War on Doctors: Tricks Used in Prosecutions

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"Show me the man and I'll find you the crime" is a famous saying from the communist Soviet Union, where prosecutions of innocent people, and over-prosecutions of people for minor infractions, were routine.

Similar sayings have existed in the United States, as in how a prosecutor can persuade a grand jury to "indict a ham sandwich."[1] (Ironically, the judge who coined that expression was himself later indicted.) As any prosecutor can confirm, if a grand jury appears reluctant to issue an indictment requested by a prosecutor, then he can simply convene another grand jury, and then another, until he gets the indictment he wants.

So much for the safeguard of the grand jury as supposedly guaranteed by the Fifth Amendment to the U.S. Constitution: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury." The grim reality is that many prosecutors today have virtually unlimited power to decide whom to indict, with no meaningful check and balance by any grand jury. Occasionally there is news about a grand jury declining to indict someone in a high-profile case, such a shooting by police of an unarmed minority teenager, but even those decisions not to indict are typically the result of the prosecutor intentionally leading the grand jury to that conclusion. In cases where there is a public outcry and the prosecutor does not feel the evidence justifies a criminal indictment, then he can lead the grand jury to non-indictment, and the public is better mollified by such a decision by a grand jury than by a solitary prosecutor. But whenever a prosecutor wants an indictment against someone, then he will get it, as any prosecutor would confirm privately.

State and Federal Systems

The U.S. Constitution established a system of dual sovereignty, with the federal and state governments wielding power over their overlapping spheres of authority. Supreme Court Justice Anthony Kennedy asserted in a landmark case that the dual sovereignty enhances liberty, but many would dispute that. "Though on the surface the idea may seem counter-intuitive, it was the insight of the Framers that freedom was enhanced by the creation of two governments, not one."[2]

In fact, the dual sovereignty means that the federal government can prosecute a defendant even after he was acquitted in state court for the very same conduct, despite the prohibition by the Double Jeopardy Clause in the Fifth Amendment to the U.S. Constitution: "...nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb." A physician who is acquitted of a crime in state court could still be prosecuted for the same conduct in federal court, and it is important to be aware of fundamental differences between the two systems.

Originally, state court is where virtually all crimes were tried. "The Constitution grants the federal government jurisdiction over only three crimes: treason, counterfeiting, and piracy,"[3] as Texas Rep. Ron Paul, M.D., famously observed on the floor of the U.S. House of Representatives. Everything else was tried exclusively in state court for most of American history.

In state and local government, there is a check on that power in the form of political accountability for the prosecutor, and in the form of real limitations on the resources available. District Attorney offices are not overflowing with spare staff and extra funding, and local police do not have the time or interest in pursuing nonexistent crimes. Out of political and economic necessity, real crimes take priority over political agendas. Prosecutors who overstep their role can be held accountable for it, as prosecutor Michael Nifong was for his role in the wrongful indictments of three Duke University lacrosse players for rape.

Additional factors tend to limit overzealous prosecution at the local or state level. Local prosecutors are part of the community in which they work, and many of them grew up there. They have long-time acquaintances in the neighborhood on both sides of the law. These local prosecutors are typically not seeking publicity to propel an ambition to run for higher office, which might induce them to seek targets for political purposes. Of course, there are some instances of prosecutorial abuse of power within the state and local system, as the Duke lacrosse case illustrated. Physicians too, such as Dr. James Graves in Florida, languish in prison for decades, possibly the rest of their lives, as victims of a local prosecution that made them a scapegoat for a tragedy, often, as in the Dr. Graves case, related to drug abuse.

But many so-called "healthcare crimes" and other offenses are prosecuted in federal, not state courts today, contrary to the text of the U.S. Constitution. Federal prosecutions lack the essential checks and balances in the state system, and it is at the federal level at which the War on Doctors is at its worst. Resources available for these prosecutions are virtually unlimited, and there is almost no political accountability for overstepping reasonable bounds. Federal prosecutors are

appointed, not elected, and have never been impeached by Congress, although they could be. The only elected person in the chain of command of a federal prosecutor is the President, and no presidential election is likely to have its outcome determined based on the track record of a federal prosecutor.

An example of a widely criticized federal prosecution was the case against Aaron Swartz, a prodigy who while still a teenager had helped develop the widely used RSS service for individualized news feeds, and also Reddit, the immensely popular informational website.[4] Aaron is no longer with us because the full weight and unlimited resources of federal prosecutors hounded him relentlessly, with threats of lengthy prison sentences, until he committed suicide shortly before trial. This was all because he had allegedly downloaded numerous copyrighted scientific articles at MIT, which he arguably had a right to do. As Professor Lawrence Lessig explained in a heartfelt criticism of the federal prosecution of Aaron:

> The "property" Aaron had "stolen," we were told, was worth "millions of dollars" — with the hint, and then the suggestion, that his aim must have been to profit from his crime. But anyone who says that there is money to be made in a stash of ***ACADEMIC ARTICLES*** is either an idiot or a liar. It was clear what this was not, yet our government continued to push as if it had caught the 9/11 terrorists red-handed [emphasis in original].[5]

Yet there was no political accountability for the federal prosecutors who perpetrated this, or the trial judge who allowed it. Unlike the state system, in which both face elections and other meaningful review of their records, federal criminal justices are insulated from political accountability.

With less publicity than the federal injustice against, and then tragedy of Aaron Swartz, numerous physicians have also felt compelled to commit suicide when trapped in the vise of overzealous federal prosecution. Benjamin R. Moore, D.O., for example, had been working in locum tenens for 7 years when he was placed by an agency in a temporary job at a chronic pain center in Myrtle Beach, S.C. Dr. Moore was the most conservative prescriber of opiates there, according to a letter he sent without avail to the U.S. Attorney General.[6] It did not matter. Federal prosecutors went after numerous physicians in the clinic and charged them with conspiracy to distribute illegal drugs, which makes each defendant legally responsible for the actions of every other defendant. Another physician, Deborah Bordeaux, M.D., who had been working there for only 57 days, was initially sentenced to 8 years in jail, although she was fortunate enough to have the term reduced later in an unusual re-sentencing.[7] Dr. Moore committed suicide before trial.

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

Typically, federal prosecutors will pile on dozens or even hundreds of counts against a physician, and the jury may think it is holding mostly for the physician if it acquits on most of the charges. But the prison sentence is just as long if a jury convicts on only one count out of 150 counts as if it had convicted on every count.

One federal prosecutor publicly declared that his office sought "to root out [certain doctors] like the Taliban. Stay tuned."[8] But physicians are not flying airplanes into the World Trade Center. Physicians are, however, much easier to prosecute than real criminals are. Physicians tend to cooperate with investigations, and will even readily admit shortcomings about their record-keeping or dealings with patients. Unlike real drug dealers, physicians trust undercover agents who wear wires attempting to entrap the target. Physicians also tend to consent to searches of their offices even when a government agent lacks a warrant.

The clincher for making physicians a top target for federal prosecutors is this: indicting a physician grabs bigger headlines than indicting a real criminal does. The fall of a good man makes for a story that is scintillating to the public. More than a century ago Fyodor Dostoyevsky observed this same phenomenon in *The Brothers Karamazov*: "Man loves to see the downfall and disgrace of the righteous."[9] The suggestion that a physician, a man of great trust in society, may actually be a horrific criminal is something that sells newspapers and attracts television viewers. The physician used his position of trust to exploit unsuspecting patients, the story goes, and a white knight in the form of a prosecutor protected society against the scoundrel by locking him up and throwing away the key.

If the physician were a real criminal, the case would be easy to prove, and it would not be necessary for a prosecutor to resort to any tricks to achieve his goal. Undercover sting operations, for example, would hardly be necessary if a physician were truly exploiting his position.

Trial by Jury

A brief history of trial by jury is necessary for readers to understand the tactics prosecutors use against physicians.

Jury trials are nearly unique to the Anglo-American system of jurisprudence, dating back to 13th-century England. Trial by jury originated not as improvement over trial by judge, but to replace the outdated approaches of "compurgation" or "ordeal." Under "compurgation," a defendant could be acquitted of an accusation by obtaining a sufficient number of sworn statements by members of the community to support him. The "ordeal," as its name implies, was less pleasant. It required the accused to stick his hand

into a pot of boiling water to pick out a stone, while in the presence of clergy, and afterward his wound was observed for several days. The idea was seek divine intervention to give a sign as to guilt or innocence depending on how the wound festered or healed. By the 1200s the Church banned participation by clergy in this inhumane process, which was being used rarely and only for the most heinous alleged crimes anyway.

The rationale for switching to trial by jury was to give the community a voice in determination of guilt or innocence, as the community (or God) were supposed to have in the ancient methods of compurgation and ordeal. All these methods contain an element of arbitrariness, some might say. Juries were not initially considered to be any more reliable, consistent, or rational than the approaches that trial by jury replaced. But juries are to speak with the voice of the community, or neighborhood, and to express their view with unanimity in order to convict.

The primary reason that the right to a trial by jury is in the U.S. Constitution, however, is because juries provide an essential check against overzealous prosecutions by government. It was a jury that established the foundation for our First Amendment, in the criminal libel case brought against John Peter Zenger in 1735 for defaming the governor of New York, William Cosby.[10] That remarkable jury trial also set the precedent for the American doctrine that truth is an absolute defense against a charge of defamation. Zenger in his *New York Weekly Journal* had published some highly critical assertions against the powerful governor, who then brought the full power of his government down on Zenger in retaliation. Truth was not recognized as a defense against a charge of criminal defamation at that time, and conviction seemed inevitable. But Zenger's lawyers Andrew Hamilton and William Smith, Sr., argued successfully, the jury acquitted Zenger, and American freedom of the press was born as a result.

Note that the Founders did not believe in democracy and never thought that the collective opinion of random members of society would yield the correct answer to every question. Quite the contrary, the Founders were very skeptical of the public being able to do what is right and just. The Founders include a "right" to a jury trial for the benefit of an accused, not a "requirement" of a jury trial. Then, as now, ordinary people are vulnerable to the influences of demagoguery, prejudice, and careless error, as the Founders were well aware.

No Right to a Trial by a Judge?

The Constitution's Sixth Amendment states:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.[11]

This establishes a right, not a requirement, to have a jury trial.

In addition, the body of the original Constitution contains the following at Art. III, § 2:

> The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any state, the Trial shall be at such Place or Places as the Congress may by Law have directed.

This provision, although ostensibly requiring trial by jury in cases brought in federal court for the three crimes that the U.S. Constitution allowed the federal government to prosecute, is again obviously intended to protect the rights of the accused, not to protect the power of government.

In colonial America, defendants were able to waive their right to a jury trial in many areas, and in Maryland the prevailing standard for 150 years was to hold criminal trials before a judge rather than a jury. In 1930, the U.S. Supreme Court held in *Patton v. United States* that a criminal defendant has a right to waive trial by jury, but then the Court unjustifiably added that "before any waiver can become effective, the consent of government counsel and the sanction of the court must be had, in addition to the express and intelligent consent of the defendant."[12]

Intuitively, most criminal defendants think they are better off with a jury hearing their case. The instinctive reaction of nearly everyone is to exercise their rights, as one might exercise his right to free speech when faced with an injustice.

But studies have shown that some defendants are better off choosing a trial before a judge than a jury, and clever attorneys realize that a trial by judge might be fairer than a trial by jury, particularly when the government is relying on demagoguery to advance its case. As the next section explains, the government is increasingly relying on arguments designed to inflame prejudice against physicians, rather than sticking only to facts relevant to a claim of wrongdoing.

The Federal Rules of Criminal Procedure states in its Rule 23 that:

(a) Jury Trial. If the defendant is entitled to a jury trial, the trial must be by jury unless:

(1) the defendant waives a jury trial in writing; (2) the government consents; and (3) the court approves.

In other words, the Federal Rules deny a criminal defendant his right to have a non-jury criminal trial unless both the prosecutor and the court itself consent to the defendant's request.

The constitutionality of requiring a criminal defendant to have a jury trial was subsequently tested and decided in an unfortunate way. A defendant was convicted of a mail fraud scam "to dupe amateur songwriters into sending him

money for the marketing of their songs," and the defendant appealed on this issue as a way to get out of his conviction.[13] He requested a non-jury trial "for the purpose of shortening the trial," rather than for a weightier reason such as to avoid prejudice against him by the jury. This case reached the U.S. Supreme Court in 1964, when defendant-friendly Chief Justice Earl Warren was presiding, but he failed to recognize and address the significance of the issue. The "Warren Court," as it was called, rendered many major decisions in favor of defendants, but missed its opportunity this time.

Writing for the Court, Chief Justice Warren correctly observed that criminal trials by jury were common at the time of the ratification of the Sixth Amendment. But evidently jury trials were not universal, or else there would have been little reason for the Founders to include the protection of a right to a jury trial. In missing obvious truths universally acknowledged with respect to other parts of the Constitution, such as how the right to free speech necessarily entails the right not to speak, the Court ruled that a constitutional right to have a jury trial does not imply a right not to have a jury trial.

The Court first recounted several compelling arguments for a right to be able to waive a trial by jury:[13, pp 25-26]

- "At common law the right to refuse a jury trial preceded the right to demand one."
- "Both before and at the time our Constitution was adopted criminal defendants in this country had the right to waive a jury trial."
- "The provisions [in the Constitution] relating to jury trial are for the protection of the accused."
- "Since a defendant can waive other constitutional rights without the consent of the Government, he must necessarily have a similar right to waive a jury trial and that the Constitution's guarantee of a fair trial gives defendants the right to safeguard themselves against possible jury prejudice by insisting on a trial before a judge alone."
- "The Fifth, Sixth, Ninth, and Tenth Amendments are violated by placing conditions on the ability to waive trial by jury."

Yet the Warren Court rejected all the above arguments and held that both a federal prosecutor and the court itself each has a veto right over a defendant's attempt to waive a trial by a jury that may be prejudiced against him.

Accordingly, federal prosecutors know that they can always insist on a trial by jury, and they tailor their prosecutorial strategy accordingly. Irrelevant or inflammatory arguments that should never persuade a judge could potentially mislead a jury to convict. With that in mind, we turn to the latest tricks and traps in the prosecutions of physicians.

Tricks and Traps in Prosecutions of Physicians

"Just the facts, ma'am," is the famous phrase attributed to Sgt. Joe Friday, the detective played by Jack Webb in the popular TV series *Dragnet* that portrayed law enforcement in glowing light in the 1950s and 1960s. If prosecutors of physicians properly stuck to "just the facts," unjust convictions and unfair plea bargains would be less frequent.

Unfortunately, some prosecutors go beyond the relevant facts in their quest for convictions, based on the end justifying the means. According to the utilitarian mindset that is increasingly common in the federal criminal justice system, why does it matter whether the defendant is really guilty or not? The stated purpose of the prosecution and lengthy sentencing is to deter wrongdoing, and that goal is met whether a guilty or an innocent man is locked up. As long as the public is persuaded that a crime occurred, and as long as the public is told that the criminal was caught and severely punished, the desired effect of deterrence is satisfied regardless of the underlying innocence of the man imprisoned.

Prosecutions of physicians today are typically accompanied by harsh public statements made by the government against the defendant physician. A recent news story about the federal prosecution of a Eugene J. Gosy, M.D., in the Buffalo area illustrates several tricks used in the war on doctors.[14]

1. **Statistical profiling:** "He was the No. 1 prescriber in New York," declared an agent in charge of the DEA's office in Buffalo, to the press. The fallacy is that there will always be a "No. 1 prescriber in New York." Why should that statistic shock anyone? Yet it does tend to prejudice the average person who hears it. After prosecutors destroy the No. 1 prescriber in a state, then the No. 2 prescriber will become No. 1. Will that statistic make him guilty too? Of course not. Moreover, high volume does not imply guilt. Popularity breeds more popularity, in any line of work. The company Apple is not guilty of anything because its iPhone is popular.

2. **Saying the doctor was "out of the country" when prescriptions were written:** This allegation is a favorite of prosecutors, and we've seen it used again and again against physicians. They compare billing records to the physician's passport, and check the dates against each other. The argument sparks jealously and improperly creates a picture of a supposedly cavalier attitude by the traveler. The fallacy is that nothing wrongful can be inferred about someone for merely traveling outside of the country. Sometimes that world travel is to establish contacts for medical mission trips to impoverished lands; other times the travel is merely to visit family in a foreign country. But even if the travel were pure leisure, that is not a bad thing that should be used to create prejudice. The government could simply say that the physician was not in the office, rather than smearing him by saying he was out of the country.

Moreover, mistaken dates in billing records are inevitable, particularly in a high-volume practice. In a prior civil lawsuit against a physician, the government claimed he billed more than 24 hours in a day, when it was merely a mistaken billing date that was the reason.

3. **Trumpeting the doctor's wealth—such as a "$126,000 Ferrari and a $103,000 Ford GT coupe":** The government

seized these assets and apparently told the newspapers all about it, so it was featured prominently in the publicity against the physician. The fallacy is that it is not a crime for a successful practicing physician to earn money and spend it on a nice car or two. The type of car that a physician drives is not evidence of any wrongdoing. Prosecutors commonly exploit class warfare in their war on doctors. The government wants to portray the physician as obscenely wealthy and incredibly greedy, for prejudicial effect. The reality is that practicing physicians, even the highest compensated ones, make only a pittance compared with insurance company executives, while working many times harder than executives do. An executive at a specialty society profiting from Maintenance of Certification (MOC) has publicly bragged about his rare car collection, yet the government has taken no action against him.

4. **Emphasizing the large sum of false claims alleged, say "more than $241,000":** Prosecutors and the newspaper report such a number as though it is shocking, but they omit the all-important denominator. The fallacy is that the absolute amount of alleged fraud is virtually meaningless unless represented as a percentage of total billings. If a physician billed $25 million over five years, then the alleged fraud of $241,000 is less than 1 percent of his billings. Error rates in most billing services are probably higher than that. By failing to disclose the denominator, the publicity fails to mention that the allegation is merely that 1 percent of his billings were fraudulent. The public would be far less impressed by an allegation of an error rate of 1 percent than by an alleged amount of $241,000.

5. **Mentioning that "Like [the indicted physician], five other doctors have found themselves investigated," and two of them pled guilty:** The fallacy is that physicians often plead guilty because they face life in prison, or at least 20 years, if they take a case to trial and a jury mistakenly finds them guilty. Moreover, taking a case to trial can cost millions of dollars. When innocent physicians are offered plea bargains of less than 10 percent of the lengthy prison sentences, and can avoid a million-dollar loss to their retirement assets, then innocent physicians might plead guilty. An offer of only 2 or 3 years in prison can look very good to an innocent physician whose assets have been seized and who cannot even hire a good attorney to defend himself. The guilty plea does not mean the defendant was really guilty, as the negative publicity falsely implies.

Effect on the Community

At the time of this writing, Dr. Gosy is awaiting trial with his New York medical license intact but his ability to practice crippled by the negative publicity against him and loss of his DEA registration to prescribe controlled substances. Despite the vigorous public relations effort by the government that thoroughly smeared Dr. Gosy's reputation, the reaction by the community was swift and intensely negative against the government. Dr. Gosy was forced by the indictment to close his practice, which stranded between 8,000 and 10,000 active patients in need of pain medications. Other physicians are obviously terrified to treat them with the threat of decades in prison hanging over them if they do. "At this point, we're at a public health crisis," observed Dr. Gale R. Burstein, county health commissioner.[15] But this prosecution is by the federal government, and federal officials have no accountability for the devastating effect this has caused to the local community.

Conclusion

The Founders would be shocked at the degree to which the federal government is pursuing prosecutions of physicians and others, and the tactics employed to attain convictions. At least physicians can become more aware of the tricks being used.

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