# DRUG-INDUCED HOMICIDE DEFENSE TOOLKIT


**HEALTH IN JUSTICE ACTION LAB**

**AT NORTHEASTERN UNIVERSITY SCHOOL OF LAW**

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**SECOND EDITION**
**OCTOBER 3, 2019**


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## I. INTRODUCTION

We are two decades into an overdose crisis that keeps getting worse. In 2017, approximately 72,000 people died of a drug overdose in the United States.[1] Overdose is now the leading cause of death for people under fifty.[2] Conventional wisdom holds that we are finally embracing a public health-type approach to this crisis rather than the usual punitive one. While it is true that there is a growing embrace of increasing access to the opioid antidote naloxone[3] and evidence-based treatment,[4] and of reducing the stigma associated with substance use and addiction,[5] progress on these and other vital public health interventions remains abysmally slow.[6] Meanwhile, "progress" is anything but slow on expanding the punitive approach. Prosecuting accidental overdose deaths as homicides is the new, growing trend.

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[1] FARIDA B. AHMAD ET AL., PROVISIONAL DRUG OVERDOSE DEATH COUNTS (2018), https://www.cdc.gov/nchs/nvss/vsrr/drug-overdose-data.htm.

[2] Josh Katz, *Drug Deaths in America Are Rising Faster Than Ever*, N.Y. TIMES (June 5, 2017), https://www.nytimes.com/interactive/2017/06/05/upshot/opioid-epidemic-drug-overdose-deaths-are-rising-faster-than-ever.html.

[3] *See* LINDSAY LASALLE, AN OVERDOSE DEATH IS NOT MURDER: WHY DRUG-INDUCED HOMICIDE LAWS ARE COUNTERPRODUCTIVE AND INHUMANE 4 (2017), https://www.drugpolicy.org/sites/default/files/dpa_drug_induced_homicide_report_0.pdf.

[4] *See id*.

[5] *See* Wayne D. Hall & Michael Farrell, *Reducing the Opioid Overdose Death Toll in North America*, PLOS MED., at 2 (July 31, 2018), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6067703.

[6] *See* German Lopez, *How to Stop the Deadliest Drug Overdose Crisis in American History*, VOX (Dec. 21, 2017), https://www.vox.com/science-and-health/2017/8/1/15746780/opioid-epidemic-end.

Drug-induced homicide (DIH) and felony murder statutes have been on the books for decades.[7] DIH statutes emerged during the height of the "drugs and crime" era of crack-cocaine.[8] These provisions were passed under the assumption that they would be used to prosecute major drug traffickers for deaths that their products caused.[9] Despite the theater of passing them, they were not used much. Indeed, in our research, we found only one example of a DIH-type prosecution in the 1980s, involving the high-profile death of John Belushi and the California felony murder law, and a mere 13 in the 1990s.[10] However, a paradigm shift is underway, in which law enforcement and prosecutors treat as crimes what used to be considered accidents.[11] Under pressure to respond to mounting overdose deaths, prosecutors and police have taken to using these provisions with increasing frequency and fervor. The media has responded in kind,

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[7] For general background on DIH laws and prosecution, especially for non-lawyers, see Zachary A. Siegel & Leo Beletsky, *Charging "Dealers" With Homicide: Explained*, THE APPEAL (Nov. 2, 2018), https://theappeal.org/charging-dealers-with-homicide-explained/, and Rosa Goldensohn, *You're Not a Drug Dealer? Here's Why the Police Might Disagree*, N.Y. TIMES (May 25, 2018), https://www.nytimes.com/2018/05/25/us/overdoses-murder-crime-police.html.

[8] *See* Bobby Allyn, *Bystanders To Fatal Overdoses Increasingly Becoming Criminal Defendants*, NPR (July 2, 2018), https://www.npr.org/2018/07/02/623327129/bystanders-to-fatal-overdoses-increasingly-becoming-criminal-defendants.

[9] *See* LASALLE, *supra* note 3, at 9 (quoting Act of June 4, 2003, 2003 Vt. Acts & Resolves 141).

[10] *See Drug Induced Homicide*, HEALTH IN JUSTICE ACTION LAB, https://www.healthinjustice.org/drug-induced-homicide (last visited Jan. 20, 2019).

[11] *See, e.g.*, Mark Neil, *Prosecuting Drug Overdose Cases: A Paradigm Shift*, 3 NAT'L ATT'YS GEN. TRAINING & RES. INST. J. 26 (Feb. 2018), https://www.naag.org/publications/nagtri-journal/volume-3-number-1/prosecuting-drug-overdose-cases-a-paradigm-shift.php (advocating for a prosecutorial "paradigm shift"). *See also* LASALLE, *supra* note 3, at 11.

with a threefold increase in coverage of these prosecutions since 2010, spiking from 363 stories in 2011 to 1,178 in 2016.[12]

Today, almost half of state jurisdictions have a special statute that can be used to mount a drug-induced homicide prosecution.[13] Federal law also has one by way of a sentence enhancement.[14] Although the laws all use an analogous instrumental framework, these provisions use a variety of criminal law mechanisms, including felony-murder, depraved heart offenses, or involuntary manslaughter. At the extreme end of the punitive spectrum, there are among these laws' provisions like West Virginia's, which imposes sentences of up to life in prison.[15] The Trump administration has advocated seeking not just the similarly long federal sentence enhancement—mandatory life sentences for most death or serious bodily injury cases for people with prior "serious drug felony" convictions—but possibly even the death penalty.[16]

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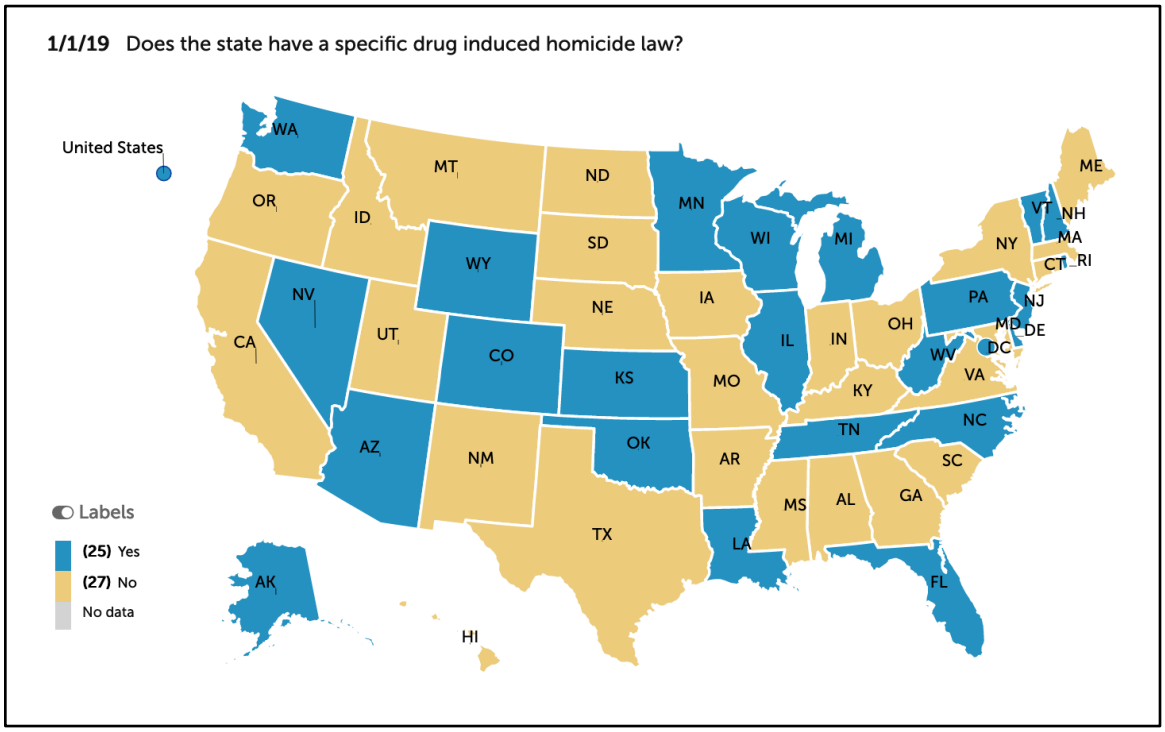
[12] *See generally* LASALLE, *supra* note 3, at 2 (noting the increase in press coverage of drug-induced homicide prosecutions).

[13] *See* Health in Justice Action Lab & Legal Science, PRESCRIPTION DRUG ABUSE POLICY SYSTEM, *Drug Induced Homicide Laws* (Jan. 1, 2019), http://pdaps.org/datasets/drug-induced-homicide-1529945480-1549313265-1559075032 (a collaboration with Mission LISA on developing a comprehensive dataset and interactive tool of drug-induced homicide statutes and their elements).

[14] *See* 21 U.S.C. §§ 841(b), 960(b).

[15] W. VA. CODE ANN. § 61-2-2.

[16] German Lopez, *Read: Jeff Sessions's memo asking federal prosecutors to seek the death penalty for drug traffickers*, VOX (Mar. 21, 2018), https://www.vox.com/policy-and-politics/2018/3/21/17147580/trump-sessions-death-penalty-opioid-epidemic.




Some of these provisions are strict liability statutes requiring no criminal intent (*mens rea*).[17] Others require a recklessness or criminal negligence standard to be met.[18] However, none of the state or federal provisions require a financial exchange to take place or exclude small-time dealers or fellow users from prosecution; those being charged with an underlying trafficking offense involving higher drug quantities may face stiffer penalties.[19]

It should be noted, however, that a specialized drug-induced homicide or similar statute is not necessary for an individual to be charged in a fatal overdose: criminal negligence or other

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17 *See* Health in Justice Action Lab & Legal Science, *supra* note 20 (interactive map).

18 *Id.*

19 *See, e.g.*, 21 U.S.C. § 841(b)(1).

generic statutes can—and are—being strategically deployed in these cases.[20] One of those strategies involves a collaboration with federal prosecutors: local district attorneys threaten that the feds will swoop in with their long sentence enhancement (including a mandatory life term for people with previous "serious" drug felonies) if the defendant doesn't accept a plea deal featuring charges under a generic state statute.[21]

There are many problems with these laws and their enforcement. DIH statutes are ostensibly intended to target major traffickers; enforcement is ostensibly intended to "send a message" deterring kingpins. However, research indicates that almost all prosecutions are actually ensnaring low-level drug dealers or individuals who do not even fit the characterization of a "dealer."[22] Analyses by the Health in Justice Action Lab,[23] Drug Policy Alliance,[24] and by the

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20 *See* LASALLE, *supra* note 3, at 2.

21 North Carolina is an example of a state where this is happening. The NDAA's white paper on opioids recommends using this approach:

> Prosecution of drug offenses in the federal system typically enhances cooperation by charged defendants, usually provides better tools for rewarding cooperation, may result in fewer discovery obligations and discovery practice, and often results in quicker resolutions. The easiest way to do this is to form or participate in a federal task force, under which state investigators become federal task force officers.

National District Attorneys Association (NDAA), *The Opioid Epidemic: A State and Local Prosecutor Response*, at 7 (Oct. 12, 2018), https://ndaa.org/wp-content/uploads/NDAA-Opioid-White-Paper.pdf. *See also* 21 U.S.C. §§ 841(b), 960(b).

22 *See id*. at 3, 11, 14.

23 *See Drug Induced Homicide*, *supra* note 10.

24 *See* LASALLE, *supra* note 3.

*New York Times*[25] revealed that the majority of these drug-induced homicide cases do not involve "traditional" drug dealers, but rather friends, family, and co-users of the overdosed decedent. Individuals suffering from Opioid Use Disorder who are jailed or imprisoned in these cases face an enormous spike in risk of death from overdose during their first few weeks after release.[26]

In cases that *do* involve commercialized drug distribution, there is a high likelihood of racial bias. Health in Justice Action Lab's analysis suggests that a disproportionate number of charges are being brought in cases where the victim is non-Hispanic white and the dealer is a person of color. Generally, the Lab found that people of color accused of drug-induced homicide or similar crimes receive sentences 2.1 years longer, on average, than white defendants.[27] Considering that average sentence lengths in these cases range from five to ten years, people of color are receiving disproportionately-longer sentences; as of October, 2019, the median DIH sentence for a person of color was eight years, compared to five for white defendants: a difference of 60% over a 10-year period.[28]

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[25] *See* Rosa Goldensohn, *They Shared Drugs. Someone Died. Does that Make Them Killers?*, N.Y. TIMES (May 25, 2018), https://www.nytimes.com/2018/05/25/us/drug-overdose-prosecution-crime.html.

[26] *See* Shabbar I. Ranapurwala et al., *Opioid Overdose Mortality Among Former North Carolina Inmates: 2000–2015*, 108 AM. J. PUB. HEALTH 1207, 1209 (2018).

[27] *Drug Induced Homicide*, *supra* note 10.

[28] *Id*.

Presently, there are two primary avenues for defending against prosecutions under drug-induced homicide statutes.[29] First, the defense can challenge the prosecution's effort to establish causation—that the drug(s) in question was the legal cause of the decedent's overdose. Second, in cases that involve a user who was sharing drugs with another user, the joint-user (or "joint-purchaser") defense may apply. This defense can undermine the underlying distribution charge that is an essential element of DIH prosecutions.

While the DIH approach tends to use strict liability principles to establish guilt, some states and federal circuits still maintain mental state requirements, and so for these states, *mens rea* arguments can be pursued. If the defendant has been charged under a statute that includes a *mens rea* element, insufficient evidence of the requisite mental state may also be a viable defense.[30]

There are many problems with these arrests and prosecutions, and much remains to be learned. This Toolkit is intended to serve as an informational guide for defense counsel and other interested parties working to mount a defense for individuals charged with drug-induced homicide or similar crimes resulting from overdoses. The creation of this Toolkit was spurred by two related trends: (1) information from parents, news reports, and other sources about inadequate legal defense being provided to many individuals charged with these crimes, and (2)

[29] In addition to these two primary defenses, there are two limited possible approaches to defending these cases. One is by way of Good Samaritan statutes. These provide full or partial immunity to arrest or prosecution to people who seek help from emergency services. As of this writing, only two states (Vermont and Delaware) extend these protections to drug delivery resulting in death, but this may offer value in mitigating sentence length.

[30] Because many DIH statutes impose strict liability and the required mental state varies among non-strict liability DIH statutes, this Toolkit does not analyze *mens rea* based defenses.

widespread efforts by prosecutors to disseminate information and tools that aid other prosecutors and law enforcement personnel in investigating and bringing drug-induced homicide and related charges, including presentations at conferences,[31] continuing legal education modules, webinars,[32] and the like. We hope that this Toolkit will assist defenders and families and, perhaps with time, will encourage police and prosecutors to focus their resources on more effective strategies for reducing crime and delinquency.

This Toolkit was produced in a collaboration led by the Health in Justice Action Lab, which aims to inject scientific evidence and public health principles into the conversation in order to level the playing field in this rapidly expanding prosecutorial offensive. The Toolkit is intended to be a living document, updated regularly and available for no cost on the Social Science Research Network.[33]

## II. AVAILABLE DEFENSE #1: CAUSATION

### *A. Discussion*

Causation is an important issue in many drug-induced homicide prosecutions. As summarized by the Supreme Court in *Burrage v. United States*,

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[31] *See Law Enforcement Track*, NATIONAL RX DRUG ABUSE & HEROIN SUMMIT (last updated Mar. 25, 2016), http://nationalrxdrugabusesummit.org/law-enforcement/#LEN4.

[32] *See Webinars*, SMART PROSECUTION: ASS'N OF PROSECUTING ATTORNEYS, https://www.smartprosecution.org/recent-webinars (last visited Jan. 20, 2019).

[33] Available at: https://ssrn.com/abstract=3265510 or http://dx.doi.org/10.2139/ssrn.3265510.

> [t]he law has long considered causation a hybrid concept, consisting of two constituent parts: actual cause and legal cause . . . . When a crime requires "not merely conduct but also a specified result of conduct," a defendant generally may not be convicted unless his conduct is "both (1) the actual cause, and (2) the 'legal' cause (often called the 'proximate cause') of the result."[34]

Accordingly, defense counsel may choose to litigate the traditional causation requirements—including the actual (or but-for) causation and the legal (or proximate) causation—in drug-induced death prosecutions.

This section discusses both requirements as well as the intervening actor doctrine. Specific strategies for raising causation issues at trial—including challenging the methodology of the prosecution's medical expert, hiring a toxicologist or forensic pathologist to testify regarding the cause of death, and closely scrutinizing the death certificate and medical examiner autopsy report—are discussed in Part III below.

### *1. But-For Causation*

Under traditional causation principles, the first step to determining whether a defendant's acts caused death is the but-for causation requirement. But-for causation "represents '*the minimum* requirement for a finding of causation when a crime is defined in terms of conduct causing a particular result.'"[35] But-for causation requires the prosecutor to prove that, but for the

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[34] 571 U.S. 204, 210 (2014) (first citing H.L.A. HART & TONY HONORÉ, CAUSATION IN THE LAW 104 (1959); then quoting WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 6.4(a) (2d ed. 2003)).

[35] *Burrage*, 571 U.S. at 211 (quoting Model Penal Code § 203(1)(a)).

defendant's acts, the harm would not have occurred when it did.[36] Although but-for causation is easily met in most traditional homicide prosecutions, it is often in dispute in drug-induced death prosecutions.[37] This is because traditional homicides involve things like bullets, blades, or blunt force trauma, whereas death from overdose involves the chemically-induced suppression of the respiratory system leading to asphyxiation and sometimes choking on vomit.

In addition, drug use and overdose deaths often involve other substances including drugs and alcohol. The majority of overdose cases in Massachusetts, for example, have involved depressants in addition to opioids.[38] This raises significant questions about causation if charges are brought against a defendant for providing heroin but not the benzodiazepines also used by the decedent. Accordingly, courts are split on whether the particular drugs at issue in the case were the "but-for" cause of death or merely "contributed" to death.

In *Burrage*, the United States Supreme Court resolved the question of whether but-for causation applies to the federal drug-induced death statute.[39] The law levies heavy mandatory minimum penalties in some controlled-substance prosecutions—including, in several situations, life sentences for individuals previously convicted of drug felonies—"if death or serious bodily

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[36] *See Causation*, LAWSHELF EDUC. MEDIA, https://lawshelf.com/courseware/entry/causation (last visited January 20, 2019).

[37] *See* LASALLE, *supra* note 3, at 41; *see also* Thomas P. Gilson et al., *Rules for Establishing Causation in Opiate/Opioid Overdose Prosecutions—The Burrage Decision*, 7 ACAD. FORENSIC PATHOLOGY 87, 88 (2017).

[38] Martha Bebinger, *It's Not Just Heroin: Drug Cocktails Are Fueling The Overdose Crisis*, WBUR COMMONHEALTH (Nov. 13, 2015), https://www.wbur.org/commonhealth/2015/11/13/drug-overdose-cocktails (reporting on research from the first half of 2014 showing four times as many overdose deaths involving heroin featured polypharmacy use versus heroin alone).

[39] *See* 571 U.S. at 206.

injury results from the use of" the substance.[40] For a time, courts were split on the question of whether the traditional but-for causation principles applied to this statute or whether, by using the phrase "results from," Congress indicated an intent to apply a broader approach to causation.[41] In *Burrage*, the Supreme Court held that but-for causation is required under the federal statute.[42]

*Burrage* involved the death of Joshua Banka, "a long-time drug user."[43] On the day Banka died, he smoked marijuana and then injected crushed oxycodone pills he had stolen from a roommate.[44] Later, Banka and his wife bought one gram of heroin from Burrage.[45] Banka injected some of the heroin and was found dead by his wife a few hours later.[46] The police found a number of drugs in Banka's house and car, including alprazolam, clonazepam, oxycodone, and hydrocodone.[47] At Burrage's trial, two medical experts testified that the heroin was a

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[40] 21 U.S.C.A. § 841(b)(1)(A)(iii) (Westlaw through Pub. L. No. 115-338); *see also* 21 U.S.C.A. § 960(b)(1)–(3) (Westlaw through Pub. L. No. 115-338) (stating penalties).

[41] *See* Benjamin Ernst, *A Simple Concept in a Complicated World: Actual Causation, Mixed-Drug Deaths and the Eighth Circuit's Opinion in United States v. Burrag*e, 55 B.C.L. REV. E. SUPP. 1, 2 (2014).

[42] *See* 571 U.S. at 218–19.

[43] *Id.* at 206.

[44] *Id.*

[45] *Id.*

[46] *Id.*

[47] *Id.*

contributing factor in Banka's death.[48] But neither was able to say "whether Banka would have lived had he not taken the heroin," given the evidence of polypharmacy use from his possessions and his post-mortem toxicology screen.[49] The trial court declined to give Burrage's requested jury instructions on causation and denied his motion for judgment of acquittal.[50] Burrage was convicted and sentenced to 20 years under 21 U.S.C. § 841(b)(1)(C).[51] The Eighth Circuit affirmed.[52]

The Supreme Court reversed Burrage's conviction and held that the "results from" language in the federal statute "imposes a requirement of but-for causation."[53] In reaching this conclusion, the Court reasoned that it had previously held that language similar to this requires "but-for" causation in other contexts.[54] The Court also noted that "Congress could have written § 841(b)(1)(C) to impose a mandatory minimum when the underlying crime 'contributes to' death or serious bodily injury, or adopted a modified causation test tailored to cases involving concurrent causes, as five States have done. It chose instead to use language that imports but-for causality."[55] Accordingly, the Court concluded, "at least where use of the drug distributed by the

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48 *Id.* at 207.

49 *Id.*

50 *Id.* at 207–08.

51 *Id.* at 208.

52 *Id.* (citing United States v. Burrage, 867 F.3d 1015 (8th Cir. 2012), *rev'd*, 571 U.S. 204 (2014)).

53 *See id.* at 214, 219.

54 *Id.* at 212–14.

55 *Id.* at 216 (citations omitted).

defendant is not an independently sufficient cause of the victim's death or serious bodily injury, a defendant cannot be liable under the penalty enhancement provision of 21 U.S.C. § 841(b)(1)(C) unless such use is a but-for cause of the death or injury."[56] But-for causality must be proven beyond a reasonable doubt, which can be a heavy burden for law enforcement and the prosecution.[57]

It should be noted that in state court, the usefulness of *Burrage* will depend on whether the language of the relevant state drug-induced death statute uses "but-for" or "contributes to" language.[58] Indeed, in *Burrage*, the Supreme Court distinguished the federal statute from five state statutes that use the phrase "contributes to death or serious bodily injury or adopted a modified causation test tailored to cases involving concurrent causes, as five States have done."[59] Of course, since this is an issue of statutory interpretation, state courts are free to decline to follow *Burrage* regardless of the statutory language at issue. Nevertheless, *Burrage* makes a compelling argument for applying its rule absent express statutory language that modifies

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[56] *Id.* at 218–19.

[57] *See* Gilson et al., *supra* note 37. See *infra* Section VI.A (regarding the downstream effects of this burden).

[58] Check using the Health in Justice Action Lab's interactive tool, *supra* note 13.

[59] 571 U.S. at 216 (internal quotations omitted); *see also, e.g.*, People v. XuHui Li, 67 N.Y.S.3d 1, 6 (N.Y. App. Div. 2017) (citing N.Y. Penal Law § 125.15 (McKinney, Westlaw through L.2019, chapters 1 to 8)). In *XuHui Li*, the court declined to apply *Burrage* in a drug-induced death manslaughter prosecution on the grounds that "*Burrage* interpreted specific causation language employed by Congress in the federal Controlled Substances Act, which language is not included in New York's manslaughter statute." 67 N.Y.S.3d at 6.

traditional causation principles and is a useful case if but-for causation is being litigated in state court.

### 2. *Proximate Causation and Foreseeability*

In addition to but-for causation, traditional criminal causation principles also require proof of proximate causation. Proximate cause, also called legal cause, is a way of identifying a but-for cause

> [t]hat we're particularly interested in, often because we want to eliminate it. We want to eliminate arson, but we don't want to eliminate oxygen, so we call arson the cause of a fire set for an improper purpose rather than calling the presence of oxygen in the atmosphere the cause, though it is a but-for cause just as the arsonist's setting the fire is.[60]

Proximate cause requires proof that death was a reasonably foreseeable consequence of the defendant's conduct. However, some statutes use a strict liability approach.[61] Most circuits have concluded that the federal drug-induced death statute does not require proof of proximate

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[60] United States v. Hatfield, 591 F.3d 945, 948 (7th Cir. 2010).

[61] *See* Health in Justice Action Lab & Legal Science, *supra* note 13. *See also infra* Section VI.F (discussing the use of a strict liability approach). Notably in its recent decision in Commonwealth v. Jesse Carrillo, possibly taking into account an argument raised by the Health in Justice Action Lab and our co-author Lisa Newman-Polk in our amicus curiae brief, the Massachusetts Supreme Judicial Court acknowledged that the legislature had considered creating a strict liability DIH crime but did not enact it. Instead, the court chose to explicitly require "specific evidence that the defendant knew or should have known that his or her conduct created 'a high degree of likelihood that substantial harm will result,'" in order to "convict the person who sold or gave the heroin to the decedent of involuntary manslaughter." Commonwealth v. Jesse Carrillo, SJC-12617, slip opn. at 31 (Mass. Oct. 3, 2019), https://www.mass.gov/files/documents/2019/10/03/v12617.pdf (internal citation omitted). Finding that the prosecution "proved no additional facts that transformed the inherent possibility of an overdose arising from any use of heroin into a high degree of likelihood of an overdose", the court vacated Carrillo's conviction for involuntary manslaughter. *Id.* at 32.

cause.[62] Because the United States Supreme Court has not addressed the issue,[63] litigants should continue to request a proximate causation instruction if only to preserve the issue.[64]

### *3. Intervening Cause Limitation*

Under traditional criminal law causation principles, the intervening cause rule provides an important limit on the scope of criminal liability. Under this principle, if an independent act intervenes between the defendant's conduct and the result, it can break the causal chain and defeat proximate cause.[65] A leading treatise on causation explained the idea this way: "[t]he free, deliberate, and informed intervention of a second person, who intends to exploit the situation created by the first, but is not acting in concert with him, is normally held to relieve the first

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[62] *See* United States v. Alvarado, 816 F.3d 242, 250 (4th Cir. 2016) (citing United States v. Cobb, 905 F.2d 784, 789 (4th Cir. 1990)) ("[W]e conclude that the district court fairly stated the controlling law in refusing to instruct the jury that § 841(b)(1)(C) contains a foreseeability requirement."); *see also* United States v. Burkholder, 816 F.3d 607, 621 (10th Cir. 2016) ("We thus hold that § 841(b)(1)(E)'s provision that 'death . . . results from the use' of a Schedule III controlled substance requires only proof of but-for causation.") (omission in original); United States v. Webb, 655 F.3d 1238, 1250 (11th Cir. 2011). In *Webb*, the court cited multiple cases and noted that "some focus on foreseeability and others on proximate cause." 655 F.3d at 1250.

[63] One of the two questions on which the Supreme Court granted review in *Burrage* was "[w]hether the defendant may be convicted under the 'death results' provision . . . without separately instructing the jury that it must decide whether the victim's death by drug overdose was a foreseeable result of the defendant's drug-trafficking offense." 571 U.S. at 208 (citing United States v. Burrage, 569 U.S. 957 (2013)). However, the court "[found] it necessary to decide only" the question of actual causation. *Id*. at 210.

[64] See *Burkholder*, 816 F.3d at 621–24 (Briscoe, J., dissenting), for a thorough and reasoned argument that the federal statute requires proof of foreseeability. Judge Briscoe believed the statute should be read to include a proximate cause requirement, stating he was "not persuaded that Congress clearly intended to impose a strict liability on a criminal defendant for any death resulting from his drug-trafficking offense." *Id.* at 624.

[65] *See* HART & HONORÉ, *supra* note 34, at 326.

actor of criminal responsibility."[66] Based on this principle, courts have held outside of the drug-induced homicide context that "the causal link between [a defendant's] conduct and the victim's death [is] severed when the victim exercised his own free will."[67]

Applying this rule to drug-induced death prosecutions would have the potential to significantly limit their reach since one could plausibly describe most drug users themselves as intervening actors. Few drug users are pressured by the distributor to use drugs; they make the choice to obtain and use the drug themselves. Indeed, the user often actively seeks out a seller to buy drugs. Moreover, the user controls the amount she chooses to ingest, and whether or not to use more than one drug at the same time (indeed, most opioid overdose deaths involve multiple substances, as illustrated in figure 1 below).[68] And so, even though a person's decision to use drugs may be the product of a substance use disorder, it would still seem to qualify as an act of free will within the intervening cause doctrine. Nevertheless, courts have generally been skeptical of the idea, with at least one going so far as to state that suicide would not defeat causation under the federal drug-induced death statute.[69]

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66 *Id.*

67 *E.g.*, Lewis v. Alabama, 474 So.2d 766, 771 (Ala. Ct. Crim. App. 1985).

68 *See also* Kandel DB, et al., *Increases from 2002 to 2015 in prescription opioid overdose deaths in combination with other substances*, 178 DRUG ALCOHOL DEPEND. 501 (Sep. 1, 2017), https://www.ncbi.nlm.nih.gov/pubmed/28719884.

69 Zanuccoli v. United States, 459 F. Supp. 2d 109, 112 (D. Mass. 2006) ("Suicide through heroin overdose meets the statute's terms, because it is a 'death resulting from the use of' the heroin, irrespective of the victim's state of mind.").

Even so, there is only limited jurisprudence on intervening cause in these cases. As with proximate causation, the Supreme Court's decision in *Burrage* did not directly address whether the intervening cause rule should apply to federal drug-induced death cases.[70]

In addition, one court expressed concern in dicta about the prospect of permitting liability under this provision where the victim died by suicide:

> That could lead to some strange results. Suppose that, unbeknownst to the seller of an illegal drug, his buyer was intending to commit suicide by taking an overdose of drugs, bought from that seller, that were not abnormally strong, and in addition the seller had informed the buyer of the strength of the drugs, so that there was no reasonable likelihood of an accidental overdose.[71]

Accordingly, as with proximate cause above, defendants should consider requesting an intervening cause instruction if only to preserve the issue.

### *B. Challenging the Scientific Evidence*[72]

This section provides examples of possible ways defendants can challenge the scientific claims upon which drug-induced homicide prosecutions are based. Recall that if a jurisdiction

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[70] *See* United States v. Rodriguez, 279 F.3d 947, 951 n.5 (11th Cir. 2002) ("While other circuits have held that the 'death or serious bodily injury' enhancement contained in § 841(b)(1) does not require a finding of proximate cause or foreseeability of death, these circuits have not addressed whether there is an intervening cause exception to the enhancement provision. . . . In light of our disposition, we too need not decide whether there can be an intervening cause exception to the enhancement provision.").

[71] United States v. Hatfield, 591 F.3d 945, 950 (7th Cir. 2010).

[72] This section is adopted and excerpted from an article drafted by Valena E. Beety. *See generally* Valena E. Beety, *The Overdose/Homicide Epidemic*, 34 GA. ST. U. L. REV. 983 (2018). For an example of how to employ some of the strategies discussed in this Section, see this transcript of the direct and cross examination of a medical examiner in federal court.

uses a but-for test, *Burrage* requires prosecutors charging DIH cases to prove beyond a reasonable doubt that the distributed drug was the "but-for" cause of death.[73] The experts at trial were unable to prove this when the decedent was on a cocktail of other drugs.[74] Accordingly, the "but-for" test requires the states using that approach to provide a medical expert to confirm that the decedent would still be alive if he had not taken the specific drug given to him by the accused. This section discusses tactics to consider in such circumstances.

### *1. Ask the Court for Expert Funds to Hire a Toxicologist or Forensic Pathologist/Medical Examiner*

A toxicologist—for the state or the defense—will be hard-pressed to make an exclusive "but-for" finding if there are other drugs or supplements in the decedent's blood stream.[75] A forensic pathologist/medical examiner may be able to challenge the autopsy finding by looking at the medical history of the decedent to determine whether an alternate cause of death exists.[76]

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[73] Burrage v. United States, 571 U.S. 204, 210, 216 (2014).

[74] *Id.* at 216–19.

[75] *See* Erin Schumaker, *Almost All Overdose Deaths Involve Multiple Drugs, Federal Report Shows*, HUFFINGTON POST (Dec. 12, 2018), https://www.huffingtonpost.com/entry/multiple-drugs-overdose-deaths-report_us_5c0fe121e4b06484c9ff3b2f.

[76] *See* Clarissa Bryan, *Beyond Bedsores: Investigating Suspicious Deaths, Self-Inflicted Injuries, and Science in a Coroner System*, 7 NAT. ACAD. ELDER L. ATT'YS J. 199, 210 (2011) ("Lay coroners rely heavily on the external condition of the deceased and any available medical records when determining cause and manner of death.").

### 2. *Ask for a Daubert or Frye Hearing to Challenge the State Expert's "But-For" Testimony*

Federal Rule of Evidence 702's[77] expert witness admissibility requirement, expounded upon by the *Daubert v. Merrill Dow Pharm., Inc.*[78] decision, requires that experts offer some kind of specialized knowledge, that their testimony be based on sufficient facts or data, and that it be the product of reliable methodology that has been properly applied to the present case.[79] *Daubert* requires trial judges in both civil and criminal proceedings to determine "whether the reasoning or methodology underlying the testimony is scientifically valid . . . ."[80]

Consider asking the court for a *Daubert* hearing to challenge the state expert's finding that the distributed drug is the but-for cause of the decedent's death. Useful queries address underlying health conditions, herbal supplements, the toxicology report (particularly evidence of other drugs, depressants, and alcohol consumed), the autopsy report if one was performed, and even the death certificate (which may say homicide as the manner of death and overdose as the cause of death before any toxicology analysis was even performed).

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[77] A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.

FED. R. EVID. 702.

[78] 509 U.S. 579 (1993).

[79] *Id.*

[80] *Id.* at 592–93.

Finally, as discussed below, consider challenging the state expert's expertise and impartiality. If a coroner determined the cause or manner of death, that means a layperson—likely with no scientific background—determined the death was an overdose and a homicide. Death investigations are not standardized across the United States. No national qualifications exist for death investigators, and often no state qualifications beyond being an adult and living in the jurisdiction—neither quality being based on skill, training, or expertise. Instead, death investigators can simply be local officials in rural counties.[81]

Some jurisdictions have *Frye*[82] hearings instead of *Daubert* hearings. In these hearings, the "general acceptance" test looks to the scientific community to determine whether the evidence in question has a valid, scientific basis. Despite the different frameworks, the outcome of these hearings is unlikely to vary substantially. The bottom line is that it is important to adequately scrutinize the scientific evidence presented.

### 3. *Consider the State Official's Expertise*

Of central importance is whether the jurisdiction has a coroner or a medical examiner (ME) system. In a coroner system or a mixed Medical Examiner/Coroner system, the coroner may have decided the manner of death (homicide, suicide, accident, natural, or undetermined), and

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[81] As one example, former Associate Justice Antonin Scalia died in West Texas, where the death investigation was governed by the justice of the peace and local judge. Justice Scalia was found in bed with a pillow over his eyes, and his breathing apparatus shut off, and yet the justice of the peace declared the death to be from natural causes, issued his findings over the phone, and never had an official examine the body. There was no autopsy. Ira P. Robbins, *A Deadly Pair: Conflicts of Interest Between Death Investigators and Prosecutors*, 79 OHIO ST. L. J. 902, 903 (2018).

[82] Frye v. United States, 293 F. 1013 (D.C. Cir. 1923).

may also have determined the cause of death: an overdose. Coroners and MEs differ significantly in their qualifications and in the nature of their roles.[83]

A medical examiner is a physician who is appointed to determine cause and manner of death. Notably, the medical examiner also determines whether an autopsy should be conducted.[84] A medical examiner is generally a forensic pathologist who has graduated from medical school, received training in anatomical or clinical pathology, and received formal training in forensic pathology in a fellowship program.[85] Forensic pathology is a "subspecialty of medicine devoted to the investigation and physical examination of persons who die a sudden, unexpected, suspicious, or violent death."[86]

A coroner is typically a county elected official, tasked with investigating deaths and with determining what the manner of death was, whether an autopsy is necessary, and in some jurisdictions, identifying the cause of death.[87] Despite this range of medico-scientific responsibilities, coroners are not required to have any medical background. They must only meet

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83 For more on comparisons between coroners and medical examiners, including subconscious and conscious bias in these roles, *see* Beety, *supra* note 72.

84 *See* NAT'L RESEARCH COUNCIL, STRENGTHENING FORENSIC SCIENCE IN THE U.S.: A PATH FORWARD 248 (Nat'l Acad. Press 2009), https://www.ncjrs.gov/pdffiles1/nij/grants/228091.pdf.

85 *See id.*

86 *Id.* at 256.

87 *See id.* at 247.

minimum statutory requirements such as residency and minimum age.[88] In extreme examples, in Indiana two seventeen-year-old high school seniors have been appointed deputy coroner.[89] Accordingly, it should come as no surprise that the continuation of the coroner system has been repeatedly and increasingly questioned.[90]

Indeed, the push for the elimination of the coroner system and replacement by scientifically-trained individuals dates back as far as the 1920s.[91] Yet the coroner system remains today in some states. This is concerning because, depending on the jurisdiction, either laypeople or

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[88] *Id.* ("Typical qualifications for election as a coroner include being a registered voter, attaining a minimum age requirement ranging from 18 to 25 years, being free of felony convictions, and completing a training program, which can be of varying length. The selection pool is local and small.").

[89] *Id.* (citing Associated Press, *Teen Becomes Indiana's Youngest Coroner*, NEWS OK (May 12, 2007), https://newsok.com/article/3053301/teen-becomes-indianas-youngest-coroner) ("Jurisdictions vary in terms of the required qualifications, skills, and activities for death investigators. . . . Recently a 17-year old high school senior successfully completed the coroner's examination and was appointed a deputy coroner in an Indiana jurisdiction."). That deputy coroner was appointed by her father, the county coroner. *See* Linsey Davis, *Amanda Barnett, Indiana's Youngest Death Investigator*, WTHR: NEWS (Apr. 15, 2016), https://www.wthr.com/article/amanda-barnett-indianas-youngest-death-investigator. Another teen was appointed more recently. Rachael Krause, *High School Works Clark County's Youngest Deputy Coroner*, WAVE 3 NEWS (Aug. 15, 2018), http://www.wave3.com/story/37527919/high-school-senior-works-as-clark-countys-youngest-deputy-coroner/. The only academic training required was a forty-hour course. *Id.*

[90] *See* Kelly K. Dineen, *Addressing Prescription Opioid Abuse Concerns in Context: Synchronizing Policy Solutions to Multiple Complex Public Health Problems*, 40 LAW & PSYCHOL. REV. 1, 41–42 (2016) ("Availability bias may also extend to the decisions made by coroners and physicians in selecting a cause of death on death certificates. The significant publicity around opioid related deaths may increase the attribution of death to *opioid* poisoning rather than one of the multiple other drugs or alcohol present in the systems of most victims.").

[91] *See* Bryan, *supra* note 76, at 216 ("If leading scientists in 1928 deemed the coroner system 'anachronistic,' it is difficult to justify its continued operation today. The apparent shortfall of the system to engage medical science in the performance of death investigations is simply unacceptable.").

> As early as 1928, even before the advent of modern forensic science, experts began recommending that the office of coroner be abolished in favor of scientifically trained staff. Almost 90 years later, this advice appears to have been ignored in some areas, where coroners may be eligible for election simply by being registered voters with clean criminal records.

Alex Breitler, *'Too much power': Rethinking sheriff-coroner role*, RECORDNET.COM (Dec. 9, 2017), https://www.recordnet.com/news/20171209/too-much-power-rethinking-sheriff-coroner-role.

medical experts are given the same task—determining how a person died—and the determinations of both are typically perceived as carrying the same scientific rigor even when that perception is entirely inaccurate.[92] And that determination is vital to the existence of any criminal investigation or prosecution that follows.

#### *4. Challenging the Scientific Basis of Death Certificates and Medical Examiner Autopsy Reports*

As observers and scholars have noted, scientific evidence has a different weight and status because it is often seen as impartial and impervious to bias.[93] When a death certificate says homicide, that finding is assumed to be the result of an independent determination, separate and apart from the role of the police and prosecutor in the criminal investigation. Similarly, when an autopsy report determines the manner of death as overdose, the report is viewed as scientific evidence of a higher status than most of the non-scientific evidence that will be presented against the defendant at trial.[94] These notions of absolute impartiality are quite false.

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92 *See* Bryan, *supra* note 76, at 210:

> Lay coroners rely heavily on the external condition of the deceased and any available medical records when determining cause and manner of death. At best, this approach is divorced from the scientific method (which requires a standardization of methods of investigation and the use of reliable modes of testing and inquiry) and relies too heavily on instinct, practical experience, or the completeness of medical records. At worst, it is completely ad hoc and involves a large potential for bias if the county coroner knows the deceased or their family.

93 *Id.* at 542 (citing Jennifer L. Mnookin et al., *The Need for a Research Culture in the Forensic Sciences*, 58 UCLA L. REV. 725 (2011)).

94 NAT'L RESEARCH COUNCIL, *supra* note 84, at 85–88.

### *a. Query Determination of Cause of Death as Overdose*

Coroners and even medical examiners are increasingly playing fast and loose with determinations of overdose as the *cause* of death. Coroners *and* MEs increasingly find cause of death—overdose—without eliminating other causes.[95] This is particularly true with state coroners who are overwhelmed by the number of deaths in their jurisdictions. Indeed, some deaths in Pennsylvania have been reported as overdoses with no toxicology reports,[96] and the NDAA encourages developing partnerships with coroners because they "may be able to perform a quick verbal assessment of causation based on the evidence at the scene."[97]

Importantly, coroners in some jurisdictions determine both the cause of death (overdose) as well as the manner of death (homicide, accident). Pennsylvania, which leads the nation in DIH prosecutions, is one of these states. There, the DEA noted that "determining causation related to overdoses is subjective and can vary widely depending on the investigative efforts/abilities of the coroner and the evidence available for review, which results in inherent difficulties in making

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95 *But see* Frank Main, *Kratom, Health Supplement Targeted by FDA, Linked to 9 Deaths in Cook County*, CHI. SUN TIMES (Mar. 5, 2018), https://chicago.suntimes.com/news/kratom-health-supplement-targeted-by-fda-linked-to-8-deaths-in-cook-county ("According to Cook County medical examiner's records, there have been nine cases since 2016 in which mitragynine was listed as a cause of death–in each instance along with at least one drug, often opioids such as heroin or fentanyl."); Charles Ornstein, *Measuring the Toll of the Opioid Epidemic Is Tougher Than It Seems*, PROPUBLICA (Mar. 13, 2018), https://www.propublica.org/article/measuring-the-toll-of-the-opioid-epidemic-is-tougher-than-it-seems; Jake Harper, *Omissions On Death Certificates Lead To Undercounting Of Opioid Overdoses*, NPR (Mar. 22, 2018), https://www.npr.org/sections/health-shots/2018/03/22/595787272/omissions-on-death-certificates-lead-to-undercounting-of-opioid-overdoses.

96 *Id.* at 28.

97 NDAA, *supra* note 21, at 9.

causation decisions."[98] Accordingly, particularly in coroner states, this is an important area for defenders to query.

*b. Query Determination of Manner of Death as Accident or Homicide for Evidence of Bias*

Medical examiners and some coroners can legally determine whether the *manner* of death from an overdose was an accident *or* a homicide. This follows the National Association of Medical Examiners (NAME) standards, which provides that an overdose can either be determined an accident or a homicide.[99] If the death certificate names the manner of death as a homicide, defense attorneys can question this description.

Bias on the part of the medical examiner or coroner should receive special attention from defenders. Without a clear toxicology report to comply with *Burrage*, a death certificate of homicide—rather than accident—is valuable support for a drug-induced homicide prosecution.

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[98] DEA PHILADELPHIA FIELD DIVISION, INTELLIGENCE REPORT: ANALYSIS OF DRUG-RELATED OVERDOSE DEATHS IN PENNSYLVANIA, 2015, 28 (July 2016) (citing Ben Allen, *No Standard Exists in PA to Accurately Track Heroin Overdose Deaths*, WITF (Apr. 9, 2015), http://www.witf.org/news/2015/04/how-accurate-are-the-states-heroin-overdose-statistics.php. At the time, Pennsylvania ranked eighth in the country for drug overdose deaths, according to the Centers for Disease Control and Prevention. *Id.* at 1 (citing *Drug Overdose Mortality by State*, CENTERS FOR DISEASE CONTROL AND PREVENTION (last visited Feb. 6, 2019), https://www.cdc.gov/nchs/pressroom/sosmap/drug_poisoning_mortality/drug_poisoning.htm).

[99] *See* Gregory G. Davis et al., *National Association of Medical Examiners Position Paper: Recommendations for the Investigation, Diagnosis, and Certification of Deaths Related to Opioid Drugs*, 3 ACAD. FORENSIC PATHOL. 77, 81 (2013).

Importantly, it is NAME's position that "medical examiner and coroner independence is an absolute necessity for professional death investigation."[100]

There are many strong influences on MEs and coroners. One bias is personal experience and related social network effects. Take, for example, the approach of Lycoming County Coroner Charles Kiessling Jr., president of the Pennsylvania State Coroners Association. After typically determining overdose deaths as accidents, a friend's son died of an overdose. He then changed his policy to identify all heroin overdose deaths as homicides. He adopted the standard, ineffectual[101] law enforcement strategy of *sending a message*: "If you chose to sell heroin, you're killing people and you're murdering people. You're just as dead from a shot of heroin as if someone puts a bullet in you. . . . Calling these accidents is sweeping it under the rug."[102]

Another common bias is politics. Recall that coroners are elected officials—and sometimes the county sheriff, too. Even if they are not also the sheriff and are at least officially "independent of law enforcement and other agencies, … as elected officials [coroners] must be responsive to the public, and this may lead to difficulty in making unpopular determinations of

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[100] Judy Melinek et al., *National Association of Medical Examiners Position Paper: Medical Examiner, Coroner, and Forensic Pathologist Independence*, 3 ACAD. FORENSIC PATHOL. 93, 94 (2013).

[101] *See infra* Section VI, including Section VI.B (sending the wrong message to the wrong people).

[102] Eric Scicchitano, *Heroin Deaths Labeled Killings: Lycoming Coroner Says Move Will Draw Attention to Epidemic*, DAILY ITEM (Mar. 22, 2016), https://www.dailyitem.com/news/heroin-deaths-labeled-killings-lycoming-coroner-says-move-will-draw/article_dc9e2518-f07e-11e5-9fa7-d7680fbbfb52.html; *see also* Sarah Larimer, *Heroin Overdoses Aren't Accidents in This Country. They're Now Homicides.*, WASH. POST (Mar. 30, 2016), https://www.washingtonpost.com/news/true-crime/wp/2016/03/30/heroin-overdoses-arent-accidents-in-this-county-theyre-now-homicides/?utm_term=.63df566e1f4c.

the cause and manner of death."[103] Politics, including the hope of reelection or election to higher office, may accordingly shape or even predetermine the finding.

Perhaps the most powerful influence comes from the prosecutor and law enforcement. Even though NAME deems medicolegal death investigations to be public health rather than criminal justice functions,[104] there are few restrictions on prosecutors or law enforcement involvement in death investigations.[105] "In rural counties, the coroner may be more likely to see himself as part of the law enforcement team sharing the same goals as the police and prosecutors, which results in a situation known as 'role effects.'"[106] Indeed, some of the investigative staff for the coroner

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[103] NAT'L RESEARCH COUNCIL, *supra* note 84, at 247.

[104] Melinek et al., *supra* note 100, at 97 ("Unlike with crime laboratory examinations, which are usually generated to determine guilt or innocence, the medicolegal death investigation is primarily a public health effort.").

[105] *See* LASALLE, *supra* note 3, at 25 (citing HEROIN EPIDEMIC: THE U.S. ATTORNEY'S HEROIN AND OPIOID TASK FORCE, U.S. DEP'T OF JUSTICE (last updated May 4, 2017), https://www.justice.gov/usao-ndoh/heroin-epidemic) (describing the U.S. Attorney's Heroin and Opioid Task Force in the Northern District of Ohio: "The Task Force developed specific protocols to treat fatal heroin overdoses as crime scenes, with investigators and prosecutors going to every scene to gather evidence.").

> It is also not surprising to find that the coroner was present at the autopsy. The coroner may be employed by the local sheriff and may not be an independent officer or a separately elected official; he or she may be paying the pathologist to perform the autopsy and all the other autopsies in the county. Also present at the autopsy may be the investigating officers and all sorts of other law enforcement agents. Prior to conducting the autopsy these investigating officers will have "briefed" the pathologist about to perform the autopsy about their investigation and what they believed to have occurred. In this regularly occurring scenario, you can be certain what the resultant findings will be: homicide.

Mark A. Broughton, *Understanding and Addressing the Challenges in Homicide and Murder Defense Cases*, *in* HOMICIDE DEFENSE STRATEGIES: LEADING LAWYERS ON UNDERSTANDING HOMICIDE CASES AND DEVELOPING EFFECTIVE DEFENSE TECHNIQUES 7, 25 (Thomas Reuters/Aspatore 2014).

[106] *See* Beety, *supra* note 72, at 1000. Conversely, depending on the availability of services in a rural jurisdiction, the rural official may also see the justice system as the only provider of public health services.

may be former police officers,[107] or in the extreme cases of Nevada, Montana, and California, the coroner may also be the sheriff.[108] The NDAA's white paper on opioids explicitly urges prosecutors to develop partnerships with coroners.[109]

Sometimes interference and influence is direct. As the Minnesota Supreme Court said when reversing a conviction where the prosecutor interfered with the defense's forensic pathologist expert, "some police and prosecutors tend to view government-employed forensic scientists . . . as members of the prosecution's 'team.'"[110]

A survey of NAME members found that seventy percent of respondents had been subjected to outside pressures to influence their findings, and when they resisted these pressures, many of the medical examiners suffered negative consequences.[111] Of responding pathologists, twenty-two percent had "experienced political pressure to change death certificates from elected and/or appointed political officials."[112] Knowledge of these forms of pressure and negative

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[107] *See* Paul MacMahon, *The Inquest and the Virtues of Soft Adjudication*, 33 YALE L. & POL'Y REV. 275, 304 (2015) (citing JOHN COOPER, INQUESTS 24 (Hart Publishing Ltd 2011)).

[108] *See, e.g.*, S. 1189, 2016 Leg. (Cal. 2016) ("Existing law authorizes the board of supervisors of a county to consolidate the duties of certain county offices in one or more of specified combinations, including, but not limited to, sheriff and coroner, district attorney and coroner, and public administrator and coroner.").

[109] NDAA, *supra* note 26, at 9 ("One key partnership that can also prove helpful is with the coroner's office. Coroners may be able to perform a quick verbal assessment of causation based on the evidence at the scene. Many jurisdictions may not do full autopsies when the circumstances and case history support the opioid overdose death.").

[110] State v. Beecroft, 813 N.W.2d 814, 834 (Minn. 2012), quoting Mark Hansen, *CSI Breakdown: A Clash Between Prosecutors and Forensic Scientists in Minnesota Bares A Long-Standing Ethical Dispute*, 96 A.B.A J. 44, 46 (Nov. 2010).

[111] Melinek et al., *supra* note 100, at 93.

[112] *Id.* at 94.

consequences for resisting would likely spread beyond the individuals directly affected, chilling professional independence.

It is important to keep in mind that MEs and coroners, "aware of the desired result of their analyses, might be influenced—even unwittingly—to interpret ambiguous data or fabricate results to support the police theory."[113] "Tunnel vision has been shown to have an effect in the initial stages of criminal investigations and this is a significant issue because all subsequent stages of the investigation will potentially be impacted by the information generated at this initial stage."[114]

This is why the NAME Standards state that death investigators "must investigate cooperatively with, but independent from, law enforcement and prosecutors. The parallel investigation promotes neutral and objective medical assessment of the cause and manner of death."[115] Furthermore, "[t]o promote competent and objective death investigations: . . . Medico-legal death investigation officers *should operate without any undue influence from law enforcement agencies and prosecutors*."[116] Accordingly, defenders should consider querying

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[113] Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291, 293 (2006) (footnote omitted); *see also* MacMahon, *supra* note 107, at 306 ("Often, however, even those coroners who are elected directly are likely to be deeply embedded in law enforcement—too deeply embedded to provide independent oversight.").

[114] Sherry Nakhaeizadeh et al., *The Emergence of Cognitive Bias in Forensic Science and Criminal Investigations*, 4 BRIT. J. AM. LEGAL STUD. 527, 539 (2015) (citing Findley & Scott, *supra* note 113).

[115] NAT'L ASS'N OF MED. EXAMINERS, FORENSIC AUTOPSY PERFORMANCE STANDARDS 1 (Oct. 16, 2006).

[116] *Id.* (emphasis added).

whether the LE or coroner in the case was biased even to the extent of being a de facto "member[] of the prosecution's 'team.'"[117]

## III. AVAILABLE DEFENSE #2: JOINT-USER / JOINT POSSESSION

### *A. Overview*

The joint-user doctrine provides that when "two individuals simultaneously and jointly acquire possession of a drug for their own use, intending only to share it together, their only crime is personal drug abuse—simple joint possession, without any intent to distribute the drug further."[118] The legal basis for this rule is that users who jointly acquire drugs to use with each other are in either constructive or actual possession of the drugs from the time of the purchase.[119] Because a person cannot distribute an item to someone who already possesses it, joint-purchasers cannot be convicted of distributing to each other. In the words of the New Jersey Supreme Court in *State v. Morrison*,[120] "[i]t hardly requires stating that the 'transfer' of a controlled substance cannot occur . . . if the intended recipient already possesses that substance."[121] And to quote the Second Circuit's decision in *U.S. v. Swiderski,* "simple joint possession does not pose any of the

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117 Hansen, *supra* note 110.; *see also* Robbins, *supra* note 81.

118 United States v. Swiderski, 548 F.2d 445, 450 (2d Cir. 1977).

119 *See id*. at 448, 450.

120 902 A.2d 860 (N.J. 2006).

121 *Id.* at 867.

evils which Congress sought to deter and punish through the more severe penalties provided for those engaged in a 'continuing criminal enterprise' or in drug distribution."[122]

In cases where the joint-user defense applies, it can defeat the underlying charge of distribution. Because distribution is the foundation of every drug-induced homicide prosecution, a successful joint-user defense will also defeat the drug-induced homicide charge.

Significantly, because a joint-user claim is not an affirmative defense but an argument that the evidence does not establish distribution as a matter of law, it can potentially be grounds for dismissing the charges before trial (as demonstrated by *State v. Morrison*, discussed below).

### *B. Application to Drug-Induced Homicide Prosecutions*

In *People v. Edwards*,[123] the California Supreme Court reversed the defendant's convictions for furnishing heroin and for felony-murder (with the furnishing charge as the predicate felony) where "the trial court erred in failing to instruct the jury that defendant could not be convicted of furnishing heroin to Rogers if he and Rogers were merely co[-]purchasers of the heroin."[124] Relying on a prior California case,[125] the court found that:

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[122] 548 F.2d at 450.

[123] 702 P.2d 555 (Cal. 1985).

[124] *Id.* at 556.

[125] The *Edwards* court did not use the terms "joint-user" or "joint-purchaser" and did not cite to any joint-user cases, including the seminal joint-user case *United States v. Swiderski*, suggesting that they might have been unaware of these cases. Nevertheless, the decision in *Edwards* closely tracks the joint-user cases.

> The distinction drawn . . . between one who sells or furnishes heroin and one who simply participates in a group purchase seems to us a valid one, at least where the individuals involved are truly "equal partners" in the purchase and the purchase is made strictly for each individual's personal use. Under such circumstances, it cannot reasonably be said that each individual has "supplied" heroin to the others. We agree with defendant that there was substantial evidence from which the jury could reasonably have concluded that he and Rogers were equal partners in *both the financing and execution* of the heroin purchase.[126]

What is required to demonstrate that defendant and decedent were joint-users? The key question, in the words of the New Jersey Supreme Court in *Morrison*, is "whether defendant distributed the heroin to [the decedent] or whether both jointly possessed the heroin at the time defendant purchased the drug from the street dealer."[127] Under this principle, the joint-user defense does not apply where one person purchased drugs on her own and later shared the drugs with a friend; that sort of social sharing is still considered to be distribution.[128] Instead, both users must have possessed the drugs from the outset. The court in *Morrison* concluded, based on its review of relevant case law, that the joint-user inquiry requires a "fact-sensitive analysis."[129]

> Among the factors to be considered are whether the relationship of the parties is commercial or personal, the statements and conduct of the parties, the degree of control exercised by one over the other, whether the parties traveled and purchased the drugs together, the quantity of the drugs involved, and whether one party had sole possession of the controlled dangerous substance for any significant length of time.[130]

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[126] *Edwards*, 702 P.2d at 559 (emphasis added) (footnotes omitted).

[127] 902 A.2d at 867.

[128] *See* United States v. Wallace, 532 F.3d 126, 130–31 (2d Cir. 2008).

[129] 902 A.2d at 870.

[130] *Id.*

In that case, Lewis Morrison was charged with the drug-induced death of his friend Daniel Shore.[131] In New Jersey, the statute is a strict liability crime.[132] Morrison and Shore had "pooled their money . . . [and] bought four decks of heroin" at around 3 a.m. one morning.[133] Morrison and Shore were together when they bought the heroin, but Morrison negotiated the purchase and took the initial physical control of the heroin.[134] Morrison "placed the decks in his pocket and, after driving out of the city, gave one to Shore."[135] Morrison and Shore drove to Morrison's house and used the heroin they had purchased.[136] Shore died of a heroin overdose a few hours later.[137]

After conducting its "fact-sensitive analysis," the court determined that Shore possessed the drugs from the start, noting that Morrison and Shore were friends; that they pooled their money

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[131] *See id.* at 862. In this case, a grand jury indicted and defense counsel moved to dismiss the drug-induced death and distribution charges prior to trial on the grounds that the prosecutor had presented insufficient evidence to support them. *See id.* at 864. The trial court agreed, and the State appealed. *See id*.

The case made its way to the New Jersey Supreme Court. Relying on the joint-user doctrine, the New Jersey Supreme Court upheld the trial court's dismissal of the charges against Morrison. *See id.* at 871.

[132] *See* N.J. STAT. ANN. § 2C:35-9(a) ("Any person who manufactures, distributes or dispenses methamphetamine, lysergic acid diethylamide, phencyclidine or any other controlled dangerous substance classified in Schedules I or II, or any controlled substance analog thereof, in violation of subsection a. of N.J.S. 2C:35-5, is strictly liable for a death which results from the injection, inhalation or ingestion of that substance, and is guilty of a crime of the first degree.").

[133] *Morrison*, 902 A.2d at 862–63.

[134] *See id.* at 863.

[135] *Id.*

[136] *Id.*

[137] *See id.* at 863–64.

together to make the purchase; and that Shore was physically present at the time of the purchase.[138] The court concluded as follows:

> The evidence clearly implies that when defendant bought the four decks both were in joint possession of the drugs—that is, defendant had actual possession and Shore constructive possession of the heroin. Viewing the evidence in the light most favorable to the State, we agree with the trial court that because defendant and Shore simultaneously and jointly acquired possession of the drugs for their own use, intending only to share it together, defendant cannot be charged with the crime of distribution.[139]

### *C. Analyzing the Simultaneous Acquisition Requirement*

Courts are split on how they interpret the joint-user doctrine's requirement that the drugs be simultaneously acquired. Some courts have held or implied that users must be physically present at the time of purchase to be joint-possessors. Other courts have taken a more holistic approach, finding that the defense may apply where users pool their money to buy drugs even if they are not both physically present for the purchase. Check to see which approach courts in your jurisdiction have adopted.

#### *1. Decisions Requiring Physical Presence*

A majority of courts that have addressed the issue have held or implied that physical presence at the purchase is a prerequisite for the joint-user defense to apply. In *United States v.*

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[138] *See id.* at 870–71.

[139] *See id.* at 871 (citations omitted).

*Wright*,[140] for example, the Ninth Circuit held the defendant was not entitled to the "joint user" defense to possession with intent to distribute where a friend:

> [a]sked him to procure heroin so that they might use it together; she gave him $20 with which to buy the heroin but did not tell him where to buy it; he left her dwelling and procured the heroin; then he brought the heroin back and they "snorted" it together.[141]

Because Wright and his friend had not acquired the heroin "simultaneously,"[142] the court found Wright's conduct constituted "distribution."[143] Specifically, the court concluded that by purchasing the heroin, "Wright facilitated the transfer of the narcotic; he did not simply 'simultaneously and jointly acquire possession of a drug for their [his and another's] own use.'"[144]

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[140] United States v. Wright, 593 F.2d 105 (1979).

[141] *Id.* at 108.

[142] *Id.*

[143] *Id.* at 106.

[144] *Id.* at 108 (alterations in original). For additional cases holding or suggesting that physical presence is required, see United States v. Mancuso, 718 F.3d 780, 798 (9th Cir. 2013) (footnote omitted) ("Even assuming the *Swiderski* rule was binding in the Ninth Circuit, it would not apply to Mancuso's case, because the record does not support finding that any of the witnesses pooled money with Mancuso and traveled with him to acquire the cocaine jointly, intending only to share it together."); People v. Coots, 968 N.E.2d 1151, 1158 (Ill. Ct. App. 2012) (joining the courts that "have held that the fact that two or more people have paid for drugs will not prevent one of them from being guilty of delivery or distribution—or intent to deliver or distribute—if he alone obtains the drugs at a separate location and then returns to share their use with his co-purchasers."); State v. Greene, 592 N.W.2d 24, 30 (Iowa 1999) (declining to apply the joint-user "rationale where both owners did not actively and equally participate in the purchase of the drugs, even though the drugs were acquired for the personal use of the joint owners."); United States v. Washington, 41 F.3d 917, 920 (4th Cir. 1994) ("[A] defendant who purchases a drug and shares it with a friend has 'distributed' the drug even though the purchase was part of a joint venture to use drugs."); State v. Shell, 501 S.W.3d 22, 29 (Mo. Ct. App. 2016) (rejecting a joint-user argument where, although "Decedent requested that Defendant purchase the heroin for both men, Defendant was the one who, on his own, purchased the heroin from his drug dealer with his own money and delivered it to Decedent.").

### 2. *Decisions Not Requiring Physical Presence*

Some courts have held or implied that both users need not be physically present for the joint-user defense to apply. These jurisdictions still require simultaneous acquisition of the substance but, citing the principles of constructive possession, hold that a person can acquire possession of an item without being physically present at the point of sale.

In *Minnesota v. Carithers*,[145] for example, the court held that "[i]f a husband and wife jointly acquire the drug, each spouse has constructive possession from the moment of acquisition, whether or not both are physically present at the transaction."[146] In *Carithers*, the Minnesota Supreme Court considered a consolidated appeal of two cases involving prosecutions under a drug-induced homicide felony murder statute.[147] In one of the two cases, the defendant:

> went by herself to buy the heroin, but it appears undisputed that she was buying not just for herself but for her husband also. She brought the heroin home and used her half. After showing her husband where she hid the heroin, she left the house. During her absence, her husband prepared a syringe and injected himself. He . . . died of an overdose.[148]

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[145] State v. Carithers, 490 N.W.2d 620 (Minn. 1992).

[146] *Id.* at 622.

[147] *See id.* at 620–21 ("Minnesota Statute § 609.195(b) (1990) is a special felony murder statute declaring it murder in the third degree if one, without intent to kill, proximately causes the death of another person by furnishing—that is, 'directly or indirectly, unlawfully selling, giving away, bartering, delivering, exchanging, distributing, or administering'—a schedule I or II controlled substance.").

[148] *Id.*

The court held that the joint-user defense applied because the defendant's husband constructively possessed the heroin as soon as it was purchased.[149] The court reasoned that, when a person is buying drugs on behalf of an absent spouse:

> [t]he absent spouse could be charged with constructive possession at any time following the purchase by his or her confederate. That the absent spouse did not exercise physical control over the substance at the moment of acquisition is an irrelevancy when there is no question that the absent spouse was then *entitled* to exercise joint physical possession.[150]

Accordingly, the joint-user defense applied and the court upheld dismissal of the felony murder charges.[151]

The New Jersey Supreme Court's multi-factor "fact-sensitive" test for determining whether users simultaneously acquired possession appears to take a similar approach.[152] Although physical presence was *one* of the factors in the New Jersey Supreme Court's test, it was not described as a necessary condition for the defense to apply. Moreover, the other factors—particularly "whether one party had sole possession of the controlled dangerous substance for any significant length of time"—suggest that users who pool their money to buy drugs to use

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[149] *See id.* at 622.

[150] *Id.*

[151] A number of courts have read *Carithers* to represent a broad application of the joint-user rule in comparison to cases like *Wright*. A recent Minnesota appeals court decision, however, read *Carithers* narrowly and suggested it may apply only to *spouses* who jointly purchase drugs. *See* State v. Schnagl, 907 N.W.2d 188, 199 (Minn. Ct. App. 2017) ("The aforementioned cases indicate that the holding in *Carithers* is narrow, and the existence of a marriage relationship is an important element in establishing joint acquisition and possession for purposes of a defense.").

[152] State v. Morrison, 902 A.2d 860, 870 (N.J. 2006).

shortly after the purchase might qualify for the defense, regardless of whether both were physically present at the sale.[153]

### 3. *Arguments in Support of a Broad Application of the Simultaneous Acquisition Requirement*

In cases where a defendant seeks to raise a joint-user defense, the scope of the simultaneous acquisition/possession rule is likely to be a key point of contention. Most jurisdictions have not yet resolved this question.[154] Although a majority of courts to have considered the issue have held that both users must be physically present at the sale for the joint-user defense to apply, there are strong policy and doctrinal arguments in favor of a broader application of the defense.

#### *a. The Constructive Possession Doctrine*

It is well established in law that a person can constructively possess an item that has not yet been delivered into his or her actual possession. Indeed, in possession prosecutions, the government often argues for a broad construction of constructive possession. These cases have led courts to hold that "a defendant also may be convicted of possession . . . of a controlled substance when his or her dominion and control are exercised through the acts of an agent."[155]

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[153] *Id.* (citation omitted).

[154] The most recent decision was just released in the Massachusetts decision in Commonwealth v. Jesse Carrillo, SJC-12617, slip opn. (Mass. Oct. 3, 2019), https://www.mass.gov/files/documents/2019/10/03/v12617.pdf.

[155] People v. Morante, 975 P.2d 1071, 1080 (1999) (citations omitted). This has the possible benefit of offering juries a compromise lesser included offense, and it is possible that a defense under a Good Samaritan law might apply (*see infra* Section VI.B), or that the lower charge opens the possibility of a treatment-oriented disposition rather than incarceration.

For instance, in *People v. Konrad*,[156] the Michigan Supreme Court held that the defendant constructively possessed cocaine where the evidence showed he "had paid for the drugs and that they were his—that is, that he had the intention and power . . . to exercise control over them."[157] Specifically, the evidence showed that the defendant had:

> made a prior arrangement with Joel Hamp and others to purchase a kilogram of cocaine, that he had already paid for the cocaine, that he told Joel to come to his house about seven that evening, and that, after he had been arrested, he had instructed his wife to direct Joel not to come. Joel arrived after 6:30 p.m. and acknowledged that he had something for the defendant.[158]

The court concluded that, although the drugs had never been in the defendant's physical presence, he constructively possessed them at the time his agent purchased them.[159] This is because a person "may constructively possess substances that their agents have *bought* for them."[160]

Similarly, the California Supreme Court has held that a person who directs an agent to purchase contraband on his behalf is guilty of possession as soon as the purchase is completed.[161] In *People v. White*, the defendant, Frank White, asked his roommate Conover to buy some heroin

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156 536 N.W.2d 517 (Mich. 1995).

157 *Id.* at 522.

158 *Id.*

159 *See id.* at 520–23.

160 *Id.* at 522.

161 People v. White, 325 P. 2d 985, 987 (Cal. 1958) (en banc).

for him.[162] Conover made the purchase while White was at work and left the heroin on White's dresser.[163] The police found the heroin before White arrived home from work.[164] Even though White never had physical access to the heroin, the court sustained his possession conviction.[165] The court reasoned that because Conover bought the heroin "pursuant to [White's] express instructions," White "had constructive possession as soon as the narcotic was acquired for him, and it is immaterial whether he had personal knowledge of the presence of the narcotic in the apartment."[166]

This principle should apply with equal force in the context of the joint-user doctrine. The *Carithers* court based its holding on this rationale, concluding that because "[t]he absent spouse could be charged with constructive possession at any time following the purchase by his or her confederate," the joint-user rule should apply.[167] Requiring both users to be physically present at the purchase for the joint-user rule to apply lets the government have it both ways, defining constructive possession broadly when it supports a conviction (i.e., to a constructive possession defendant) but narrowly when it supports the joint-user defense. This should be reason enough

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[162] *Id.* at 986.

[163] *Id.*

[164] *Id.*

[165] *Id.* at 987.

[166] *Id*.

[167] State v. Carithers, 490 N.W.2d 620, 622 (Minn. 1992).

for courts to reject decisions like the Ninth Circuit's in *Wright* and to follow decisions like the Minnesota Supreme Court's in *Carithers*.

### *b. The Challenges of Elucidating the Physical Presence Aspect of the Simultaneous Purchase Requirement*

The simultaneous purchase requirement can become farcical if physical presence is required and taken to the extreme. In the Seventh Circuit case *Weldon v. United States*,[168] for example, the court expressly rejected the government's argument that both users must physically interact with the seller to be joint-possessors.

> The government argues (with no judicial support) that the holding of *Swiderski* is inapplicable to this case because "Weldon was the only one of the three to get out of Roth's car and conduct a hand-to-hand exchange of money for heroin with the dealer." The implication is that the rule of *Swiderski* requires absurd behavior. Imagine Weldon, Roth, and Fields squeezing into the dealer's car and each handing the dealer a separate handful of money. What on earth would the dealer think of such antics? How would he react? What would he do? If he gave them the drug would they have to divide it on the spot in order to avoid being guilty of distribution? What matters is that the [users] were participants in the same transaction. No cases require literal simultaneous possession; *Swiderski* and another decision (very much like the present case) implicitly reject such a requirement.[169]

[168] 840 F.3d 865, 867 (7th Cir. 2016).

[169] *See id.* at 867.

The Seventh Circuit did not elaborate on the question of what it means for both users to have been "participants in the same transaction," however, due to the posture of the case—a motion to vacate a guilty plea as a result of ineffective assistance of counsel.[170]

### *D. Arguing for a Broad Application of the Joint-User Rule Based on Distinguishing Users from Sellers*

A broad application of the joint-user rule is also supported by the policy goals of linking penalties to culpability while also distinguishing, to the extent possible, between users and people who are actively involved in the drug trade. These policy goals are inherent in the structure of drug laws and have sometimes been expressly stated by legislators. This was a motivating consideration in the court's decision in *Morrison*:

> The Legislature stated that "it is the policy of this State to distinguish between drug offenders based on the seriousness of the offense, considering principally the nature, quantity and purity of the controlled substance involved, and the role of the actor in the overall drug distribution network." . . . In passing the Act, the Legislature deemed the sentencing guidelines under the old drug laws inadequate in "identify[ing] the most serious offenders and offenses and [in] guard[ing] against sentencing disparity." . . . The consequences of a finding of distribution are significantly greater than that of possession. Whereas the maximum term of imprisonment for distributing heroin that causes a person's drug-induced death is twenty years, . . . the maximum term for possession of heroin is only five years . . . . The Legislature expected the criminal culpability of parties to bear some proportion to their conduct.[171]

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[170] *Id.* (first citing United States v. Swiderski, 548 F.2d 445, 448 (2nd Cir. 1977); then citing United States v. Speer, 30 F.3d 605, 608–09 (5th Cir. 1994)). As evidence that it is worth pursuing these arguments, and analogies like the one proposed in the next section *infra*, the Massachusetts Supreme Judicial Court noted that had the facts at issue in the case been closer to those in *Weldon*, it would have been willing to revisit precedent in order to apply the joint possession doctrine. Commonwealth v. Jesse Carrillo, SJC-12617, slip opn. at 35-44 (Mass. Oct. 3, 2019), https://www.mass.gov/files/documents/2019/10/03/v12617.pdf.

[171] State v. Morrison, 902 A.2d 860, 870 (N.J. 2006) (alteration in original) (first quoting N.J. STAT. ANN. § 2C:35-1.1(c) (West, Westlaw through L.2018, c. 169 and J.R. No. 14); then quoting § 2C:35–1.1(d); then citing N.J. STAT. ANN. § 2C:35-9(a) (West, Westlaw through L.2018, c. 169 and J.R. No. 14); then citing N.J. STAT. ANN.

To hammer home this goal, it may be worthwhile to parse the statutory language and/or legislative of terms such as "sell"—as the Minnesota Supreme Court did in *Carithers*.[172] It may also be worthwhile to argue by way of analogy. Consider the analogy used by the Seventh Circuit in *Weldon*: if two friends order takeout together from a restaurant and one of them drives to pick up the food and pays for it with their pooled money, "[i]t would be very odd to describe what [the friend who drove to get the takeout] did as 'distributing' the food."[173]

## IV. SENTENCING AND MITIGATION

At the federal level, DIH is written into law by way of a sentencing enhancement for drug delivery resulting in death or serious bodily injury.[174] Even though it is a sentencing enhancement, it is considered an element of the offense and must be alleged in the indictment.[175]

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§ 2C:43-6(a)(1) (West, Westlaw through L.2018, c. 169 and J.R. No. 14); then citing N.J. STAT. ANN. § 2C:35-10(a)(1) (West, Westlaw through L.2018, c. 169 and J.R. No. 14); and then citing § 2C:43-6(a)(3)); *see also*, *Swiderski*, 548 F.2d at 449. The *Swiderski* court noted that in interpreting criminal drug laws "it is important to understand their place in the statutory drug enforcement scheme as a whole, which draws a sharp distinction between drug offenses of a commercial nature and illicit personal use of controlled substances." *Swiderski*, 548 F.2d at 449.

[172] *See generally*, Carithers, 490 N.W.2d 620.

[173] Weldon v. United States, 840 F.3d 865, 866 (7th Cir. 2016).

[174] 21 U.S.C. §§ 841(b), § 960(b).

[175] *See* Andrea Harris & Lisa Lorish, *Litigation Strategies In Opioid Overdose Cases*, FEDERAL CRIMINAL PRACTICE SEMINAR – SPRING 2018 (April 13, 2018), https://nce.fd.org/sites/nce.fd.org/files/pdfs/LItigation%20Strategies%20in%20Opioid%20Overdose%20Cases.pdf. However in at least one federal case, the prosecution did not make the charge in the indictment, but instead later used DIH as an aggravating factor in sentencing, requesting 14 years of incarceration. *See* United States v. Reynoso, Case 1:17-cr-10350-NMG (D. Mass. Jun. 24, 2019) (prosecution's sentencing memo).

The sentences are quite severe—often mandatory life terms—but possibilities do exist in mitigation. For more information regarding federal sentencing, see the Federal Defenders information from its Federal Criminal Practice Seminars.[176]

At the state level, in addition to the usual considerations regarding sentencing and mitigation,[177] Good Samaritan laws may come into play.[178] In Vermont and Delaware, they may provide immunity to DIH charges for people who call 911 to seek help.[179] The rest of these laws only apply to possession and related crimes, but they may offer an opportunity for mitigation for other crimes. Indeed, approximately half of the statutes specifically provide that they can be used for mitigation more broadly.[180] For cases not going to trial, the possibility of mitigation may offer advantages in plea bargain negotiations.

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[176] *Id*.

[177] *See infra* Section VII (regarding the use of person-first language to humanize defendants and other people who use drugs or suffer addiction).

[178] *See* Network for Public Health Law, *Legal Interventions To Reduce Overdose Mortality: Naloxone Access and Overdose Good Samaritan Laws* (Dec. 2018), https://www.networkforphl.org/_asset/qz5pvn/network-naloxone-10-4.pdf. *See also* Legal Science, PRESCRIPTION DRUG ABUSE POLICY SYSTEM, *Good Samaritan Overdose Prevention Laws* (Jul. 1, 2018), http://pdaps.org/datasets/good-samaritan-overdose-laws-1501695153 (providing an interactive tool for a dataset of state Good Samaritan laws).

[179] *See* LASALLE, *supra* note 3, at 40.

[180] *See* Legal Science, *supra* note 178, at question 5.

## V. CONSTITUTIONAL AND STATUTORY PROBLEMS WITH DIH ENFORCEMENT

### *A. Disparate Impact on People of Color*

As with many elements of the War on Drugs and mass incarceration—though contrary to the conventional wisdom that the opioid crisis is a "white" problem—DIH enforcement appears to disproportionately target people of color. The Health in Justice Action Lab's preliminary analysis of the limited data available found that DIH-type prosecutions are more likely to be brought when the decedent is white, and that people of color receive median sentences that are 3 years longer than whites.[181] This pattern of practice that harkens back to one of the most egregious founding elements of the War on Drugs.[182]

It also points to the health problem of the low access to health care that is disproportionately experienced by people of color. Ironically, in areas where criminal justice institutions and actors are striving to bring increased access to services, these prosecutions may further undermine trust

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[181] *See Drug Induced Homicide*, *supra* note 10.

[182] For example, consider the statement of John Erlichman, Nixon's domestic policy advisor:

> The Nixon campaign in 1968, and the Nixon White House after that, had two enemies: the antiwar left and black people. You understand what I'm saying? We knew we couldn't make it illegal to be either against the war or black, but by getting the public to associate the hippies with marijuana and blacks with heroin, and then criminalizing both heavily, we could disrupt those communities. We could arrest their leaders, raid their homes, break up their meetings, and vilify them night after night on the evening news. Did we know we were lying about the drugs? Of course we did.

Dan Baum, *Legalize It All: How to win the war on drugs*, HARPER'S (Apr. 2016), https://harpers.org/archive/2016/04/legalize-it-all/.

in police among people of color, steering them away from even beneficial police contact and inadvertently worsening disparities in access to care.

### *B. Denial of MOUD to inmates may violate the ADA or Rehabilitation Act*

Considering that DIH defendants are overwhelmingly likely to suffer OUD themselves, the criminal justice system's tragic failure to provide pharmacotherapy is a critical problem for DIH enforcement.[183] If a carceral facility deprives an inmate suffering from OUD from receiving pharmacotherapy, some courts are beginning to hold that the failure may violate the Americans with Disabilities Act (local and state facilities) or the Rehabilitation Act (federal facilities).

For example, in *Pesce v. Coppinger*, the U.S. District Court in Boston issued an injunction requiring Massachusetts facilities to provide methadone to the plaintiff, and ruling that the commonwealth's policy depriving methadone to inmates with OUD violated the ADA (as well as the U.S. Constitution, see below).[184] Similarly, the U.S. Court of Appeals for the First Circuit affirmed a preliminary injunction ordering a jail in Maine to provide buprenorphine to treat an individual with OUD.[185]

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[183] *See* discussion *infra* Sections V.C and VI.B.

[184] *See* Pesce v. Coppinger, 1:18-cv-11972-DJC (slip op'n), (D. Mass. Nov. 28, 2018); *see also* Brief in Support of Plaintiff by amici, https://www.aclum.org/sites/default/files/field_documents/20181102_pesce_publichealthamicus.pdf.

[185] Smith v. Aroostook County, 922 F.3d 41 (1st Cir. 2019).

For in-depth treatment of the legal and advocacy issues regarding clients suffering OUD and regarding treatment in jails and prisons, the Legal Action Center provides a number of resources for attorneys.[186]

### *C. Forcing an inmate into withdrawal may violate the Eighth Amendment*

Similarly, where facilities provide no inadequate treatment services and force inmates into the misery of withdrawal,[187] this may count as cruel and unusual punishment. In *Pesce*, the federal district court noted that the case met the First Circuit's tests of a "sufficiently serious" medical need—"meaning it was either diagnosed by a physician as mandating treatment or is so obvious that a layperson would recognize the need for medical assistance"—and that "defendants acted with intent or wanton disregard when providing inadequate care."[188] In that case, Pesce was receiving physician-prescribed treatment for his OUD, but the state refused to consider the medical dynamics of his case.

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[186] *See* Legal Action Center, *Substance Use: Medication Assisted Treatment Resources*, https://lac.org/resources/substance-use-resources/medication-assisted-treatment-resources/.

[187] *See* Brian Barnett, *Jails and prisons: the unmanned front in the battle against the opioid epidemic*, STAT NEWS (Jul. 2, 2018), https://www.statnews.com/2018/07/02/opioid-epidemic-jails-prisons-treatment/.

[188] *See* Pesce slip op'n. at 16 (citing cases). *See also* Legal Action Center, *supra* note 186 (for resources); *e.g.*, Legal Action Center, *Legality of Denying Access to Medication Assisted Treatment in the Criminal Justice System* (Dec. 1, 2011), https://lac.org/wp-content/uploads/2014/12/MAT_Report_FINAL_12-1-2011.pdf.

### *D. Cell phone searches and* Carpenter

Cell phones automatically collect, store, and transmit an enormous amount of data about their users. Consequently, information obtained from cell phones, their manufacturers, service providers, and app developers has come to play a crucial role in criminal investigations. In this section, we highlight some of the important legal and practical considerations that arise when evidence from cell phones is used during the course of drug-induced homicide enforcement. As the applicable legal protections vary based on the type of information sought by law enforcement,[189] this section is divided up into three parts: one dealing with contents of communications and related metadata, one dealing with location information, and one dealing with information from the mobile applications ecosystem.

#### *1. Contents and Metadata*

First and foremost, cell phones are a rich source of information regarding an individual's communications. Communication records obtained from an individual's cell phone may include both the *content* of an individual's communications[190] and information *about* an individual's communications (also known as "metadata").[191] In DIH investigations, prosecutors are keen to access communication information. The National District Attorneys Association's white paper on the opioid crisis addresses this desire:

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[189] Ben Brown & Kevin Buckler, *Pondering personal privacy: a pragmatic approach to the Fourth Amendment protection of privacy in the information age*, 20 CONTEMP. JUST. REV. 227 (2017).

[190] Saved text messages are an example of the contents of an individual's communication that can be retrieved from their phone.

[191] Phone call metadata can include the identity of the caller and recipient, time of the call, and duration of the call.

> Of particular importance in the homicide investigation of a fatal overdose is the individual's cell phone. In many instances, a user will engage in a series of calls and/or texts with the drug dealer shortly before death to arrange the purchase of the fatal dose of product. It's important as part of the investigative process to seek the proper legal process to obtain subscriber information that can provide valuable intelligence to pursue a case. Obtaining phone records can take time and are sometimes difficult to pursue, but it can be one of the most critical parts of an investigation and can hold key evidence to successfully pursue a drug delivery in death statute case.[192]

Under federal law, law enforcement must obtain a warrant based on probable cause prior to accessing the contents of stored communications without notice or consent.[193] While, on its face, federal law distinguishes between contents of communications held in storage for 180 days or less (for which a warrant is always required)[194] and contents of communications held in storage for more than 180 days (which could be obtained with a subpoena),[195] it is now general practice to obtain a warrant regardless of the age of the communication as there is "no principled basis to treat email less than 180 days old differently from email more than 180 days old."[196] In contrast, federal law allows law enforcement to obtain a customer's name and "local and long distance telephone connection records" through an administrative subpoena,[197] and other non-content

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[192] NDAA, *supra* note 21, at 9.

[193] 18 U.S.C. § 2703 (a)-(c) (2018).

[194] *Id.* § 2703 (a).

[195] *Id.* § 2703 (b).

[196] Department of Justice, *Acting Assistant Attorney General Elana Tyrangiel Testifies Before the U.S. House Judiciary Subcommittee on Crime, Terrorism, Homeland Security, and Investigations* (2013), https://www.justice.gov/opa/speech/acting-assistant-attorney-general-elana-tyrangiel-testifies-us-house-judiciary.

[197] 18 U.S.C. § 2703 (c). An administrative subpoena can also be used to obtain a range of basic subscriber information, including address and payment mechanism.

information through a court order.[198] However, some states have implemented stricter protections for certain types of communications metadata.[199]

There is also the issue of encryption. Where information on a phone is encrypted in such a way that law enforcement cannot access it, even a court order will not make the information available. For this reason, the NDAA, the FBI, and others in law enforcement are actively advocating that Congress amend the Communications Assistance for Law Enforcement Act of 1994 to require encryption technology to include backdoor access for law enforcement.[200]

### 2. *Location Tracking*

Second, data from an individual's cell phone can be used to track their *location* over a (potentially long) period of time by way of commercial records indicating which cell towers were connected to their phone at what times.[201] Also known as cell site location information (CSLI), this information can be used to track an individual in the past by leveraging previously stored cell site location records (also known as historical CSLI), or in real time by leveraging

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[198] 18 U.S.C. § 2703 (d).

[199] *See*, *e.g.*, People v. Sporleder, 666 P.2d 135 (Co. 1983). For a general discussion of state deviation from federal standards for law enforcement access to metadata, *see* Stephen E. Henderson, *Learning from All Fifty States: How to Apply the Fourth Amendment and Its State Analogs to Protect Third Party Information from Unreasonable Search*, 55 Cath. U. L. Rev. 374 (2006).

[200] NDAA, *supra* note 21, at 7-9 ("Address the Obstacle of Smartphone Encryption").

[201] Marc McAllister, *GPS and Cell Phone Tracking: A Constitutional and Empirical Analysis,* 82 U. CIN. L. REV. 207, 225 (2013).

prospective CSLI.[202] In the DIH context, law enforcement may seek to use location information from both the suspect and victim as evidence that they were in the same location – and thus presumably may have interacted – shortly prior to the fatal overdose.

The Supreme Court recently clarified the legal protections that apply to cell phone location information in *Carpenter v. United States,* holding that law enforcement generally must obtain a warrant supported by probable cause prior to acquiring cell phone location information.[203] Because an individual has a reasonable expectation of privacy in the detailed, continuous location information that can be obtained through cell site records, law enforcement use of these records constitutes a search regulated by the Fourth Amendment.[204] However, the Supreme Court explicitly and narrowly limited the technology covered by their opinion in *Carpenter*, declining to "express a view on…real-time CLSI or 'tower dumps' (a download of information on all devices that connected to a particular cell site during a particular interval)."[205]

Defenders seeking to challenge law enforcement use of location information not covered by *Carpenter* should determine whether stronger privacy protections may be provided by state statute or jurisprudence. For example, although the Supreme Court excluded real-time CLSI from their opinion in *Carpenter*, the Florida Supreme Court has previously held that use of real-

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[202] Electronic Frontier Foundation, *Cell Phone Location Tracking or CSLI: A Guide for Criminal Defense Attorneys* (2017), https://www.eff.org/files/2017/10/30/cell_phone_location_information_one_pager_0.pdf.

[203] United States v. Carpenter, 585 U.S. ____, No. 16-402 (Jun. 22, 2018).

[204] *Id.* at 12.

[205] *Id.* at 17.

time CLSI to track a criminal suspect violated the Fourth Amendment because "a subjective expectation of privacy of location as signaled by one's cell phone – even on public roads – is an expectation of privacy that society is now prepared to recognize as objectively reasonable."[206] Additionally, as lower courts have already begun to explore whether this opinion may be extended to other technologies,[207] the protections available for other forms of location information may shift in the future.

### *3. Apps*

Finally, prosecutors and law enforcement may be able to obtain a wide variety of information generated or transmitted by the mobile applications on an individual's smart phone. Mobile applications ("apps") are software designed to run on a mobile device and are widely employed by mobile device users[208] to add a variety of functionality to their phone. As many mobile apps derive much or all of their revenue by targeted advertising, they are incentivized to collect, store, and transmit an enormous amount of information about their users.[209] It is probable that

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[206] Tracey v. State, 152 So. 3d 504, 526 (Fla. 2014).

[207] *See*, *e.g.*, *Naperville Smart Meter Awareness v. City of Naperville*, No. 16-3755 (7th Cir. 2018) (holding that city-mandated smart energy meters that regularly collect and transmit energy-use data constitute a Fourth Amendment search, although this search is reasonable due to the governmental interest in modernizing the electrical grid), and *Florida v. Quinton Redell Sylvestre*, No. 4D17-2166 (Fla. 15th Cir. 2018) (holding that use of a cell-site simulator constitutes a Fourth Amendment search).

[208] According to one estimate, smartphone users "access 30 apps on a monthly basis" and "launch an average of at least 9 apps per day." Sarah Perez, *Report: Smartphone owners are using 9 apps per day, 30 per month*, TECH CRUNCH (2017), https://techcrunch.com/2017/05/04/report-smartphone-owners-are-using-9-apps-per-day-30-per-month/.

[209] Edward Balkovich et al., *Electronic Surveillance of Mobile Devices: Understanding the Mobile Ecosystem and Applicable Surveillance Law*, RAND CORP. RR800, 10 (2015), https://www.rand.org/pubs/research_reports/RR800.html.

prosecutors would seek to mine this broad range of information collected by mobile applications for insight into an individual's behaviors, social network, and locations.[210]

Because this information is frequently transmitted and stored off the user's device, it can be available even when the phone itself cannot be accessed – for example, should the phone be lost, destroyed, or encrypted. While the exact protections that apply will depend on the type of information transmitted by the mobile application, data transmitted by many commonly-used mobile apps may include the contents of electronic communications[211] (requiring a warrant),[212] as well as metadata about these communications (requiring a court order[213] or subpoena[214]). While this framework is doctrinally identical to the framework used for information about phone calls or text messages, law enforcement officers will be required to approach the application developer – rather than a phone company – to obtain this information. Some application developers have well-established mechanisms for receiving and processing law enforcement requests,[215] while

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[210] For a hypothetical description of how investigators might use information from mobile applications, *see* Edward Balkovich et al., *Helping Law Enforcement Use Data from Mobile Applications: A Guide to the Prototype Mobile Information and Knowledge Ecosystem (MIKE) Tool*, RAND CORP. RR1482 (2017), https://www.rand.org/pubs/research_reports/RR1482.html.

[211] For purposes of 18 U.S.C. § 2703, an electronic communication includes "any transfer of signs, signals, writing, images, sounds, data, or intelligence" through wire or electromagnetic means. *Id.* § 2501(12).

[212] *Id.* § 2703(a)-(c).

[213] *Id.* § 2703(d).

[214] *Id.* § 2703(c)

[215] *See, e.g.,* Instagram, *Information for Law Enforcement*, https://help.instagram.com/494561080557017 (last accessed Nov. 20, 2018).

others have not yet done so or might even make it difficult in order to deter law enforcement requests. Additionally, law enforcement may be unaware of the information collected by mobile applications or which developers to approach to obtain it.[216] Consequently, as a practical matter it may be relatively more difficult for law enforcement to obtain information from app developers than from telecommunication companies.

## VI. PUBLIC POLICY ISSUES

DIH enforcement is a flawed strategy. While it may offer some emotional value to some of the bereaved, and it may provide some political value to law enforcement and prosecutors to be seen "doing something" about the opioid crisis, study after study demonstrates that tough law enforcement practices do not curb problematic drug use or trafficking on a large scale.[217] DIH enforcement doesn't work, and if one of its goals is to reduce overdose deaths, it exacerbates the problem.

### *A. DIH statutes purport to target major traffickers, but prosecutions target co-users and small-scale sellers*

Nationwide, legislative history tends to be quite clear: criminal penalties for drug distribution are intended to target traffickers and dealers to stop them from preying on youth and people suffering addiction. Take the example of Massachusetts. In his June 1980 letter to the legislature submitting "An Act Providing Mandatory Terms of Imprisonment for Major Drug

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216 Balkovich et al., *supra* note 209, at 6.

217 *See* LASALLE, *supra* note 3, at 39.

Traffickers…"—which became the drug distribution statute currently enforced—then-Governor Edward King clearly identified the purpose and targets of the bill:

> The time has come to launch a new, more aggressive campaign against *those who operate and profit* from the death-dealing traffic in drugs. They should be the principal focus of law enforcement activities at the state and local level. We need major changes in the way our criminal system deals with *these dealers in drugs*.[218]

Statements supporting DIH statutes identify the same stated targets. Vermont's "death results" statute specifically states that it is directed "at the entrepreneurial drug dealers who traffic in large amounts of illegal drugs for profit," and that it "is not directed at" people who "resort to small-scale sale of drugs to support their addiction."[219]

There is a similar focus to operational and prosecutors' statements. The "strategic objectives" in New Jersey's 1993 "Statewide Narcotics Action Plan" were:

> to target repeat offenders, large scale or prolific distributors, upper echelon members of organized trafficking networks, manufacturers and persons who distribute to, or employ juveniles in, drug distribution schemes for investigation and prosecution; … [and] to disrupt organized drug trafficking networks by targeting key network members...[220]

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[218] *See* Commonwealth v. Jackson, 464 Mass. 758 (2013), *quoting* 1980 House Doc. 6652, at 1 (emphasis added by the Court).

[219] *See* 2003 Vermont Law P.A. 54, §1(2) (legislative findings). *See also* LASALLE, *supra* note 3, at 15-16 (quoting legislative statements nationwide, such as "We want to get the drug dealers. That is what this bill is designed to do.").

[220] NJ DIV. OF CRIMINAL JUSTICE, *Statewide Narcotics Action Plan* (Mar. 12, 1993), https://www.state.nj.us/lps/dcj/agguide/snap93.htm.

The National Heroin Task Force's recommendation that prosecutors bring more drug-induced homicide prosecutions was intended to target traffickers; it makes no mention of regular users.[221] A National Association of Attorneys General publication exhorted law enforcement and prosecutors to make a "paradigm shift" in how they think about overdose deaths—as crimes, not accidents—and that prosecuting them "is one tool in the law enforcement arsenal which, if used appropriately, can assist locally in focusing on the drug dealers who take advantage of those who have become addicted to opioids."[222] Or put simply in a public statement by former Ocean County, New Jersey, Prosecutor Joseph Coronato: "If you're going to be a dealer, and that heroin is going to kill somebody, we're going to take that death, that overdose . . . and treat it as a homicide."[223]

Despite the explicit intention of these laws and policies, their real world application almost always involves people who are not dealers or traffickers, but are instead are struggling with addiction and who purchase drugs on behalf of themselves and their peers. Nationwide research conducted by the Health in Justice Action Lab has found that a full half (50 percent) of drug-induced homicide and similar prosecutions are brought against other users, friends, relatives,

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221 *See* DEP'T OF JUSTICE, NATIONAL HEROIN TASK FORCE FINAL REPORT AND RECOMMENDATIONS, at 12 (Dec. 31, 2015), https://www.justice.gov/file/822231/download. ("Federal prosecutors should prioritize prosecutions of heroin traffickers when the distribution of that drug results in death or serious bodily injury from use of that product.").

222 *See, e.g.*, Neil, *supra* note 11.

223 Deluxe Team, *Do Drug-Induced Homicide Laws Punish Dealers or Kill Addicts*, BETTER LIFE RECOVERY (Feb. 3, 2016), https://abetterliferecovery.com/do-drug-induced-homicide-laws-punish-dealers-or-kill-addicts.

romantic partners, and people with whom the decedent had a non-dealer relationship.[224] Only 47 percent were brought against "traditional" drug dealers, many of whom were selling small amounts of drugs.[225]

A study conducted by the Drug Policy Alliance had similar findings.[226] State-specific research does, too: in New Jersey, 25 of 32 identified prosecutions were against friends of the decedent; in Wisconsin, 90 percent of prosecutions targeted friends, relatives, or low-level street dealers; and in several Illinois counties, prosecutions usually targeted whoever was the last person with the decedent at the scene of the accidental overdose.[227] An extensive study by the *New York Times* looking at prosecutions in Pennsylvania came to similar findings.[228]

This disconnect between the stated intent of the laws and the actual targets of day-to-day prosecution likely stems from the problem of proof. But-for causation à la *Burrage* can be hard to prove, and it can be almost impossible to prove against anyone other than the person who held the drugs prior to the decedent.[229] Some states have adopted a "contributes to" standard to ease the burden of proof. The NDAA's white paper on opioids recommends legislatures "mak[e]

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[224] *See* Leo Beletsky, *America's Favorite Antidote: Drug-Induced Homicide, Fatal Overdose, and the Public's Health*, 4 UTAH L. REV. 833 (2019), https://dc.law.utah.edu/ulr/vol2019/iss4/4/. Visualizations of the data are available on the Lab's website at https://www.healthinjustice.org/drug-induced-homicide.

[225] *Id*.

[226] *See* LASALLE, *supra* note 3, at 41.

[227] *Id.* at 42 (summarizing studies).

[228] *See* Goldensohn, *supra* note 25.

[229] *See* Beletsky, *supra* note 224, at 57-58.

every person in the chain of delivery criminally liable for an overdose death[.]"[230] But even so, prosecutors have for the most part only found it practicable to pursue cases against tightly proximate individuals, which contradicts the deterrence rationale of the DIH concept.

### *B. DIH enforcement actually **reduces** help-seeking, thereby **increasing** the risk that people will die from overdose*

From a public health perspective, DIH enforcement against people who use drugs harms three important and interrelated public health imperatives: (1) the timely administration of naloxone to reverse overdoses; (2) public education and harm reduction efforts to reduce isolation among those who use opioids; and (3) the 911 Good Samaritan law designed to encourage help-seeking behavior among overdose witnesses.

Naloxone nasal spray is simple to administer and effective at reversing overdoses, and it can be done by emergency responders, by fellow users, or by others (such as people in the user's circles or bystanders).[231] Overdose education and naloxone distribution (OEND) programs are now widespread (though not widespread enough). These programs are effective at improving the ability of both professional and lay responders to recognize and reverse overdose events to prevent a fatal outcome, as well as improving access to naloxone.[232]

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230 NDAA, *supra* note 21 at 9.

231 *See* Edward W. Boyer, *Management of Opioid Analgesic Overdose*, 367 N. ENG. J. MED. 146, 150–53 (2012) (discussing the use of naloxone to treat overdoses).

232 *See* Alexander Walley et al., *Opioid Overdose Rates and Implementation of Overdose Education and Nasal Naloxone Distribution in Massachusetts: Interrupted Time Series Analysis*, 346 BMJ f174 (2013), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4688551/. In the Massachusetts example, over 7,400 overdose rescues by first responders were reported to the Department of Public Health after the program began in 2015. *See* GOVERNOR'S PRESS OFFICE, *Press Release: Baker-Polito Administration Awards Nearly $1 Million in First Responder Naloxone Grants* (June 28, 2018), https://www.mass.gov/news/baker-polito-administration-awards-

Naloxone works, but only if administered in time.[233] It is therefore critical that someone else be present who can administer naloxone or call 911 to prevent accidental overdoses from turning fatal.[234] Accordingly, the second common intervention is a public health education campaign targeted to people who use drugs that discourages them from using drugs alone. Particularly in the current context of potent synthetics adulterating the illicit opioid drug supply, using alone places individuals at far greater risk of death than using with others. "Use alone, die alone," as the phrase goes.

However, most drug use is criminalized outside the medical setting, and therefore witnesses to overdose events are often reluctant to call 911 because doing so summons not just EMS but law enforcement. They fear legal consequences for themselves or the person overdosing, ranging from being arrested and prosecuted for a drug-related crime to losing their housing or shelter.[235]

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nearly-1-million-in-first-responder-naloxone-grants. To make naloxone nasal spray more accessible, it can now be purchased without a prescription. Mary Markos, *Prescription No Longer Needed to Buy Naloxone in Massachusetts*, BOSTON HERALD (Oct. 19, 2018), https://www.bostonherald.com/2018/10/19/prescription-no-longer-needed-to-buy-naloxone-in-massachusetts/.

[233] *See* Boyer, *supra* note 231.

[234] *See* Travis Lupick, *If They Die of an Overdose, Drug Users Have a Last Request*, YES! MAG. (Aug. 25, 2018), https://www.yesmagazine.org/people-power/if-they-die-of-an-overdose-drug-users-have-a-last-request-20180830 ("In public health messaging, the first thing that's said is, 'Don't use alone.' You want people to be using with someone or with a group of people[.]"). A person experiencing an overdose can also administer naloxone on oneself, though the window of opportunity for this may be quite brief.

[235] According to several studies, many people refuse to call 911 for fear of police involvement (ranging from one-third to one-half); for those who did call 911, many delayed making the call for several critical minutes while they faced those fears. *See* Amanda Latimore & Rachel Bergstein, *"Caught with a Body," Yet Protected by Law? Calling 911 for opioid overdose in the context of the Good Samaritan Law,* 50 INT'L J. DRUG POL. 82 (2017), https://www.sciencedirect.com/science/article/abs/pii/S0955395917302888. *See also* LASALLE, *supra* note 3 (summarizing studies).

Accordingly, almost all state legislatures—though regrettably *not* the federal government—have passed 911 Good Samaritan laws. These laws aim to remove the fears by carving out limited criminal amnesty for overdose victims and witnesses who call for help.[236]

Unfortunately, Good Samaritan laws are too narrowly drawn. In every state except Vermont and Delaware, these laws only provide immunity to charges for possession of drugs and drug paraphernalia for personal use, not to distribution or death resulting from overdose—and these laws vary state to state on whether they cover investigation, arrest, and/or prosecution.[237] In other words, they create a quandary for people calling 911: you (probably) won't get in trouble if the person experiencing an accidental overdose event survives, but if death occurs, you're calling the cops on yourself.

And that's if you are even aware of the law. Tragically, knowledge and understanding of 911 Good Samaritan laws is limited—among users and first responders as well as the public.[238]

On the flip side, in their efforts to "send a message" to deter illegal drug sales (and be seen to be "doing something" about the opioid crisis), law enforcement and prosecutors often seek—and receive—press coverage when bringing charges or securing a conviction.[239] Unfortunately, this is

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[236] *See* NETWORK FOR PUBLIC HEALTH LAW, *Legal Interventions To Reduce Overdose Mortality: Naloxone Access and Overdose Good Samaritan Laws* (Dec. 2018), https://www.networkforphl.org/_asset/qz5pvn/network-naloxone-10-4.pdf. *See also* Legal Science, *supra* note 178.

[237] *See* Section IV *supra* (regarding the relevance of Good Samaritan laws in mitigating sentence severity).

[238] *See* Caleb J. Banta-Green et al., *Police Officers' and Paramedics' Experiences With Overdose and Their Knowledge and Opinions Of Washington State's Drug Overdose-Naloxone-Good Samaritan Law*, 90 J. URBAN HEALTH 1102 (2013), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3853169/.

[239] Indeed, the studies mentioned above conducted by the Health in Justice Action Lab, the *New York Times*, and Drug Policy Alliance (and those it cited) are based upon the many hundreds of news articles available online.

a case of sending the wrong message to the wrong people. Arresting and prosecuting users and petty street dealers does not threaten kingpins, but it does it does put the word out that witnesses to an overdose may be arrested and charged. Worse, an increasing number of prosecutors and law enforcement leaders are calling for *all* overdose sites to be treated as crime scenes, which *itself* receives media coverage.[240] This increasingly common practice of treating every overdose scene as a crime scene is becoming widely known among users, and its chilling effect may help explain the relatively anemic impact of Good Samaritan laws on help-seeking observed thus far.[241] Indeed, this may become worse if the panic in law enforcement surrounding fentanyl, particular the myth that the mere bodily contact can trigger an overdose, continues to spread.[242]

Accordingly, if prosecutors are trying to "send a message" to people in the drug trade but are only targeting end-users, this strategy is bound to fail. Similarly, if they are trying to "send a message" to reduce drug overdose, it is bound to fail. These criminal justice efforts target the very people who are best positioned to summon life-saving help during overdose events: friends,

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[240] *See, e.g.*, LASALLE, *supra* note 3, at 23, 40; Allyn, *supra* note 8. *See also, e.g.*, NDAA, *supra* note 21, at 9 ("Law enforcement agencies and prosecutors should treat every overdose death as a homicide and assign homicide detectives to respond to these scenes.").

[241] *See* LASALLE, *supra* note 3, at 40. Recommendations to treat overdoses as crime scenes are sometimes presented as an opportunity to investigate up the drug supply chain, with an immediate emphasis on the decedent's cell phone. *See, e.g.*, NDAA, *supra* note 21, at 9. This raises evidentiary issues that are discussed *infra* Section V.D and *supra* Section VI.A.

[242] *See, e.g.*, Crime and Justice News, *Should Exposing Someone to Fentanyl Be a Crime?*, THE CRIME REPORT (Dec. 17, 2018), https://thecrimereport.org/2018/12/17/should-exposing-someone-to-fentanyl-be-a-crime/; *Man pleads guilty after East Liverpool officer's accidental fentanyl overdose*, ASSOCIATED PRESS (Mar. 13, 2018), https://fox8.com/2018/03/13/man-pleads-guilty-after-east-liverpool-officers-accidental-fentanyl-overdose/; Peter Andrey Smith, *What Can Make a 911 Call a Felony? Fentanyl at the Scene*, N.Y. TIMES (Dec. 17, 2018), https://www.nytimes.com/2018/12/17/us/fentanyl-police-emt-overdose.html.

family members, romantic partners, and others within the drug user's close social nexus. These prosecutions make it more likely that people will use drugs alone in order to avoid implicating friends in the case of an accidental overdose.[243] If fellow users witnessing an overdose do not have naloxone and do not call 911, then entirely avoidable deaths will inevitably follow.

It is worth noting that some drug users are attempting to counter this problem through a strategy of signing "Do Not Prosecute" documents modeled on "Do Not Resuscitate" directives.[244] While these likely have no normative legal power, they are an instance of drug users trying to embrace the harm reduction practice of not using alone, and they may signal to families and others that they knowingly adopted the risks of opioid use and do not want their friends to come into legal harm—particularly if calling 911 to save their lives was the trigger for that legal harm.

### *C. Jail and prison actually **increases** the risk of overdose and death*

Research shows that jail and prison time are tightly correlated with mental health problems, the intensity of opioid use, and overdose death.[245] A recent study in *Lancet Public Health* found that counties with high rates of incarceration have a greater than 50% increase in drug-related deaths compared to those with low incarceration rates. As its authors noted,

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[243] *See* Beletsky, *supra* note 224.

[244] *See* Louise Vincent, *The Rage of Overdose Grief Makes It All Too Easy to Misdirect Blame*, FILTER MAG., Dec. 5, 2018, at https://filtermag.org/the-rage-of-overdose-grief-makes-it-all-too-easy-to-misdirect-blame/; Lupick, *supra* note 234.

[245] Tyler N.A. Winkelman et al., *Health, Polysubstance Use, and Criminal Justice Involvement Among Adults With Varying Levels of Opioid Use*, 1 JAMA NETWORK OPEN e180558 (2018), https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2687053.

> Previous research has shown that mortality rates among former inmates are nearly 13 times higher than that of the general population**,** former inmates are at high risk of mortality during the first 2 weeks post release, and high incarceration rates exert cascading effects spanning generations, local communities, and other networks of current or former incarcerated people. Incarceration is directly associated with stigma, discrimination, poor mental health, and chronic economic hardship, all of which are linked to drug use disorders. Moreover, the interaction between substance abuse and incarceration interferes with treatment and reduces the likelihood of recovery.[246]

From moral, public health, and legal standpoints, DIH enforcement fails to consider the increased degree of harm done to people with substance use disorders. Incarceration generally has a deleterious impact on a person's mental and physical health. For those with substance use disorders, the health risks are especially severe because, due to get-tough federal laws that prevent Medicaid from funding health care in federal and state correctional facilities, very few jails or prisons offer treatment of any kind, let alone evidence-based behavioral therapies or medications.[247]

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[246] Elias Nosrati et al., *Economic decline, incarceration, and mortality from drug use disorders in the USA between 1983 and 2014: an observational analysis*, 4 LANCET PUB. HEALTH e326 (2019), https://www.thelancet.com/journals/lanpub/article/PIIS2468-2667(19)30104-5/fulltext.

[247] *See* Leo Beletsky et al., *Fatal Re-Entry: Legal and Programmatic Opportunities to Curb Opioid Overdose Among Individuals Newly Released from Incarceration*, 7 NE. U. L. J. 155, 206 (2015) (citing § 1905 of the Social Security Act) (summarized in Beletsky, *With Massive Prisoner Release, Averting Fatal Reentry*, HUFFINGTON POST (Nov. 3, 2015), https://www.huffpost.com/entry/with-massive-prisoner-rel_b_8462816); NATIONAL CENTER ON ADDICTION AND SUBSTANCE ABUSE, BEHIND BARS II: SUBSTANCE ABUSE AND AMERICA'S PRISON POPULATION at 43 (2010), https://www.centeronaddiction.org/download/file/fid/487 (correctional facilities that do offer addiction-related services tend to provide only "alcohol and other drug education or low-intensive outpatient counseling sessions rather than evidence-based, intensive treatment").

Indeed, only a fraction of those who require treatment and other health services during their incarceration receive care that remotely resembles modern day standards and practices.[248] One study of people incarcerated in America found that in 2017, only 4.6 percent of people referred to treatment for OUD received pharmacotherapy.[249] Opioid agonist therapy (OAT) is known throughout the medical field as the "gold standard" of care.[250] Indeed, there have been alarming reports of people with OUD dying from dehydration caused by untreated withdrawal symptoms while being incarcerated, often for minor crimes unrelated to drugs.[251]

The vast majority of people suffering from opioid use disorder who are incarcerated are sent to facilities that either offer mere abstinence-based programming or force inmates to go "cold turkey." In these contexts of substandard care, people rapidly lose their accumulated tolerance to

[248] Elizabeth L.C. Merrall et al., *Meta-analysis of Drug-related Deaths Soon After Release from Prison*, 105 ADDICTION 1545, 1549 (2010) (explaining the variation in availability of drug treatment programs inside and outside correctional settings); *see also* Kathryn M. Nowotny, *Race/Ethnic Disparities in the Utilization of Treatment for Drug Dependent Inmates in U.S. State Correctional Facilities*, 40 ADDICTIVE BEHAVIORS 148, 150 (2015) (noting that, of all covered individuals in prison who were diagnosed with substance use disorder using DSM IV criteria, "[f]orty six percent of whites report having received some kind of treatment compared to 43 percent of blacks and 33 percent of Latinos" (p-value omitted) and "of those who received treatment, self-help groups are the most commonly reported with 83 percent receiving that form of treatment, Detox (27%) and drug maintenance programs (35%) are the least reported").

[249] Also called medication for addiction treatment (MAT), medication treatment (MT), opioid maintenance therapy, and drug substitution therapy, this approach includes the well-established use of methadone, buprenorphine, and naltrexone. For a general explanation of the difference between opioid agonists (methadone), partial agonists (buprenorphine), and antagonists (naloxone, naltrexone), *see* the NATIONAL INSTITUTE ON DRUG ABUSE (NIDA), *Medications to Treat Opioid Use Disorder: How do medications to treat opioid use disorder work?* (June 2018), https://www.drugabuse.gov/publications/research-reports/medications-to-treat-opioid-addiction/how-do-medications-to-treat-opioid-addiction-work.

[250] Noa Krawczyk et al., *Only One In Twenty Justice-Referred Adults In Specialty Treatment For Opioid Use Receive Methadone or Buprenorphine*, 36 HEALTH AFF. 2046, 2046 (2017), https://www.ncbi.nlm.nih.gov/pubmed/29200340.

[251] Julia Lurie, *Go to Jail. Die From Drug Withdrawal. Welcome to the Criminal Justice System*, MOTHER JONES (Feb. 5, 2017), https://www.motherjones.com/politics/2017/02/opioid-withdrawal-jail-deaths/. Cutting off pharmacotherapy patients can also trigger withdrawal symptoms, as discussed *supra* Sections V and VI.

opioids,[252] but unfortunately their brain chemistry does not reset to the point of losing cravings. When these individuals reenter society without being provided evidence-based treatment immediately, there is a very high risk that their brain chemistry's cravings—combined with the emotional and social trauma of reentry—will lead them to consume opioids.[253] Without their prior physical tolerance to the drugs, the risk of accidental overdose and death increases astronomically.[254] The present-day heightened potency of heroin and the increased lacing of heroin and other drugs with illicitly-produced fentanyl further increases the risk. Particularly during the critical first weeks after release, overdoses are staggeringly common. The risk of death from heroin overdoses jumps 40 to 130 times higher than for the general public.[255]

Because tolerance is lost so quickly, this is true even of short stints in jail. Opioid overdoses are the most common cause of death within the first six weeks of being released from jail.[256]

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[252] *See* Beletsky, *supra* note 247, at 164 (first citing Ingrid A. Binswanger et al., *Return to Drug Use and Overdose After Release from Prison: A Qualitative Study of Risk and Protective Factors*, 7 ADDICTION SCI. & CLINICAL PRAC. 1, 5 (2012); then citing Michelle McKenzie et al., *Overcoming Obstacles to Implementing Methadone Maintenance for Prisoners: Implications for Policy and Practice*, 5 J. OPIOID MGMT. 219 (2009); and then citing WORLD HEALTH ORG., PREVENTION OF ACUTE DRUG-RELATED MORTALITY IN PRISON POPULATIONS DURING THE IMMEDIATE POST-RELEASE PERIOD, 10–11 (2010)).

[253] *See id.* (citing Binswanger et al., *supra* note 252, at 7).

[254] *See id.* (first citing Binswanger et al., *supra* note 252, at 5; then citing McKenzie et al., *supra* note 252, at 219; and then citing WORLD HEALTH ORG., *supra* note 159, at 10–11).

[255] *See id.* at 150 (footnote omitted); Ranapurwala, *supra* note 26. For example, a Massachusetts study found that newly-released inmates are 120 times more likely to overdose and die during the first month after re-entry than the general population. MASSACHUSETTS DEPARTMENT OF PUBLIC HEALTH, AN ASSESSMENT OF FATAL AND NONFATAL OPIOID OVERDOSES IN MASSACHUSETTS 2011-2015 at 50 (2017), https://www.mass.gov/files/documents/2017/08/31/legislative-report-chapter-55-aug-2017.pdf.

[256] Byron Alex et al., *Death After Jail Release: Matching to Improve Care Delivery*, 23 J. OF CORRECTIONAL HEALTH CARE 83 (Jan. 1, 2017),

This lack of standard-of-care treatment followed by "fatal re-entry" is a tragic downstream policy problem with DIH enforcement.[257] This is yet another reason why it is extremely important not to accidentally scoop users into a net intended for big fish. DIH laws were passed to target dealers, not users. In these cases, there has already been a tragic accidental death. There is no reason to risk another by prosecuting a co-user suffering OUD and directly raising the risk of another overdose death. Depending on the availability of care in your state's correctional system, it might be an issue to raise in mitigation and sentence location.

### *D. DIH prosecutions hinder law enforcement efforts to connect users with treatment*

Many criminal justice agencies are attempting to recast themselves as embracing a "public health approach" to the overdose crisis. Programs such as the Police-Assisted Addiction and Recovery Initiative (PAARI) and Law Enforcement Assisted Diversion (LEAD) depend upon users feeling comfortable working with police and prosecutors for help accessing support resources. They are significantly more likely to reduce accidental overdose deaths than DIH prosecutions. Creative efforts like these—as well as others—require citizens to open their doors and find them credible, and are thereby undermined by aggressive DIH enforcement.

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https://journals.sagepub.com/doi/abs/10.1177/1078345816685311?journalCode=jcxa (based upon electronic health records from people incarcerated in New York City jails between 2011 and 2012).

[257] The (slow) expansion of medical treatment for OUD in carceral settings, with its proven reductions in fatal overdoses upon reentry, should not, however, be seen as legitimizing DIH as a response to the opioid crisis. *See e.g.*, NATIONAL INSTITUTE ON DRUG ABUSE (NIDA), *Medication in Prison Associated with Reductions in Fatal Opioid Overdoses After Release* (Feb. 14, 2018), https://www.drugabuse.gov/news-events/news-releases/2018/02/medication-in-prison-associated-reductions-in-fatal-opioid-overdoses-after-release (discussing Rhode Island's successful program).

Considering that these programs also require police to work in partnership with public health and other sectors, they might undermine the credibility of those other sectors among those individuals with a history of individual or community trauma involving the criminal legal system.

### *E. DIH prosecutions do not reduce drug use or drug crime*

Proponents of DIH enforcement contend that "it can be a helpful tool in identifying and prosecuting dealers and distributors in an effort to create a deterrent and turn the tide of opioids flowing through communities."[258] However, their contentions are never supported by citations because the evidence consistently demonstrates that drug prosecutions do not create a deterrent to drug trafficking or drug use. Quite the opposite: There is a broad consensus among scholars and policy analysts that the threat of legal sanction does not reduce drug dealing or drug use, even when the threatened punishments are increased.[259]

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[258] NDAA, *supra* note 21, at 10. *See* William J. Ihlenfeld II, *"Death Results" Prosecutions Remain Effective Tool Post*-Burrage, U.S. ATT'YS' BULL. (Sep. 2016) at 45 (claiming effectiveness due to the continuing ability for prosecutors to secure convictions rather than any downstream reduction in overdose); Sam Adam Meinero, *Danger in Milligrams and Micrograms: United States Attorneys' Offices Confront Illicit Fentanyls*, U.S. ATT'YS' BULL. (Jul. 2018), at 5 (citing three convictions, including one "trafficking ring" and one online distribution network, but offering no evidence as to downstream benefits); and Rod Rosenstein, *Fight Drug Abuse, Don't Subsidize It*, N.Y. TIMES (Aug. 28, 2018), https://www.nytimes.com/2018/08/27/opinion/opioids-heroin-injection-sites.html (contending without evidence that the rise in overdose deaths was related to a decline in federal drug prosecutions during the Obama Administration).

[259] *See* Michael Tonry, *The Mostly Unintended Effects of Mandatory Penalties: Two Centuries of Consistent Findings*, 38 CRIME & JUSTICE 65 (2009), https://scholarship.law.umn.edu/faculty_articles/501.

Historically, drug law enforcement has not led to reductions in drug-related crime, overdose, or other drug-related harms. According to publicly available data from law enforcement, corrections, and health agencies, there is no statistically significant relationship between a state's imprisonment rate for drug crimes and three measures of state drug problems: rates of illicit drug use, drug overdose deaths, and drug arrests.[260] Similarly, research has found no public safety benefits to increasing sentence length; even as more people were convicted to longer federal sentences for drug crimes between 1980 and 2010, "self-reported use of illegal drugs has increased over the long term as drug prices have fallen and purity has risen."[261] "[T]he results show there is no statistically significant basis for believing that increasing prison admissions for drug offenses deters drug use."[262]

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[260] *See Pew Analysis Finds No Relationship Between Drug Imprisonment and Drug Problems*, PEW CHARITABLE TRUSTS (Jun. 19, 2017), https://www.pewtrusts.org/en/research-and-analysis/speeches-and-testimony/2017/06/pew-analysis-finds-no-relationship-between-drug-imprisonment-and-drug-problems (including all drugs and all levels of drug offenses, from possession to trafficking).

[261] *Federal Drug Sentencing Laws Bring High Cost, Low Return*, PEW CHARITABLE TRUSTS, at 1 (Aug. 2015), https://www.pewtrusts.org/-/media/assets/2015/08/federal_drug_sentencing_laws_bring_high_cost_low_return.pdf.

[262] Vincent Schiraldi & Jason Ziedenberg, *Costs and Benefits? The Impact of Drug Imprisonment in New Jersey* at 27 (2003), https://www.drugpolicy.org/sites/default/files/jpi_njreport.pdf. *See also* Friedman et al., *Drug Arrests and Injection Drug Deterrence*, 101 AM. J. PUB. HEALTH 344 (2011), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3020200/ (finding that the rate of arrest for possession of "hard" drugs has no correlation with injection drug use); DeBeck et al., *Incarceration and Drug Use Patterns Among a Cohort of Injection Drug Users*, 104 ADDICTION 69 (2009), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3731940/ (finding that incarceration for any cause does not reduce injection drug use, and actually interfered with the goal of reducing injection drug use insofar as it deprived the people who were incarcerated from access to effective treatment); and Friedman et al., *Relationships of Deterrence and Law Enforcement to Drug-Related Harms Among Drug Injectors in U.S. Metropolitan Areas*, 20 AIDS 93 (2006), https://www.ncbi.nlm.nih.gov/pubmed/16327324 (finding that the number of police employees or the amount of corrections spending per capita does not reduce injection drug use, but that, conversely, increases in "hard" drug possession arrests, police employees, and corrections expenditures correlated with an increase in the spread of bloodborne diseases).

The failure of punitive measures to suppress demand stems from the very nature of addiction. The National Institute on Drug Abuse (NIDA) as: "A chronic, relapsing disorder characterized by compulsive drug seeking and use despite adverse consequences."[263] Substance use disorders change the neurochemistry of the brain. When it comes to addiction, one of the foundational elements of the disease is that it alters brain neurochemistry such that it compels a person to satisfy cravings *despite recognized negative consequences*.

In addition to cravings, another source of compulsive use despite adverse consequences is the intense drive to avoid the physical and psychological pain of withdrawal. In this context, ratcheting up criminal consequences to deter behavior that is tied to an individual's addiction is bound to fail because it misses the very essence of this disease.[264]

Further, there is evidence suggesting that drug enforcement activities actually lead to *increases* in *violent* crime. So long as demand for illegal drugs exists, attempts to constrict the drug supply and disrupting markets by incarcerating traffickers will continue to lead to the "replacement effect," whereby individuals or organizations quickly fill the void created by enforcement activities. This replacement effect further disrupts drug markets, but instead of

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[263] National Institute on Drug Abuse, *Media Guide: The Science of Drug Use and Addiction: The Basics* (July 2018), https://www.drugabuse.gov/publications/media-guide/science-drug-use-addiction-basics. *See* Steve Sussman & Alan N. Sussman, *Considering the Definition of Addiction*, 10 INT'L J. ENVTL. RES. & PUB. HEALTH 4025 (2011), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3210595/; *and* AMERICAN SOCIETY OF ADDICTION MEDICINE, *Definition of Addiction* (Apr. 12, 2011), https://www.asam.org/resources/definition-of-addiction.

[264] *See* Roger K. Przybylsk; RKC Group, *Correctional and Sentencing Reform for Drug Offenders* at 14-16 (Sep. 2009), http://www.ccjrc.org/wp-content/uploads/2016/02/Correctional_and_Sentencing_Reform_for_Drug_Offenders.pdf (summarizing research).

suppressing supply, the disruption predictably prompts an *increase* in violent crime.[265] A comprehensive review of studies analyzing the relationship between drug enforcement and drug violence found that "the existing scientific evidence suggests drug law enforcement contributes to gun violence and high homicide rates and that increasingly sophisticated methods of disrupting organizations involved in drug distribution could paradoxically increase violence."[266]

Indeed, the supply-side focus of American drug enforcement bears some of the blame for the current opioid overdose crisis. By cracking down on prescribers and dispensers of pharmaceutical opioids, thousands of legitimate pain patients—who were reliant upon opioid analgesics to maintain their quality of life—were forced to buy medications on the black market.[267] Accordingly, rather than being able to legally purchase drugs that came from a regulated supply chain, they were now forced to illegally purchase pain relievers that came from an unregulated supply chain. Tragically, patients who resorted to the black market discovered that diverted painkillers were prohibitively expensive but heroin was historically cheap, on the order of $80 per pill versus $8 per bag. And then synthetic fentanyl and its analogs began hitting

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[265] *See id*. at 17-19 (summarizing research).

[266] Dan Werb et al., *Effect of Drug Law Enforcement on Drug Market Violence: A Systematic Review*, 22 Int'l J. DRUG POL'Y 87 (2011), https://www.sciencedirect.com/science/article/pii/S0955395911000223.

[267] *See generally*, Leo Beletsky & Jeremiah Goulka, *The Opioid Crisis: A Failure of Regulatory Design and Action*, CRIM. JUST. MAG. (2019) https://www.americanbar.org/groups/criminal_justice/publications/criminal-justice-magazine/2019/summer/opioid-crisis/; Leo Beletsky & Jeremiah Goulka, *The Federal Agency that Fuels the Opioid Crisis*, N.Y. TIMES (Sep. 17, 2018), https://www.nytimes.com/2018/09/17/opinion/drugs-dea-defund-heroin.html.

the market—which was itself a response to the economics of supply-side enforcement—and poisoning the supply.[268]

### *F. The questionable strict liability approach*

DIH enforcement legally transforms accidents involving possibly risky behavior into homicide. While the strict liability approach may make perfect sense in regulating (particularly in the civil law context) environmental and other issues involving things that are *always* inherently dangerous (such as the use of explosives), deploying harsh criminal penalties in retribution for unintended consequences raises normative and constitutional questions. In many ways, DIH is like felony murder, and there is a nearly unanimous scholarly consensus that felony murder and analogous strict liability provisions are both bad law and counterproductive criminal justice policy.[269] The American Law Institute accordingly excludes the felony murder rule from its Model Penal Code,[270] as well as several states.[271]

Take the example of Massachusetts, which abandoned felony murder in a 2017 decision by the Commonwealth's Supreme Judicial Court. The chief justice criticized how the felony murder

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[268] *See* Leo Beletsky & Corey Davis, *Today's Fentanyl Crisis: Prohibition's Iron Law, Revisited*, 46 INT'L J. OF DRUG POLICY 156 (2017), https://www.ncbi.nlm.nih.gov/pubmed/28735773.

[269] Guyora Binder, *The Culpability of Felony Murder*, 83 NOTRE DAME L. REV. 965, 966 (2008) (providing a comprehensive overview of the empirical and doctrinal scholarship on felony murder).

[270] *See* Paul H. Robinson & Tyler Scot Williams, *Mapping American Criminal Law Variations Across the States: Ch. 5 Felony-Murder Rule*, PENN. LAW LEGAL SCHOLARSHIP REPOSITORY No. 1719 at 3 (2017).

[271] Jason Tashea, *California considering end to felony murder rule*, AM. B. ASS'N J. (Jul. 5, 2018) http://www.abajournal.com/news/article/california_considering_end_to_felony_murder_rule/ ("Hawaii, Kentucky, Massachusetts and Michigan have abolished the rule by either legislation or through the courts").

rule amplified the legal consequences of an illegal act absent an inquiry into the perpetrator's state of mind:

> punish[ing] all homicides committed in the perpetration of a felony whether the death is intentional, unintentional or accidental, without the necessity of proving the relation of the perpetrator's state of mind to the homicide, *violates the most fundamental principle of the criminal law* -- "criminal liability for causing a particular result is not justified in the absence of some culpable mental state in respect to that result."[272]

To treat accidental overdoses as homicides would exponentially raise the homicide "rate" exponentially. In 2017, police in Massachusetts reported a statewide total of 173 murders and non-negligent homicides;[273] whereas more than 2,000 people died from accidental overdoses that year.[274] Many of these accidental deaths involved a fact pattern where friends and co-users played an inadvertent role. Yet under the strict liability theory, each one of these individuals could face prosecution and a lengthy prison sentence—an ethically dubious leap that perverts legislative intent and could flood the system.

Massachusetts provides an example of why it is worth raising these types of arguments. In a DIH-type involuntary manslaughter prosecution on appeal to the Supreme Judicial Court, the Health in Justice Action Lab and amici submitted an amicus curiae brief raising these points,

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[272] Commonwealth v. Brown, 477 Mass. 805, 831 (2017) (Gants, CJ, concurring) (emphasis added), *quoting* Commonwealth v. Matchett, 386 Mass. 492, 506-507 (1982).

[273] *See* FEDERAL BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES 2017, TABLE 5 (2018), https://ucr.fbi.gov/crime-in-the-u.s/2017/crime-in-the-u.s.-2017/tables/table-5.

[274] NATIONAL CENTER FOR HEALTH STATISTICS, DRUG OVERDOSE MORTALITY BY STATE (2018), https://www.cdc.gov/nchs/pressroom/sosmap/drug_poisoning_mortality/drug_poisoning.htm.

noting that the legislature had considered but not passed a strict liability DIH statute.[275] The court appeared to take note of the problems with strict liability statutes as well as of other states that refused to implicitly create strict liability crimes through judicial decisions rather than legislation.[276] The result was to vacate the defendant's conviction for involuntary manslaughter.

Of course, the most sensible approach would be to avoid the convoluted arguments about what sorts of behaviors count as "reckless" and to instead bring the illicit drug supply into the regulatory system.

### *G. Better approaches to the overdose crisis*

District attorneys are under intense pressure to demonstrate that they are "doing something" about the overdose crisis. There are much more effective approaches to solving the crisis than these counterproductive enforcement efforts, and they are far more cost-effective than DIH enforcement. Numerous cost-benefit analyses have found that treatment outperforms punitive measures; it reduces demand.[277] Yet only around one in ten people with substance use disorder

[275] Brief for the Committee for Public Counsel Services, the Health in Justice Action Lab at Northeastern School of Law, et al. as Amici Curiae Supporting Appellant, Commonwealth v. Carrillo (argued Feb. 4, 2019) (No. SJC-12617), https://docs.wixstatic.com/ugd/dc612a_c862345af8c14e9caa48e85bd052068f.pdf (on which this section is based).

[276] Commonwealth v. Jesse Carrillo, SJC-12617, slip opn. at 26-32 (Mass. Oct. 3, 2019), https://www.mass.gov/files/documents/2019/10/03/v12617.pdf. See also *supra* Section II.A.2.

[277] For example, a 1997 study found that treatment was 15 times more effective at reducing drug-related violent crimes than incarceration; and a 2006 study found that Wisconsin could reduce prison expenditures by $3 to $4 per additional dollar spent on treatment. *See* Przybylsk, *supra* note 264, at 29-32 (describing studies).

receive any type of appropriate evidence-based treatment,[278] and only one in twenty within the criminal justice system.[279] This presents a huge opportunity, and some law enforcement and prosecution leaders are already making a difference by choosing to advocate for increasing the availability of evidence-based treatment in the community to close the "care gap."[280] Prosecutors and law enforcement should be encouraged to use their "bully pulpit" to advocate for increased funding and access to evidence-based treatment, bravely citing evidence to show that it will deter drug crime far better than counterproductive efforts like DIH enforcement. Considering that many public health agencies, treatment facilities, and nonprofits are already operating in an environment of extreme scarcity, and that the price of naloxone is rising, this sort of advocacy by prosecutors and law enforcement should be encouraged and lauded. It is true that there is widespread pressure to "do something" about the overdose crisis, but law enforcement and prosecutors would do well to stick to what they are good at—investigating and prosecuting *actual* crime—and be brave in announcing that that is just what they are going to do. The truly brave might even advocate for ending the War on Drugs through decriminalization or legalization and/or by adopting policies of not pursuing investigations or prosecutions.

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[278] *See* Marc R. Larochelle et al., *Medication for Opioid Use Disorder After Nonfatal Opioid Overdose and Association With Mortality: A Cohort Study*, 169 ANNALS INTERNAL MED. 137 (2018), http://annals.org/aim/article-abstract/2684924/medication-opioid-use-disorder-after-nonfatal-opioid-overdose-association-mortality#. *See also* U.S. SURGEON GENERAL, FACING ADDICTION IN AMERICA: THE SURGEON GENERAL'S REPORT ON ALCOHOL, DRUGS, AND HEALTH (2016), https://addiction.surgeongeneral.gov/sites/default/files/surgeon-generals-report.pdf.

[279] Krawczyk, *supra* note 250.

[280] *See Policing and the Opioid Crisis: Standards of Care*, BLOOMBERG AMERICAN HEALTH INITIATIVE (2018), http://americanhealth.jhu.edu/sites/default/files/inline-files/PolicingOpioidCrisis_LONG_final_0.pdf.

## VII. FINAL THOUGHTS: USE PERSON-AFFIRMING LANGUAGE

As with much of the rest of criminal justice and social issues more generally, it is important to use person-first language. The terminology that is commonly used tends to stigmatize and paint defendants and drug users (and others) as guilty, immoral, lesser, and deserving of punishment. Positive language that presents human beings as human beings, albeit flawed (as human beings tend to be), is not just more accurate, fair, inclusive, and equitable, but also strategically useful in the defense setting.

The Health in Justice Action Lab is a leading partner in an effort to improve the language used by journalists when discussing the overdose crisis and addiction more generally. Called Changing the Narrative, this initiative provides web resources and contact information for subject matter experts to help journalists and other interested people avoid stigmatizing language, learn why that language is stigmatizing, and dig deeper into effective solutions rather than false ones.[281]

According to this approach, terms to avoid include *addict*, *alcoholic*, *substance abuser.* Instead use terms like person with a *substance use disorder* or *opioid use disorder* or *alcohol use disorder*.[282] Instead of substance *abuse*, say *misuse.* Instead of *felon* say *justice-involved* or

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[281] *See generally Changing the Narrative*, HEALTH IN JUSTICE ACTION LAB (2019), https://www.changingthenarrative.news/.

[282] *See Changing the Narrative: Words Matter*, HEALTH IN JUSTICE ACTION LAB (2019), https://www.changingthenarrative.news/stigmatizing-language.

*returning citizen* or *formerly incarcerated*; instead of *inmate* say *prisoner*, and so on.[283] For more guidance on language, consult the Changing the Narrative website and explore its various topics and resources.

Similarly, defenders may be well advised to learn more about the science and psychology of addiction to help humanize defendants and SUDs.[284] This type of knowledge may also improve the ability of defenders to represent and communicate with clients suffering SUDs.

Additional fact-based rhetorical considerations are: (1) fentanyl is *poisoning* the nation's illicit drug supply;[285] (2) while we should not necessarily celebrate the use of recreational use addictive or illegal drugs, psychoactive substances have been a part of human life as long as civilization has existed, and so there will always be people who use them, and accordingly society should recognize that and try to reduce rather than increase the risks of harm; (3) prosecutors who are trying to "send a message" to kingpins are actually sending a message to users to prompt them to use drugs alone, *increasing* their risk of death from overdose; (4) drug users understand the risks, and to label decedents as homicide victims is to demean their memory; (5) where the defendant is a mere co-user (rather than a major trafficker), consider

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[283] *Id*. *See also* Eddie Ellis, *Open Letter on Language* (last visited Oct. 2, 2019), http://prisonstudiesproject.org/language/; *and* Blair Hickman, *Inmate. Prisoner. Other. Discussed.* (Apr. 3, 2016), https://www.themarshallproject.org/2015/04/03/inmate-prisoner-other-discussed.

[284] For examples of how defenders might explain this type of knowledge in a briefing context, see generally the briefs drafted by Lisa Newman-Polk in Commonwealth v. Julie Eldred, SJC-12279, including the Brief for the Probationer on a Reported Question (June 2017) and Reply Brief of the Probationer (Sep. 2017).

[285] Bryce Pardo et al., *Treat the fentanyl crisis like a poisoning outbreak*, LA TIMES (Sep. 1, 2019), https://www.latimes.com/opinion/story/2019-08-30/fentanyl-opioids-overdose-deaths-treatment-sales.

using redemption- and rehabilitation-oriented language to offset the prosecution's use of the emotional appeal of "righteous" punishment.

## VIII. CONCLUSION

The number of drug-induced homicide prosecutions continues to rise. This Toolkit is our effort to empower the defense to challenge these charges: as baseless in alleging distribution, as unsubstantiated but-for causes of death, as damaging to public safety, and as heightening the harm of the current opioid crisis. Our hope is to turn away from prosecutions to solve the crisis, and turn toward public health solutions.

## IX. ADDITIONAL RESOURCES

### *A. Allies*

Partnerships are critical in responding to the overdose crisis and counterproductive policy responses. Here is a sample of groups that are currently active. (Please contact us if you would like to be added to this list or connected with any of these groups.)

- National Association of Criminal Defense Lawyers
- Drug Policy Alliance
- Health in Justice Action Lab
- Legal Action Center
- Justice Collaborative
- Fair and Just Prosecution
- American Civil Liberties Union
- Harm Reduction groups, including the Harm Reduction Coalition
- Open Societies Foundation
- Drug user unions, such as the Urban Survivor Union and its #ReframeTheBlame campaign

### *B. General Resources*

For repositories of reports, white papers, and other useful resources, see:

- Health in Justice Action Lab (https://www.healthinjustice.org/resources)
- Drug Policy Alliance (http://www.drugpolicy.org/resources)
- Harm Reduction Coalition (https://harmreduction.org/our-resources/)
- RAND Corporation Drug Policy Research Center (https://www.rand.org/well-being/justice-policy/centers/dprc.html)

For media coverage, see:

- *Filter* (https://filtermag.org/)
- *The Appeal* (https://theappeal.org/)
- *The New York Times* (https://www.nytimes.com/)

For up-to-date guidance on appropriate language, see:

- Changing the Narrative (https://www.changingthenarrative.news/)

### *C. News Articles*

- Rosa Goldensohn, *You're Not a Drug Dealer? Here's Why the Police Might Disagree*, N.Y. TIMES (May 25, 2018), at https://www.nytimes.com/2018/05/25/us/overdoses-murder-crime-police.html.

- Rosa Goldensohn, *They Shared Drugs. Someone Died. Does that Make Them Killers?*, N.Y. TIMES (May 25, 2018), at https://www.nytimes.com/2018/05/25/us/drug-overdose-prosecution-crime.html.

- Zachary Siegel, *You Want to Get Them While the Teardrops are Warm*, THE APPEAL (Nov. 21, 2017), at https://theappeal.org/you-want-to-get-them-while-the-teardrops-are-warm-prosecutors-swap-strategies-for-turning-942a783ae87c/.

- Zachary Siegel, *Despite Public Health Messaging, Law Enforcement Increasingly Prosecutes Overdoses as Homicides*, THE APPEAL (Nov. 8, 2017), at https://theappeal.org/despite-public-health-messaging-law-enforcement-increasingly-prosecutes-overdoses-as-homicides-84fb4ca7e9d7/

- Leo Beletsky & Jeremiah Goulka, *The Opioid Crisis: A Failure of Regulatory Design and Action*, CRIM. JUST. MAG. (Jul. 15 2019), at

https://www.americanbar.org/groups/criminal_justice/publications/criminal-justice-magazine/2019/summer/opioid-crisis/.

- Leo Beletsky & Jeremiah Goulka, *The Federal Agency that Fuels the Opioid Crisis*, N.Y. TIMES (Sep. 17, 2018), at https://www.nytimes.com/2018/09/17/opinion/drugs-dea-defund-heroin.html.

- Daniel Denvir, *The Opioid Crisis Is Blurring the Legal Lines Between Victim and Perpetrator*, SLATE (Jan. 15, 2018), at https://slate.com/news-and-politics/2018/01/the-opioid-crisis-is-blurring-the-legal-lines-between-victim-and-perpetrator.html.

- Louise Vincent, *The Rage of Overdose Grief Makes It All Too Easy to Misdirect Blame*, FILTER MAG. (Dec. 5, 2018), at https://filtermag.org/the-rage-of-overdose-grief-makes-it-all-too-easy-to-misdirect-blame/.

- Jack Shuler, *Overdose and Punishment*, THE NEW REPUBLIC (Sep. 10, 2018), at https://newrepublic.com/article/150465/prosecutors-reviving-reagan-era-drug-induced-homicide-laws.

- James Buikema, *Punishing the Wrong Criminal for Over Three Decades: Illinois' Drug-Induced Homicide Statute* (April 15, 2015), at https://ssrn.com/abstract=2662312 or http://dx.doi.org/10.2139/ssrn.2662312

*D. Law Review Articles*

- Leo Beletsky, *America's Favorite Antidote: Drug-Induced Homicide, Fatal Overdose, and the Public's Health*, 4 UTAH L. REV. 833 (2019), https://dc.law.utah.edu/ulr/vol2019/iss4/4/.

- Leo Beletsky et al., *Fatal Re-Entry: Legal and Programmatic Opportunities to Curb Opioid Overdose Among Individuals Newly Released from Incarceration*, 7 NE. U. L. J. 155 (2015).

- Valena E. Beety, *The Overdose/Homicide Epidemic*, 34 GA. ST. U. L. REV. 983 (2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3176552.

- Amanda Latimore & Rachel Bergstein, *"Caught with a Body," Yet Protected by Law? Calling 911 for opioid overdose in the context of the Good Samaritan Law,* 50 INT'L J. DRUG POL. 82 (2017), https://www.sciencedirect.com/science/article/abs/pii/S0955395917302888.

- Mark Neil, *Prosecuting Drug Overdose Cases: A Paradigm Shift*, 3 NAT'L ATT'YS GEN. TRAINING & RES. INST. J. 26 (Feb. 2018), https://www.naag.org/publications/nagtri-journal/volume-3-number-1/prosecuting-drug-overdose-cases-a-paradigm-shift.php

- Commonwealth v. Eldred*: Massachusetts Supreme Judicial Court Holds Drug-Free Probation Requirement Enforceable for Defendant with Substance Use Disorder*, 132 HARV. L. REV. 2074 (May 2019), https://harvardlawreview.org/2019/05/commonwealth-v-eldred/ (see also the briefs in this case, particularly the probationer's reply brief).

*E. Reports, Briefs, & Other Articles*

- LINDSAY LASALLE; DRUG POLICY ALLIANCE, AN OVERDOSE DEATH IS NOT MURDER: WHY DRUG-INDUCED HOMICIDE LAWS ARE COUNTERPRODUCTIVE AND INHUMANE (2017), https://www.drugpolicy.org/sites/default/files/dpa_drug_induced_homicide_report_0.pdf

- Legal Action Center, *Substance Use: Medication Assisted Treatment Resources*, https://lac.org/resources/substance-use-resources/medication-assisted-treatment-resources/.

- Bryce Pardo et al., *The Future of Fentanyl and Other Synthetic Opioids*, RAND CORP. RR3117 (2019), https://www.rand.org/pubs/research_reports/RR3117.html.

- Beau Kilmer et al., *Considering Heroin-Assisted Treatment and Supervised Drug Consumption Sites in the United States*, RAND CORP. RR2693 (2018), https://www.rand.org/pubs/research_reports/RR2693.html.

- Sean E. Goodison, *Law Enforcement Efforts to Fight the Opioid Crisis*, RAND CORP. RR3064 (2019), https://www.rand.org/pubs/research_reports/RR3064.html.

- Amy Hawes and Denise Martin, *A Dose of Reality: Drug Death Investigations and the Criminal Justice System*, THE CHAMPION (June 2019), at 14, https://www.nacdl.org/Article/June2019-ADoseofRealityDrugDeathInvestigations

- Kevin Martone, Francine Arienti, Sherry Lerch, *Olmstead at 20: Using the Vision of* Olmstead *to Decriminalize Mental Illness,* Technical Assistance Collaborative (Sept. 4, 2019), http://www.tacinc.org/media/90807/olmstead-at-twenty_09-04-2018.pdf.

- National District Attorneys Association (NDAA), *The Opioid Epidemic: A State and Local Prosecutor Response* (Oct. 12, 2018), https://ndaa.org/wp-content/uploads/NDAA-Opioid-White-Paper.pdf.

- Andrea Harris, Lisa Lorish, *Litigation Strategies in Opioid Overdose Cases*, Federal Criminal Practice Seminar – Spring 2018 (Apr. 13, 2018), https://nce.fd.org/sites/nce.fd.org/files/pdfs/LItigation%20Strategies%20in%20Opioid%20Overdose%20Cases.pdf.

- Network for Public Health Law, Legal Interventions To Reduce Overdose Mortality: Naloxone Access and Overdose Good Samaritan Laws (Dec. 2018), https://www.networkforphl.org/_asset/qz5pvn/network-naloxone-10-4.pdf.

- "Fentanyl and Related Threats" (dedicated issue), 66 United States Attorneys' Bulletin (July 2018)

- "Addressing the Heroin and Opioid Crisis" (dedicated issue), 64 United States Attorneys' Bulletin (Sep. 2016)

- Rachel L. Rothberg and Kate Stith, The Opioid Crisis and Federal Criminal Prosecution, 46 J. of Law, Medicine & Ethics 292 (2018), https://www.ncbi.nlm.nih.gov/pubmed/30147006.

- Sample direct and cross examination of a medical examiner in federal court (transcript).

- Brief for the Committee for Public Counsel Services, the Health in Justice Action Lab at Northeastern School of Law, et al. as Amici Curiae Supporting Appellant, Commonwealth v. Carrillo (argued Feb. 4, 2019) (No. SJC-12617) https://docs.wixstatic.com/ugd/dc612a_c862345af8c14e9caa48e85bd052068f.pdf.

- Brief for the Probationer on a Reported Question and on Appeal from a Finding of Probation Violation from the Concord Division of the District Court Department, Commonwealth v. Julie Eldred, SJC-12279 (June 2017), https://www.dropbox.com/s/z0lqqf4zch60fbz/Eldred%20Probationer's%20Brief%20(redacted).pdf?dl=0.

- Reply Brief of the Probationer, Commonwealth v. Julie Eldred, SJC-12279 (Sep. 2017), https://www.dropbox.com/sh/iu9uy3hk57jhsx4/AAA4UJLz_JPPbR0p1GoDa46Va?dl=0&preview=Eldred+Reply+Brief.pdf.

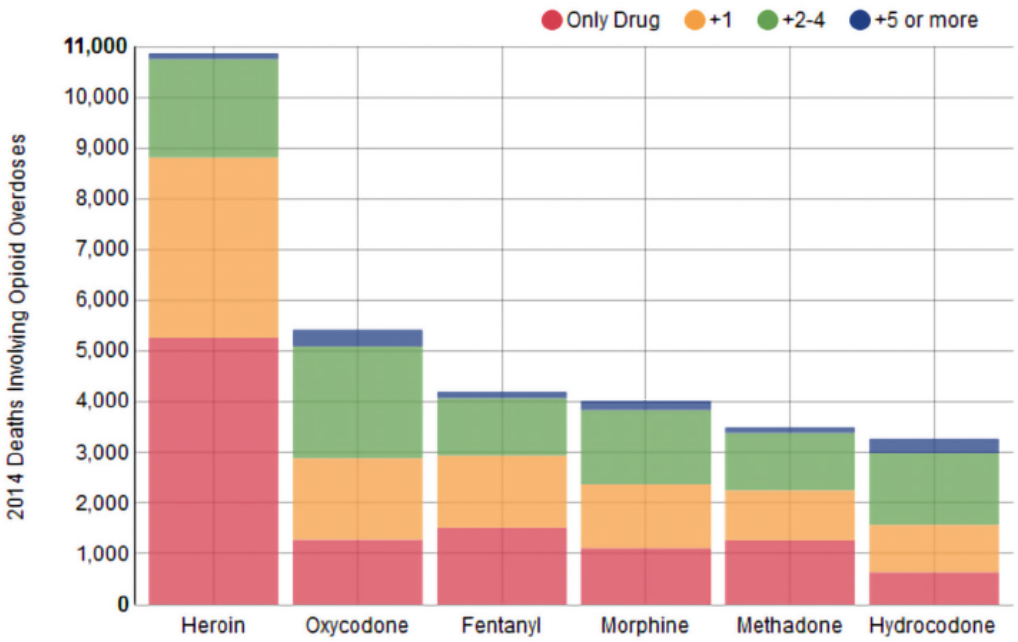
*F. Datasets*

- Health in Justice Action Lab & Legal Science, Drug Induced Homicide Laws (last updated Jan. 1, 2019), http://pdaps.org/datasets/drug-induced-homicide-1529945480-1549313265-1559075032.

- Legal Science, Good Samaritan Overdose Prevention Laws (last updated Jul. 1, 2018), http://pdaps.org/datasets/good-samaritan-overdose-laws-1501695153

*G. Visuals*

**Figure 9. Opioid Overdose Deaths by Number of Drugs Involved, 2014**




Source: CDC, National Vital Statistics Reports, Vol. 65, No. 10, December 20, 2016, Table 5 (https://www.cdc.gov/nchs/data/nvsr/nvsr65/nvsr65_10.pdf). Includes all deaths, unintended or otherwise.

## X. CONTACT US

Please alert us to any updates this Toolkit should include, any errors in the Toolkit, and any suggested resources, allies, or other topics this Toolkit should include.

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