bringing more drug distribution charges against doctors, the full story about criminal prosecutions is more complicated than the

344. *See* Press Release, *supra* note 342.

345. *See id.*

346. Abby Goodnough, *In Rare Bipartisan Accord, House and Senate Reach Compromise on Opioid Bill*, N.Y. TIMES (Sept. 26, 2018), https://www.nytimes.com/2018/09/26/health/opioid-bill-congress.html.

347. *See id.*

general public and the medical community likely realize. While prosecutors are aggressively charging doctors who have engaged in the most egregious behavior, there are many potentially criminal cases in which prosecutors have declined to bring criminal charges. This Article documented more than two dozen cases in which state medical boards revoked or suspended doctors' licenses for improper opioid prescribing but for which neither federal nor state prosecutors brought criminal charges. There are surely many more cases that have evaded the public spotlight.

Given how rarely medical boards revoke doctors' licenses for improper prescribing, we should be concerned that many of these cases did not result in criminal prosecutions. Prosecutors face an uphill battle in charging doctors with drug dealing for prescribing drugs without a legitimate medical purpose outside the course of professional practice. Doctors have prestige and the money to hire excellent lawyers, making them more challenging to convict in a courtroom. Prosecutors must also surmount the new American norm of pain being treated as a fifth vital sign, which can be used to explain away misprescribing. Faced with these obstacles, as well as considerable resource constraints, the availability of less serious white-collar charges, and the option of leaving discipline entirely to state medical boards, it is tempting for prosecutors to forego charging doctors with distributing drugs without a legitimate medical purpose.

Declining to prosecute drug distribution cases is problematic however. Doctors who contributed to the opioid epidemic will escape punishment, while street dealers of heroin (which is effectively the same drug as the opioids that come in pill bottles) are rigorously prosecuted. That disparity harms the legitimacy of the criminal justice system. Federal and state criminal codes authorize prosecuting doctors for drug dealing. Doctors should therefore not escape justice when they write opioid prescriptions without physical examinations, trade sex for drugs, or prescribe pills in quantities so high that no person could possibly ingest all of the pills.

The primary reason that prosecutors have declined to bring charges against doctors who lost their medical licenses for drug dealing is simply a lack of resources. Demonstrating that a doctor was dealing drugs requires showing that she knowingly acted without a legitimate medical purpose and outside the course of professional practice. Building that case typically requires witnesses, a review of patient files, analysis from independent medical experts, and possibly even DEA raids and undercover operations. Prosecutors—even federal prosecutors—have limited time and resources however. Prosecutors may believe that there are cases to be made against doctors who lost their medical licenses, but simply lack the means to fully prepare and bring that prosecution.

The solution to the under-prosecution of doctors in the opioid crisis is therefore not to loosen the statutory language that requires proving there was no legitimate medical purpose for the prescriptions. Nor is the answer to

reduce the mens rea below the current threshold of "knowingly" acting without a legitimate medical purpose. Loosening the statutory language or lowering the mens rea would likely over-deter ethical doctors and give rise to (possibly valid) objections that prosecutors hold too much power to prosecute doctors.

Instead, the solution is to provide adequate resources to prosecutors' offices—at both the federal and state levels—so that prosecutors have the capacity to bring criminal charges in all meritorious cases, rather than turning away cases for lack of time or funding. States should make targeted funding grants to counties with the greatest opioid problems. The federal government should do the same and provide resources to hire additional prosecutors who will focus only on white-collar opioid cases in opioid-ravaged districts across the country. Congress and state legislatures should also be sure to provide funding for medical experts—the backbone of physician drug-dealing cases—who are currently in short supply.

To be sure, society's primary goal should be to end the opioid crisis. Policymakers must focus on treating the victims and preventing more needless deaths. In doing so, however, we should not allow some of the main protagonists in the epidemic to escape justice. If doctors acted as drug dealers, they should be held accountable.