



WHEN ACCIDENTAL OVERDOSE IS TREATED AS MURDER

SEEKING RELIEF FOR DEFENDANTS
WHY POST-CONVICTION RELIEF IS NECESSARY

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Morgan Godvin is a drug and justice policy advocate and freelance writer. She is formerly incarcerated for drug-induced homicide and now strives to see a public health approach to substance use implemented nationally. While still an undergraduate student at the OHSU-PSU School of Public Health, she was appointed to the Oregon Alcohol and Drug Policy Commission. Her focus at the Lab is drug-induced homicide, the US-Mexico border, and using justice policy reform as a way to increase civic engagement within marginalized communities.

Health in Justice

is an action laboratory guided by a vision of a healthier, more just society. We advance criminal justice reform through a public health lens.

Engaging with academic, community, public and private partners, we inform responses to today's most critical community challenges. This includes reducing drug overdose; improving access to effective, safe, and cost-effective health care; and aligning law enforcement practices with public health goals. True to Northeastern's mission, we use our portfolio as an opportunity for experiential learning to prepare the next generation of leaders in legal, health, and social policy professions.

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EXECUTIVE SUMMARY

As the overdose crisis continues to surge, prosecutors are increasingly reframing accidental overdoses as murders. Under the banner of overdose prevention, thousands have now been sentenced to lengthy stints behind bars on “drug-induced homicide” and similar charges. These prosecutions are predicated on false narratives about drugs and the people who use them, including the false dichotomy between user and dealer. By deploying the notion of “pushers” and other Drug War tropes, these charges often ensnare friends, family members, and romantic partners. Giving voice to the data, this report focuses on four stories that illustrate the absurdity of drug-induced homicide prosecutions.

One man was spurred to initiate drug treatment after losing his childhood friend to overdose. Months into recovery and just after the birth of his first child, he was sentenced to 20 years. Two friends relapsed under the weight of the pandemic; one now faces decades in prison for the other’s accidental overdose. A young man obliged his coworker’s request to act as a middle man. The coworker overdosed and he has served nearly a decade in prison. A husband and wife used heroin together. One overdosed and the other was sentenced to up to 25 years in prison, leaving the children parentless.

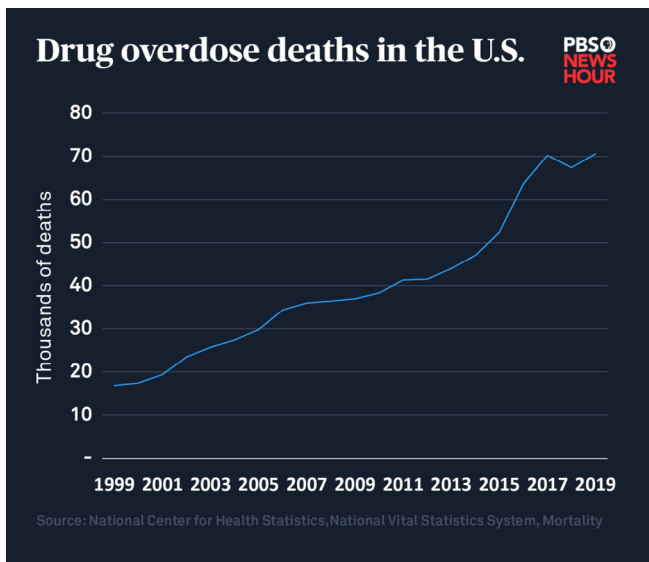
By scapegoating individuals for structural failures and conflating performative vengeance with justice, the government has opened a new frontier in the Drug War. But like other interventions in that decades-long war, hyper-punitive measures increase drug harms. Data demonstrate that drug-induced homicide prosecutions only fuel the very problem they are purporting to solve.

Numerous effective interventions to prevent overdose remain under-utilized, even as we enter the third decade of the overdose crisis. Drug-induced homicide prosecutions crowd out vital investments in health-based solutions. Counterproductive to their declared aim, they achieve harm without achieving benefit.

We are working on shifting policy and legal practice to prevent more people from being ensnared by these misguided measures. But justice and public health considerations demand urgent action to remedy abuses of state power borne by many of those already languishing behind bars on drug-induced homicide charges. By highlighting just some of their stories, this report is designed to advance clemency pathways and other forms of post-conviction relief for the thousands already affected.

INTRODUCTION

The stressors and isolation of COVID-19 made 2020 the worst year in history for overdose deaths. While official statistics are still pending, research published in JAMA¹ indicates more than 100,000 people fatally overdosed in the span of just one year. And yet, fatal overdoses are preventable and there are effective solutions that can flatten the mortality curve. For decades, American policymakers responded to so-called drug epidemics with excessively punitive measures. History is repeating itself, as drug-induced homicide prosecutions have become a go-to response during the current era of record breaking overdose deaths (see figure 1).



Manufactured Murder

Prosecutions that treat accidental overdoses as murder have proliferated since 2011 (see Figure 2) after the media began heavily reporting on the “opioid epidemic,” which has skyrocketed with advent of illicit fentanyl. Referred to here as drug-induced homicide (DIH), alternatively called drug delivery resulting in death, this family of laws was rarely used until the last decade despite existing since the 1980s when lawmakers crafted harsh provisions to target “kingpins” in the crack-cocaine trade.

DIH Charges (1978 - 2018)



Source: Health in Justice Action Lab

Figure 2 - DIH Charges by Year
Source: HIJ Action

Just as a surge in cocaine use devastated communities in the 1980s and '90s, the public is now clamoring for politicians and law enforcement to “do something” in response to burgeoning overdose deaths. They responded with a spate of new laws promising swift punishment and hundreds of prosecutions, often carrying mandatory minimum sentences of two decades or more.

The data disagree with current practice. There is no evidence that drug-induced homicide laws reduce overdose rates; to the contrary, these laws have been shown to magnify the risks and harms of drug use. Perhaps because people who use drugs become even more afraid to call 911 during an overdose, terrified of facing a murder charge. Overdose rates have skyrocketed alongside these prosecutions.

Going beyond the anecdotes, our team’s analysis² found a 7.7% increase in overdose following an increase in media coverage of DIH cases. In fact, states like Ohio that have deployed these prosecutions most aggressively saw a subsequent surge in overdose, suggesting that prosecutions only aggravate the problem they are purported to solve.

The areas hardest hit by overdose have been most apt to lean on DIH prosecutions, where the tragedy of overdose death is compounded by hundreds of decades-long prison sentences that prove futile as deaths continue to ravage communities.

The Myth of the “Deterrent Effect”

A frequent refrain from prosecutors who indict defendants on DIH, knowing it condemns them to incredibly long prison sentences, is that the threat of such a long sentence will “send a message” to their communities to deter would-be drug dealers.

This postulated “deterrent effect” of sentence length is a myth that has been busted by the federal National Institute of Justice itself, which stated in a report³ that the most effective deterrent is the certainty with which someone will be arrested for their crime and that potential sentence length has very little effect.

Not only do sentence lengths *not* deter crime, incarceration itself shows to have no impact on drug use or overdose rates, according to a 2018 PEW report⁴. When your only tool is a hammer, everything looks like a nail. Law enforcement and prosecutors reflexively reach for incarceration, despite all data showing it to be ineffective.

The Drug Policy Alliance’s brief titled, “An Overdose Is Not Murder⁵,” provides additional information on the mythical deterrent effect and other absurdities of the law and its application.

On “Targeting Drug Dealers”

Prosecutors consistently release statements about how DIH laws hold drug dealers responsible for the deaths they cause. In nearly every case where prosecutors speak out, something is said about how these laws exclusively target “drug dealers,” making a clear if unrealistic distinction between user and dealer.

With drugs only being available via underground networks, which require person-to-person access, the reality is actually a much more complex world of grey areas, where users and dealers switch roles depending on the day. Health in Justice Action Lab data show that 50% of DIH defendants did not meet the traditional definition of “dealer” and were instead friends, family, or romantic partners of the deceased. The vast majority of those people also had a substance use disorder, and merely sold small amounts of drugs to fund their addiction.

Relationship between overdose decedents and individuals accused of drug-induced homicide, by category
(N=213, Online News Reports 2000-2017)

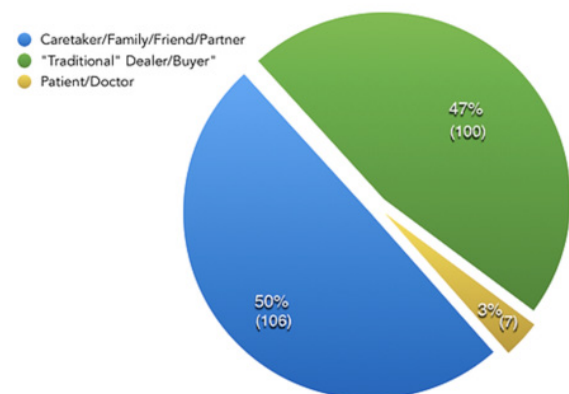


Figure 3 - Relationship Breakdown of Decedent and Accused
Source: HIJ Action Lab

HOW WE RESPONDED

Alarmed by watching a repeat of failed War on Drugs policies that destroy lives and increase drug-related risks and harms, the Health in Justice Action Lab has been conducting research on and advocating against DIH laws since 2017. When new DIH bills are filed in state legislatures, our policy team provides testimony on the data to legislators in an effort to prevent yet more of these bills becoming law. We help attorneys defend against these cases and their severe sentences via our DIH Defense Toolkit (third edition forthcoming this summer) and by filing documents such as amicus briefs in ongoing cases.

Successful Amicus Briefs

In *Commonwealth v. Carrillo*, the Massachusetts Supreme Judicial Court vacated Jesse Carrillo's involuntary manslaughter conviction, ordering the case to be sent back to the trial court to record a finding of not guilty. The court cited our brief during oral argument and held, in a unanimous decision:

We conclude that the mere possibility that the transfer of heroin will result in an overdose does not suffice to meet the standard of wanton or reckless conduct under our law. The Commonwealth must introduce evidence showing that, considering the totality of the particular circumstances, the defendant knew or should have known that his or her conduct created a high degree of likelihood of substantial harm, such as an overdose or death.⁶

In the *U.S. v. Semler*, in a 2-1 decision the U.S. Court of Appeals for the Third Circuit vacated Emma Semler's conviction for drug delivery resulting in death, with the majority holding that "the definition of 'distribute' under the Controlled Substances Act does not cover individuals who jointly and simultaneously

acquire possession of a small amount of a controlled substance solely for their personal use."⁷ This may be the first time a court has recognized how DDRD prosecutions of fellow users do not address traffickers and instead increase overdose risk, both of which were points raised by our brief.

The government would have us believe that if two drug addicts jointly and simultaneously purchase methamphetamine and return home to smoke it together, a "distribution" has occurred each time the addicts pass the pipe back and forth to each other. Such an interpretation diverts punishment from traffickers to addicts, who contribute to the drug trade only as end users and who already suffer disproportionately from its dangerous effects. Indeed, the threat of harsh penalties in any joint-use situation could jeopardize addicts' safety even more by deterring them from using together specifically so that one can intervene if another overdoses. Moreover, given the prevalence of shared drug use, a too-broad construction of "transfer" risks arbitrary enforcement.⁸

Our efforts have yet to address the hundreds of people already sentenced and serving time in prison. While post-conviction relief can be complex, we hope to identify individual cases that are strong candidates for any form of post-conviction relief while drawing attention to the burgeoning problem of people with a substance use disorder serving incredibly long and expensive prison sentences that are counterproductive while overdose prevention efforts go underfunded nationally.

**THE FOLLOWING PROFILES
ILLUSTRATE THE TRAGIC REALITY
OF DIH PROSECUTIONS, A FAR CRY
FROM PROSECUTOR STATEMENTS
FOUND IN PRESS RELEASES.**

THE TRUE FACES OF DIH PROSECUTIONS

Profile: Aaron Wodzinski



Source: Taylor Wodzinski

Quick Facts

Relationship to deceased:	Friend since middle school
Sentence:	20 years
Currently Incarcerated:	USP Leavenworth
History of substance use disorder:	Diagnosed with opioid use disorder
Met traditional definition of "dealer":	No
Other Info:	Is exposed to prison violence daily, has an infant son

Full Profile:

Aaron Wodzinski struggled with heroin addiction for four years before finally finding recovery after an overdose almost ended his life, prompting him to seek treatment. He and his wife were ecstatic about finally beginning their life together, sober. Months into recovery, he was indicted on drug-induced homicide for an overdose that occurred before he had entered treatment. Shortly after, he learned his wife was pregnant. He spent a mere two months with his newborn son before self-surrendering to the federal prison.



"He has overdosed twice and both times narcans saved his life. It could have easily been the other way around, it could have been him that died," his wife tries but fails to grasp the logic that has left her to raise their son alone. "He wanted to get better." Despite federal prosecutors charging Aaron as if he were a malicious dealer and sentencing him to 20 years in prison, the deceased's mother showed more complexity when she spoke with KELOLAND News⁹. "I will always have to live without [my son]. But I feel for his family. I feel for his newborn baby. And I am working on forgiveness and letting go of the anger that I have been struggling with for so long."

Profile: Justin Morgan



Source: Paula Morgan

Quick Facts

Relationship to deceased:	Close friend of many years
Sentence:	Unsentenced, facing 40 years
Currently Incarcerated:	Lackawanna County Jail
History of substance use disorder:	Diagnosed with opioid use disorder
Met traditional definition of "dealer":	No
Other Info:	Was actively co-parenting his son before arrest

Profile: Justin Morgan (con't)

Full Profile:

Justin vacillated between addiction and recovery for the better part of 20 years, many times side-by-side with his friend Tom. According to Justin's mom, both men had recently completed treatment but relapsed under the weight of the COVID pandemic. Justin was working at a lucrative job and in no way a "drug dealer" in the traditional sense of the word. But he did facilitate a transaction for Tom one night - and Tom overdosed and died.



"From what I know his friend would never blame Justin for his death and would not want this to have happened to Justin," said Justin's mother. "He and his friend were both good people with a bad disease."

Facing decades in prison, Justin is living a nightmare that is beyond his control. Himself having been raised without a father, he is agonizing over the fact his own son, three at the time of his arrest and whom he was actively co-parenting, will now suffer the same fate.

Quick Facts

Relationship to deceased:	Friend and coworker
Sentence:	11.5 years
Currently Incarcerated:	Federal Prison Camp Canaan
History of substance use disorder:	Diagnosed with opioid use disorder
Met traditional definition of "dealer":	No
Other Info:	Denied transfer to home confinement despite CARES Act expansion

Full Profile:

Benjamin sold what he believed to be heroin, the very drug to which he was addicted, to his friend and coworker. He went to fetch the drugs at Cassie's behest while she waited behind at the restaurant where they both worked. Sometime after they parted ways, she overdosed and died in her apartment. Though recognizing he was gainfully employed and only acted as a middle man, federal prosecutors sentenced

Profile: Benjamin Rogers



Source: Winnifred Rogers

Benjamin, struggling with an opioid use disorder and incarcerated on his first-ever offense, to 11.5 years in federal prison.

"He was not a dealer. She asked him to buy for her and he did... He would never intentionally or knowingly hurt anyone. He used the same dope," his mother explained to us, startled by the government's insistence that he was either a drug dealer, malicious, or both.



Acting US Attorney Farley continued to insist that Benjamin was a nefarious dealer. “This should send a message to the community that those who distribute opioids will face substantial consequences. While those suffering from addiction need access to treatment, those who sell or distribute these deadly substances will be prosecuted for their actions.”

Not everyone who spoke on behalf of the deceased agreed. “The prison of addiction is far greater than any bars in any prison or jail,” wrote a friend of Cassie’s who had watched her struggle with addiction for years. “Justice for Cassie would be treating another addict with compassion and seeing him in a long-term treatment center, with the possibility of achieving sobriety.”

Profile: Brandon Lopez

Quick Facts

Relationship to deceased:	Spouse
Sentence:	Up to 25 years
Currently Incarcerated:	Macomb Correctional Facility
History of substance use disorder:	Diagnosed with opioid use disorder
Met traditional definition of “dealer”:	No
Other Info:	With his wife dead from overdose and he incarcerated, he worries for their children

Brandon Lopez was sentenced to prison for his wife’s accidental overdose. According to a press briefing, he pulled out a handwritten note at sentencing and read it aloud, “I am truly scared for my life and my children’s lives.” With one parent dead and the other headed to prison for up to 25 years, the fate of their children is unknown, though the magnitude of the tragedy is undeniable.

“I lost my best friend. I lost my family,” lamented Brandon during his sentencing according to news reports¹⁰, “I’ve heard people say that I should have been the one who died. I’m with them. I should have been.” He told the court numerous times that he was sorry for everything that happened but insisted that he and his wife made a conscious choice to use drugs.

Huron County Circuit Court judge Gerald M. Pril laid the responsibility squarely at Brandon’s feet. “You are equally responsible as far as this court is concerned.” He went as far as to say he was glad Brandon will have to live with the knowledge that he caused his own beloved wife’s death.

DIH IN THE LEGAL SYSTEM: MYTHS AND MISUNDERSTANDINGS

What is a “Drug Dealer?”

After decades of War on Drugs rhetoric, the term “drug dealer” has taken on a nefarious connotation and conjures images of predators offering drugs to innocent victims. This image of a drug dealer is detached from reality and imbued with racism.

People who use drugs often buy and sell via expanded social networks. People with an opioid use disorder experience painful withdrawal, motivating them to “seek help” from their friends--in the form of opioids to alleviate withdrawal.

The most frequently prosecuted person is the lowest link in the chain, for they are the easiest for law enforcement to locate and secure enough evidence against to indict. Rarely do DIH cases reach the highest levels of drug supply chains; law enforcement prefer to secure convictions with low-hanging fruit.

“Middle men,” those who take the buyer’s money, go meet with the dealer, and return with the drugs, are often charged under DIH statutes as they fit the legal definition of having “distributed” the drugs. The same definition of “distribution” applies when two people pool their money together to buy a certain quantity of drugs and they then split it up amongst themselves.

DIH laws are predicated on a false dichotomy between users and dealers. Overdose deaths are incredible tragedies that cause immense pain and grief to families. Grieving parents sometimes seek long prison sentences for the person who provided the drugs off which their loved ones overdosed. In many cases, the person indicted for DIH is themselves an overdose survivor and came one dose of naloxone away from themselves being labeled “the deceased.” Often in DIH cases, there is also a false dichotomy between victim and perpetrator.

They also require an incongruent application of the legal framework underpinning the criminalization of substance use. Oftentimes, the person who overdosed and died also had a long history of substance use disorder. They may even have lengthy arrest records. While they lived, the justice system heavily criminalized them for their drug use, holding them fully accountable for their addiction and incarcerating them for simple possession. Only upon death are they treated with compassion by the justice system.

Only when the victim’s opinion aligns is it respected. When the wishes of the deceased’s family match the prosecutors, the prosecutor lauds their desire for vengeance as if it were justice. When the deceased’s family pleads for compassion, prosecutors often disregard them. Only certain victim’s voices are elevated by the justice system--the ones that favor punishment over compassion.

WHAT DOES DIH ACHIEVE? (THE HARMS)

One thing DIH laws are successful at is scapegoating people with substance use disorders for our overdose crisis. By allocating blame off of governmental policy failures that exacerbated the overdose crisis and onto marginalized individuals – already primed for villainization and stigmatization due to War on Drugs rhetoric – the government maintains the facade of “doing something” in the face of rampant deaths without actually reversing course on the policies that caused said deaths. It is blame allocation, not sensible drug policy.

Scapegoating the result of multiple systems failure and placing the blame at the feet of marginalized individuals cannot be called justice. It is a miscarriage of justice.

They confuse vengeance for justice. “I look at it in a real micro way,” Pete Orput, chief prosecutor in Washington County outside Minneapolis, said about prosecuting drug induced homicide in the New York Times¹¹. “You owe me for that dead kid.”

Vengeance is not justice. While some grieving parents claim to support DIH prosecutions, their justified anger and frustration is easier to place onto one specific individual than it is the multiple systems failures that created the overdose crisis. Exacting vengeance saves no lives. If the goal is to reduce overdose, we know how to do that. It is not waiting until after someone with a substance use disorder has overdosed and died to invest money in their life.

Hundreds of people are serving thousands upon thousands of years behind bars as the result of DIH prosecutions. These laws are unjust, ineffective, and harmful.

DIH prosecutions perpetuate the legacy of racism. Defendants are significantly more likely to be prosecuted under a DIH statute and face a decades-long mandatory minimum if the deceased is white and the alleged dealer is Black similar to the racial disparities found in death penalty cases.

All cost and no benefit, they are an irresponsible use of taxpayer funds.

To improve return-on-investment, the government has dozens of evidence-based interventions from which to choose. Focusing on overdose punishment instead of overdose prevention isn't only ineffective, it's hugely expensive to the American taxpayer. With an average sentence length of eight years and an average cost of imprisonment by year of \$33,274¹², the government spends an average of \$266,192 on incarceration costs alone.

This money could be put to productive use on overdose prevention as opposed to blind punishment: harm reduction services, treatment, and recovery support. These services are proven to save lives. Drug-induced homicide prosecutions are an absurd use of public resources during the overdose crisis.

STOPPING THE HARMS AND SEEKING RELIEF

The Media and Public Opinion

For decades, the media perpetuated one particular narrative around “drug dealers” and the American public has internalized it. In any of the daily news reports of drug-induced homicide, it is unlikely the average reader questions the “drug dealer” label affixed to the latest DIH defendant’s mugshot.

It is not politically dangerous to put “drug dealers” in prison for “murdering our children with their poison.” In fact, it may even win votes. It is only when people dig deeper that they begin to question the policy. Or when it affects them directly. Only upon realizing that the government’s use of the term “drug dealer” has lost all meaning and is most often affixed to friends and family do people reject DIH prosecutions.

While data do not always play well with voters – voters being who elects the district attorneys who decide the indictments and the legislators that write the laws themselves – narrative storytelling often does.

The preceding profiles are an attempt at changing public opinion around DIH defendants to combat decades of War on Drugs toxic rhetoric. As public opinion sways in favor of evidence-based policy, prevention over punishment, and the winding down of the War on Drugs, it opens up vast opportunities for post-conviction relief and policy reform.

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POST-CONVICTION RELIEF

There are hundreds more cases just like these, equally as tragic. With a rash of progressive prosecutors assuming office and a general softening of the rhetoric, post-conviction relief is becoming viable. From sentence reductions to clemency, multiple routes exist depending on the jurisdiction.

As the political climate warms to post-conviction relief, so does it warm to outright policy reform; abolition of DIH laws or the commitment by prosecutors to eliminate or restrict their use; a more favorable environment for clemency or reprieve from governors or state boards; and less opposition of post-conviction relief for these cases originating from district attorneys' offices.

Regardless of the avenue of action, the path is the same: change the narrative around drug-induced homicide. Humanize defendants and illustrate the absurdities. The information contained in this report and the data collected to compile it could be translated into other products to accomplish this aim.

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With more accessible data and three-dimensional profiles of defendants, mainstream journalism will be more apt to cover these stories in a critical light. The more material the Lab produces on DIH, the more media inquiries and potentials for media partnerships we receive.

A video explainer could help otherwise ignorant people look beyond the surface of these laws and into the tragedy that lies beneath. Other audiovisual products would be effective at evoking empathy in the audience and souring public opinion against DIH.

John Oliver, for example, has been making a series of justice-related videos and our goals may align.

DIH cannot withstand scrutiny. To bring scrutiny, we increase awareness and elevate humanizing and three-dimensional portrayals of defendants.

Our Goals

Restrict	Limit the use of DIH laws by leveraging prosecutorial discretion
Relief	Seek post-conviction relief avenues for those already convicted
Repeal	Reform DIH laws to include a mens rea component and/or seek total repeal of them

A mens rea requirement would virtually eliminate DIH prosecutions. The cases described in this report as well as the vast majority of all cases known to us lack intentionality. Minor changes to statute by adding a mens rea component would have an effect similar to that of total repeal.

No matter which of the three R's we seek, it will be accomplished by swaying public opinion and therefore policy. Not only will it reduce human tragedy, it will have a much higher return-on-investment for tax dollar expenditures. It promotes justice. It makes economic sense.

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A mens rea requirement would virtually eliminate DIH prosecutions.

¹ Friedman Joseph, Beletsky Leo, Schriger David L. [Overdose-Related Cardiac Arrests Observed by Emergency Medical Services During the US COVID-19 Epidemic](#). JAMA Psychiatry. DOI: 10.1001/jamapsychiatry.2020.4218

² Kung Kelly et al., Analysis of the Effect of Drug Induced Homicide Prosecution Media reports on Drug Overdose Deaths. American Statistical Association. August 2020. <https://ww2.amstat.org/meetings/jsm/2020/onlineprogram/AbstractDetails.cfm?abstractid=312810>

³ U.S. Department of Justice, Office of Justice Programs. Five Things about Deterrence. May 2016. NCJ 247350. National Institute of Justice. Available at <https://ncjrs.gov/pdffiles1/nij/247350.pdf>

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⁵ Drug Policy Alliance. An Overdose Death is not Murder: Why Drug-Induced Homicide Laws are Counterproductive and Inhumane. 2017. Available at <https://drugpolicy.org/resource/DIH>

⁶ Commonwealth v. Carrillo, 483 Mass. 269, 270 (2019) (Gants, CJ), available at <http://masscases.com/cases/sjc/483/483mass269.html>.

⁷ U.S. v. Semler, No. 19-2319 (3d. Cir. 6/1/2001) slip opn. at 2. Counsel of record plans to file a motion to make the decision precedential.

⁸ Id. at 11.

⁹ “Sioux Falls man sentenced to 20 years in federal prison for fentanyl overdose death.” KELOLAND News. <https://www.keloland.com/news/local-news/sioux-falls-man-sentenced-to-20-years-in-federal-prison-for-fentanyl-overdose-death/>

¹⁰ “Husband of Overdose Victim Sentenced to up to 25 years.” Huron County View. January 12, 2017. <https://huroncountyview.mihomepaper.com/articles/husband-of-overdose-victim-sentenced-up-to-25-years>

¹¹ “They Shared Drugs. Someone Died. Does That Make Them Killers?” Rosa Goldensohn. The New York Times. May 25th, 2018.

¹² Prison Spending in 2015. The Vera Institute. <https://www.vera.org/publications/price-of-prisons-2015-state-spending-trends/price-of-prisons-2015-state-spending-trends/price-of-prisons-2015-state-spending-trends-prison-spending>

