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AMERICA'S FAVORITE ANTIDOTE: DRUG-INDUCED HOMICIDE IN THE AGE OF THE OVERDOSE CRISIS

Leo Beletsky*

Abstract

Nearing the end of its second decade, the overdose crisis in the United States continues to claim tens of thousands of lives. Despite the rhetorical emphasis on a "public health" approach, criminal law and its enforcement continue to play a central role among policy responses to this crisis. A legacy of the 1980s War on Drugs, statutory provisions that implicate drug distributors in overdose fatalities are on the books in many U.S. jurisdictions and federally. This Article articulates an interdisciplinary critique of these "drug-induced homicide" laws at a time of their increased popularity, expanding scope, and aggressive prosecution. That these policy mechanisms are deployed under the banner of overdose prevention invites a critical public health lens to their re-examination.

After tracing the trajectory of the overdose crisis, this Article examines the role of drug-induced homicide laws as exemplars of U.S. drug policy's reliance on criminal law to address problematic substance use. An empirical analysis of publicized drug-induced homicide cases documents a rapid and accelerating diffusion of prosecutions in many hard-hit jurisdictions; pronounced racial disparities in enforcement and sentencing; and broad misclassification of friends, partners, family members, and others as "dealers." In addition to crowding out evidence-based interventions and investments, these policies and prosecutions run at direct cross-purposes to public health efforts that encourage witnesses to summon lifesaving help during overdose events. At a time of crisis, drug-induced homicide laws and prosecutions represent a false prophecy of retribution, deterrence, and incapacitation. These findings support further efforts to demobilize criminal law and criminal justice actors from responding to drug-related harms in the U.S. as elsewhere.

* © 2019 Leo Beletsky. Associate Professor of Law and Health Sciences, Director of the Health in Justice Action Lab at Northeastern University and Adjunct Processor, UCSD School of Medicine. The author wishes to thank Wendy Parmet, Daniel Medwed, and numerous other colleagues, including participants of the Petrie Flom Center Health Policy and Law Workshop at Harvard Law School and the Health Law Grand Rounds at the McKinney School of Law at University of Indiana for feedback. Siri Nelson, Safira Castro, Sarah Seymour, Zachary Siegel, Jeremiah Goulka, Paige Baum and Belinda Bonnen provided excellent research assistance. Funding for the empirical research portion of this analysis was provided by the Proteus Fund and the Vital Projects Fund.

INTRODUCTION

On April 14, 2010, Joshua Banka went on a drug-using spree in the city of Nevada, Iowa.[1] After crushing and injecting oxycodone pills he had stolen from a friend, Banka and his wife Tammy Noragon Banka drove to a nearby town to purchase heroin.[2] Banka, who had a long history of substance use, had recently reinitiated using heroin after abstaining for six months.[3] A dealer named Marcus Burrage sold Banka one gram of heroin in a grocery store parking lot.[4] The couple cooked and injected some of the drug in the car immediately following the transaction and then again later upon returning home.[5] After his wife had gone to sleep in the early hours of April 15, 2010, Banka injected another batch.[6]

The next morning, Noragon found her husband's lifeless body on the bathroom floor and called 911.[7] In conducting a death-scene investigation, police found drug paraphernalia, about half of the recently procured heroin, and a cocktail of prescription pills.[8] Subjected to questioning, the bereaved wife picked Marcus Burrage out of a photo lineup as the dealer who had sold them the ill-fated bag the night before.[9]

Noragon was never arrested, but Burrage was soon apprehended and charged with heroin distribution.[10] After taking over this seemingly unremarkable drug case, federal prosecutors charged Burrage with a seldom-used, but powerful enhancement under the federal Controlled Substances Act.[11] This provision—§ 841(b)(1)(C)—mandates a sentence of twenty years to life in cases when "death . . . results from the use of [the] substance" unlawfully distributed by the accused.[12]

At trial, two toxicologists testified to the presence of multiple substances in Banka's body at the time of death.[13] In addition to heroin, this included metabolites of prescription opioid analgesics and benzodiazepines.[14] As depressants, all these drugs act synergistically to slow down the central nervous system, including

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[1] Burrage v. United States, 571 U.S. 204, 206 (2014).
[2] Brief for the United States at 5–6, Burrage v. United States, 571 U.S. 204 (2014) (No. 12-7515) [hereinafter Brief for the United States].
[3] *Id*. at 5.
[4] *Id.* at 5–6.
[5] *Id.* at 6.
[6] *Id.*
[7] *Id.*
[8] *Id.* (noting that the drugs included opioid analgesics and benzodiazepines).
[9] *Id.*
[10] *Id.*
[11] 21 U.S.C. §§ 801–904 (2018).
[12] *Id*. § 841(b)(1)(C).
[13] Burrage v. United States, 571 U.S. 204, 207 (2014).
[14] *Id.*

respiration control.[15] In view of multiple-drug toxicity, the experts opined that heroin was likely an important "contributing" factor, but its causal role in Banka's death could not be determined.[16] Nonetheless, Burrage was convicted on both the distribution and "death results" charges, triggering the twenty-year minimum sentence mandated under § 841(b)(1)(C).[17]

After losing on appeal at the District and then the Circuit levels, this case was granted *certiorari* by the U.S. Supreme Court.[18] There, Burrage's contention that the language in § 841(b)(1)(C)'s "death results" enhancement requires "but-for" causation finally carried the day.[19] Writing for the unanimous Court,[20] the late Justice Scalia rebuffed the Government's reading of the enhancement, ultimately rejecting its application in cases where the drug was not an independently sufficient cause of death.[21]

In reaching this decision, Justice Scalia deliberated about the Government's predictions that the provision's narrow construction would "unduly limi[t] criminal responsibility" and run counter to public policy.[22] In addition to the customary retribution rationale—that drug dealers deserve severe sanctions based on their high level of blame—the Government advanced a broader narrative of deterrence. Without providing any empirical evidence, it contended that "extremely stiff penalties" are a way to send a "clear message"[23] to drug dealers. The goal articulated by the provision's drafters—and implied by the Government in *Burrage*—was to "prevent further drug-related deaths."[24]

Justice Scalia was characteristically acerbic in responding to the Government's predictions of a "public policy disaster" if the charge implicating Marcus Burrage in

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[15] *Id.*; *see also* Jermaine Jones et al., *Polydrug Abuse: A Review of Opioid and Benzodiazepine Combination Use*, 125 DRUG & ALCOHOL DEPENDENCE 8, 8–18 (2012), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3454351/ [http://perma.cc/7QM4-862M].

[16] Brief for the United States, *supra* note 2, at 7–9 (noting that the drugs included opioid analgesics and benzodiazepines).

[17] *Burrage*, 571 U.S. at 208–09.

[18] *Id.* at 208.

[19] *Id.* at 218–19 (holding that "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").

[20] Note that the decision was only unanimous in judgment, but not in reasoning. Justice Ginsburg separately wrote a concurring opinion, joined by Justice Sotomayor. Further, Justice Alita did not join Part III-B—the portion of the case discussing the rationale regarding "but-for" causation. Thus, only five justices in total signed onto the decision's resting on lack of but-for causation.

[21] *Burrage*, 571 U.S. at 218–19.

[22] *Id.* at 216 (quoting Brief for the United States, *supra* note 2, at 24) (alteration in original).

[23] Brief for the United States, *supra* note 2, at 4.

[24] Brief for the United States, *supra* note 2, at 4 (quoting 132 CONG. REC. 26,453 (1986) (statement of Sen. Mattingly)).

Joshua Banka's accidental overdose were vacated.[25] But the late Justice's opinion never critiqued the deployment of such prosecutions—and the underlying statutory provisions—as instruments of overdose prevention.[26] This Article endeavors to do just that.

Nearing the end of its second decade, the crisis of fatal opioid-involved overdose in the United States continues unabated.[27] In fact, the crisis has gone from bad to worse,[28] but not for the lack of evidence about how it can be brought under control. There is broad agreement that reducing opioid overdose deaths requires wider distribution of the opioid antidote naloxone, rapid scale-up in evidence-based treatment, and reducing stigma associated with substance use and addiction.[29] Progress on these—and other—vital measures remains abysmally slow, both in

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[25] *Burrage*, 571 U.S. at 216–17 (noting that federal prosecutors had a track record of successfully applying § 841(b)(1)(C) in other cases involving multiple-drug toxicity, with the operative difference that the experts were less ambivalent about the role of the substance in the fatal outcome). From a practical perspective, even if the prosecutors could not secure a conviction on the "death results" enhancement, the accused would still typically receive a substantial sentence on the underlying drug trafficking charge. *See id.*

[26] Perhaps a missed opportunity for public health-minded observers to submit an amicus brief. Such an Amicus was recently submitted in a Massachusetts Supreme Judicial Court case involving a drug-induced homicide charge, *see* Brief for the Comm. for Public Counsel Services et al., Commonwealth v. Carrillo, 2019 WL 400620 (Mass. 2019) (No. SJC–12617); *see also* Leo Beletsky et al., *Advancing Public Health Through the Law: The Role of Legal Academics: Workshop Report* (Northeastern University School of Law Research Paper No. 110-2012, 2012) (calling for increased involvement among public health legal academics in different areas of litigation touching on public health issues).

[27] *See* HOLLY HEDEGAARD ET AL., NAT'L CTR. FOR HEALTH STATISTICS, U.S. DEP'T OF HEALTH & HUMAN SERVS., NCHS DATA BRIEF NO. 294, DRUG OVERDOSE DEATHS IN THE UNITED STATES, 1999–2016, at 2 (2017), https://www.cdc.gov/nchs/data/databriefs/db294.pdf [https://perma.cc/V9RW-NLQ5] (noting that the opioid overdose death rate "increased on average by 10% per year from 1999 to 2006, by 3% per year from 2006 to 2014, and by 18% per year from 2014 to 2016").

[28] *See id.*

[29] *See* U.S. DEP'T OF HEALTH & HUMAN SERVS., FACING ADDICTION IN AMERICA: THE SURGEON GENERAL'S REPORT ON ALCOHOL, DRUGS, AND HEALTH 4–10 (2016), https://addiction.surgeongeneral.gov/sites/default/files/surgeon-generals-report.pdf [https://perma.cc/9NYR-WXKK] [hereinafter FACING ADDICTION]; *see also* CHRIS CHRISTIE ET AL., THE PRESIDENT'S COMMISSION ON COMBATING DRUG ADDICTION AND THE OPIOID CRISIS 7 (2017), https://www.whitehouse.gov/sites/whitehouse.gov/files/images/Final_Report_Draft_11-1-2017.pdf [http://perma.cc/9R3M-WHGB]; Jerome Adams, *Surgeon General's Advisory on Naloxone and Opioid Overdose*, U.S. DEP'T HEALTH & HUMAN SERVS., https://www.surgeongeneral.gov/priorities/opioid-overdose-prevention/naloxone-advisory.htm [http://perma.cc/6JZR-YDTP]. *See generally* INST. OF MED., PAIN MANAGEMENT AND THE OPIOID EPIDEMIC: BALANCING SOCIETAL AND INDIVIDUAL BENEFITS AND RISKS OF PRESCRIPTION OPIOID USE (Richard J. Bonnie et al. eds., 2017).

terms of translating empirical evidence into policy and implementing programs on the ground.[30]

Meanwhile, progress has been far from sluggish in deploying § 841(b)(1)(C) and similar state-level prosecutions as a response to fatal drug overdoses. Since Joshua Banka's death in 2010, such prosecutions have surged at least threefold to now number in the thousands per year,[31] while news mentions of drug-induced homicide cases rise in tandem.[32] During this period, a growing list of states passed—and many more are considering—new provisions to enhance such charges.[33] At the time of this writing, thirty-six states had deployed these prosecutions in response to the opioid crisis.[34]

In 2017, over 70,000 people died from drug overdoses.[35] Drawing on their established role as the go-to experts on drug policy, law enforcement leaders and organizations have advanced drug-induced homicide laws and prosecutions as a core element of our society's response to this mass calamity.[36] There are numerous ways

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[30] FACING ADDICTION, *supra* note 29, at 1–2; *see also* Barrot Lambdin et al., *Identifying Gaps in the Implementation of Naloxone Programs for Laypersons in the United States*, 52 INT'L J. DRUG POL'Y 52, 52–55 (2018) (describing the gap in overdose education and naloxone distribution programs); 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, 2050 (2017) (noting that only 1 in 20 individuals (4.6%) referred through the criminal justice system to opioid use disorder treatment received appropriate agonist medications).

[31] LINDSAY LASALLE, DRUG POLICY ALL., AN OVERDOSE DEATH IS NOT MURDER: WHY DRUG-INDUCED HOMICIDE LAWS ARE COUNTERPRODUCTIVE AND INHUMANE 11 fig.2 (2017), http://www.drugpolicy.org/sites/default/files/dpa_drug_induced_homicide_report_0.pdf [http://perma.cc/U2PT-MXYV] (charting the increase in drug-induced homicide prosecutions from 2011–2016).

[32] *See, e.g.*, *Drug-Induced Homicide*, HEALTH JUST. (2019), https://www.healthinjustice.org/drug-induced-homicide [https://perma.cc/5ZN6-Y8AP] (tracking drug-induced homicide cases and updating visual analyses of these cases on www.healthinjustice.org).

[33] *See* Joseph Walker, *Prosecutors Treat Opioid Overdoses as Homicides, Snagging Friends, Relatives*, WALL ST. J. (Dec. 17, 2017, 11:12 PM), https://www.wsj.com/articles/prosecutors-treat-opioid-overdoses-as-homicides-snagging-friends-relatives-1513538404 [http://perma.cc/6ZDB-WQKP].

[34] *See* LASALLE, *supra* note 31, at 56–63; *see also Drug Induced Homicide Laws Database*, PRESCRIPTION DRUG ABUSE POL'Y SYS., (Jan. 1, 2019), http://pdaps.org/datasets/drug-induced-homicide-1529945480-1549313265-1559075032 [http://perma.cc/BE9E-2386].

[35] HOLLY HEDEGAARD ET AL., NAT'L CTR. FOR HEALTH STATISTICS, U.S. DEP'T OF HEALTH & HUMAN SERVS., NCHS DATA BRIEF NO. 329, DRUG OVERDOSE DEATHS IN THE UNITED STATES, 1999–2017, at 1 (2018), https://www.cdc.gov/nchs/products/databriefs/db329.htm [http://perma.cc/K789-RPB8].

[36] *See, e.g.*, NAT'L DIST. ATTORNEYS ASS'N, THE OPIOID EPIDEMIC: A STATE AND LOCAL PROSECUTOR RESPONSE 9–10 (2018), https://ndaa.org/wp-content/uploads/NDAA-

to scrutinize this paradigm. From a doctrinal standpoint, deployment of harsh criminal penalties in retribution for unintended conduct raises thorny normative and constitutional issues.[37] As they relate to the felony murder doctrine, those questions have been explored elsewhere by scholars expert in history, epistemology, and theory of criminal law.[38] The resulting consensus is nearly unanimous regarding felony murder and other provisions that are corollaries to drug-induced homicide—to be both bad law and bad criminal justice policy.[39] And yet, drug-induced homicide laws persist in most jurisdictions.[40] Their surging deployment under the banner of overdose prevention adds new urgency to their reexamination, inviting a critical public health lens.[41]

This Article unfolds as follows: Part I provides an overview of the scope of the opioid "epidemic," tracing its macabre trajectory from a crisis driven primarily by prescription analgesics to the rapid rise of fatalities involving black market drugs like heroin and, more recently, illicitly manufactured fentanyl. As the supposed antidote to problematic substance use,[42] punishment has long been the central instrument of the U.S. drug control system.[43] Part II challenges the widely held notion that a different, "public health" approach characterizes the response to the current crisis. To illustrate the continued centrality of punitive policy narratives and measures, Part III focuses on drug-induced homicide laws. After tracing their origins

Opioid-White-Paper.pdf [http://perma.cc/JYK8-5X5N] (setting the agenda and objectives for prosecutors to investigate overdoses as homicides).

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

[38] *See, e.g.*, *id.*; Mary Ellen Gale, *Retribution, Punishment, and Death*, 18 U.C. DAVIS L. REV. 973 (1985) (arguing that various justifications for punishment are not sufficient for capital punishment); Paul Rubin & Joanna M. Shepherd, *Tort Reform and Accidental Deaths*, 50 J.L. ECON. 221, 221–38 (2007).

[39] Binder, *supra* note 37, at 966 ("Legal scholars are almost unanimous in condemning felony murder as a morally indefensible form of strict liability."); *see also* Jason Tashea, *California Considering End to Felony Murder Rule*, AM. BAR ASS'N (July 5, 2018), http://www.abajournal.com/news/article/california_considering_end_to_felony_murder_rule/ [http://perma.cc/Q67U-3KEL] ("Forty five states still have felony murder rules, 24 of which allow for the death penalty in such cases. Hawaii, Kentucky, Massachusetts and Michigan have abolished the rule by either legislation or through the courts.").

[40] LASALLE, *supra* note 31; NAT'L DIST. ATTORNEYS ASS'N, *supra* note 36.

[41] *See generally* James G. Hodge, Jr. et al., *Emerging Legal Responses to Curb the Opioid Epidemic*, 45 J.L. MED. & ETHICS 460 (2017) (summarizing the national shift towards characterizing the opioid epidemic as a public health emergency and the resulting legal pressures).

[42] AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS: FIFTH EDITION 483–85 (2013) (describing the key features of substance use disorders).

[43] MATTHEW R. PEMBLETON, CONTAINING ADDICTION: THE FEDERAL BUREAU OF NARCOTICS AND THE ORIGINS OF AMERICA'S GLOBAL DRUG WAR 21–22 (2017).

and theoretical underpinnings, this Part provides an instrumentalist critique of these criminal justice interventions. For the first time, this appraisal draws on an original dataset containing detailed information on 263 drug-induced homicide prosecutions between 2000 and 2016, as well as a broader analysis of the media infosphere on this issue.

The present analysis of key legal, logistical, and other case elements suggests that, while the number and scope of these laws have grown in the wake of the opioid crisis, prosecutions invoking these laws have proliferated even faster.[44] Evaluated for the first time here, emerging trends in the deployment of these provisions raise grave concerns. Mapping onto existing racially disparate patterns of drug law and felony murder enforcement,[45] there is evidence to suggest that prosecutors are applying drug-induced homicide charges selectively,[46] resulting in gaping sentencing disparities between whites and people of color.[47]

In contrast to the fact pattern in *Burrage*, however, approximately half of the drug-induced homicide charges in the dataset ensnared co-using friends, family, or romantic partners of the deceased.[48] Had Tammy Noragon Banka handled the purchase and brought the heroin to her husband that fateful night, she could have been held liable for his death.[49] Such common, but patently unjust application of these provisions magnify individual and community trauma. They also run at cross-purposes to 911 Good Samaritan laws and other efforts to encourage help-seeking during overdose events,[50] while further fraying trust in the law and its enforcement

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[44] German Lopez, *The New War on Drugs*, VOX (Sept. 13, 2017, 7:50 AM), https://www.vox.com/policy-and-politics/2017/9/5/16135848/drug-war-opioid-epidemic [https://perma.cc/6NFW-DD7M] (noting that to specifically address the deadliness of illicit fentanyl, legislative efforts are making it easier for prosecutors to apply mandatory minimums and prosecute drug-induced homicide cases, and that at least 16 states have increased punishment for dealing and possessing illicit fentanyl). This approach is also garnering support on the federal level. *See, e.g.*, Press Release, U.S. Senate, Senators Introduce Legislation to Fight Fentanyl (2018), https://www.cotton.senate.gov/?p=press_release&id=911 [http://perma.cc/S7QQ-YHQ5] (noting that the quantity of fentanyl possession required to trigger mandatory minimums is reduced); *Amendments to the Sentencing Guidelines (Preliminary)*, U.S. SENTENCING COMM'N (2018), https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20180412_prelim_rf_final.pdf?utm_medium=email&utm_source=govdelivey [http://perma.cc/P5XX-2822].

[45] MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 7 (2010).

[46] *See infra* Figure 3.

[47] *See infra* Figure 6.

[48] *See infra* Figure 2.

[49] 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'Y 82, 82–89 (2017).

[50] *Id.*

among people who use drugs.[51] From a population perspective, a synthesis of existing research with original data presented here support the finding that drug-induced homicide laws and their deployment likely exacerbate fatal overdose risk, fueling the very problem they purport to address.

Ultimately, the invocation of drug-induced homicide to address the overdose crisis is symptomatic of U.S. overreliance on criminal law and its instruments to regulate problematic substance use. Drawing on the common law maxim *salus populi suprema lex*,[52] public health must reclaim its historical role as the central objective in the design and application of legal systems, including criminal law.[53] The overdose crisis provides an opportunity to reexamine criminal justice responses to drug policy challenges with that maxim in mind. A call for a substantial redesign of that response architecture completes this Article.

I. THE U.S. OVERDOSE CRISIS AND ITS CONTEXT

A. The State of the Crisis

The United States is undergoing one of the most alarming public health crises in its modern history. After a near fourfold rise in the rate of drug-related overdose fatalities since the beginning of this century,[54] deployment of policies and financial resources to resolve the crisis have failed to do so.[55] The untold devastation wrought on families, communities, and businesses across the country is adding to the already disproportionate burden on urban communities and people of color, in particular Native Americans and older African-American men in urban centers.[56]

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[51] Kathryn Casteel, *A Crackdown on Drug Dealers Is Also a Crackdown on Drug Users*, FIVETHIRTYEIGHT (Apr. 5, 2018, 6:00 AM), https://fivethirtyeight.com/features/a-crackdown-on-drug-dealers-is-also-a-crackdown-on-drug-users/ [http://perma.cc/Y5V5-DTDA].

[52] The maxim has been translated to mean "the welfare of the people is the supreme law." *See* William J. Novak, *Common Regulation: Legal Origins of State Power in America*, 45 HASTINGS L.J. 1061, 1091 n.89 (1994).

[53] *See* WENDY E. PARMET, POPULATIONS, PUBLIC HEALTH, AND THE LAW 51–54 (2009).

[54] HEDEGAARD ET AL., *supra* note 35, at 1.

[55] *Id.*

[56] *See* THE COUNCIL OF ECON. ADVISORS, THE UNDERESTIMATED COST OF THE OPIOID CRISIS 3–6 (2017), https://www.whitehouse.gov/sites/whitehouse.gov/files/images/The%20Underestimated%20Cost%20of%20the%20Opioid%20Crisis.pdf [https://perma.cc/EWV2-WK6V] (noting the large economic detriment of the crisis); *Opioid Overdose Treated in Emergency Departments*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/vitalsigns/opioid-overdoses/index.html [http://perma.cc/U2YQ-BJQD]; German Lopez, *The Opioid Epidemic Has Now Reached Black America*, VOX (Dec. 22, 2017, 2:10 PM), https://www.vox.com/science-and-health/2017/12/22/16808490/opioid

Joshua Banka's untimely death reflects the complexity of "opioid overdose" events, on several fronts. His death involved a mixture of opioids, along with additional sedatives and a slew of other substances.[57] Polydrug toxicity currently accounts for the majority of deaths involving opioids, including powerful synthetics like fentanyl and its analogues.[58] Returning to drug use after a period of abstinence is another known risk factor for opioid poisonings, which also likely contributed to Banka's death.[59]

-epidemic-black-white [https://perma.cc/9WH3-S3HT]; STEPHANIE SCHMITZ BECHTELER & KATHLEEN KANE-WILLIS, CHI. URBAN LEAGUE, WHITEWASHED: THE AFRICAN AMERICAN OPIOID EPIDEMIC 2 (2017), https://www.thechicagourbanleague.org/cms/lib/IL07000264/Centricity/Domain/1/Whitewashed%20AA%20Opioid%20Crisis%2011-15-17_EMBARGOED_%20FINAL.pdf [http://perma.cc/6R3H-HNND] (noting that people of color already experience a disproportionate burden of opioid overdose in numerous states in the Midwest and elsewhere); N.Y.C. DEP'T OF HEALTH & MENTAL HYGIENE, UNINTENTIONAL DRUG POISONING (OVERDOSE) DEATHS IN NEW YORK CITY, 2000 TO 2016, 89 EPI DATA BRIEF 1 (2018), http://www1.nyc.gov/assets/doh/downloads/pdf/epi/databrief89.pdf [http://perma.cc/C5UW-MXF4] ("Black New Yorkers had the largest increase (86%) compared with all other races/ethnicities. The rate increased from 10.9 per 100,000 residents in 2015 to 20.3 per 100,000 residents in 2016."); *How The Opioid Crisis Is Affecting Native Americans*, NPR: ALL THINGS CONSIDERED (Nov. 11, 2017, 5:42 PM), https://www.npr.org/2017/11/11/563551077/how-the-opioid-crisis-is-affecting-native-americans [http://perma.cc/ZT3B-GQTA] (noting that Native Americans have been the hardest hit by opioid overdoses of any ethnic group); *Native American Overdose Deaths Surge Since Opioid Epidemic,* ASSOCIATED PRESS NEWS (Mar. 14, 2018), https://www.apnews.com/81eb3ae96c2b4f6aae272ec50f0672d2 [http://perma.cc/PH5D-GTFL] (explaining that the increase in opioid overdose deaths among Native Americans from 1999–2015 was higher than any other ethnic group during the same period).

[57] Burrage v. United States, 571 U.S. 204, 207 (2014).

[58] Chelsea Carmona, *What Opioid Hysteria Leaves Out: Most Overdoses Involve a Mix of Drugs*, GUARDIAN (June 8, 2016, 7:00 AM), https://www.theguardian.com/us-news/commentisfree/2016/jun/08/opioid-epidemic-drug-mix-overdose-death [http://perma.cc/EA7M-BMCL] (noting the under-appreciated and under-documented role of polysubstance use as a driver of "opioid" overdose deaths). The role of polysubstance overdose is reflective in the national picture as well, and is echoed in state and local data. *See, e.g.*, N.Y.C. DEP'T OF HEALTH & MENTAL HYGIENE, *supra* note 56, at 2–3.

[59] Detoxification or abstinence-based drug treatment, criminal detention, and other episodes of forced interruption in opioid use dramatically lower an individual's tolerance. *See* Ingrid A. Binswanger et al., *Release from Prison—A High Risk of Death for Former Inmates*, 356 NEW ENG. J. MED. 157, 160–61 tbl.3 (2007) (showing that among Washington State prisoners, drug overdose was the leading cause of death among former inmates); *see also* Derek C. Chang et al., *A Case of Opioid Overdose and Subsequent Death After Medically Supervised Withdrawal: The Problematic Role of Rapid Tapers for Opioid Use Disorder*, 12 J. ADDICTION MED. 80, 82 (2018); P.B. Christensen et al., *Mortality Among Danish Drug Users Released from Prison*, 2 INT'L J. PRISONER HEALTH 13, 17 (2006); Shane Darke and Michael Farrell, *Would Legalizing Illicit Opioids Reduce Overdose Fatalities? Implications From a Natural Experiment*, 109 ADDICTION 1, 3–4 (2014); Michael Farrell &

Another important element of overdoses involving opioids is that they create an opportunity for life-saving intervention.[60] Basic first aid and timely administration of the opioid antidote naloxone reverses the deadly coma; this prevents overdoses from turning fatal and helps people live to see another day.[61] Combined, overdose education and naloxone distribution (OEND) into the community have saved thousands of lives.[62]

But such efforts have long sparked controversy, raising concerns about sending the "wrong message" and "enabling" immoral behavior.[63] The argument against naloxone distribution posits that doing so might push people who use drugs toward ever-more risky practices[64]—what economists call "moral hazard."[65] Public health researchers evaluating naloxone distribution have looked for behaviors reflecting moral hazard, finding none.[66] With few exceptions, analyses of naloxone's moral

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John Marsden, *Acute Risk of Drug-Related Death Among Newly Released Prisoners in England and Wales*, 103 ADDICTION 251, 252–54 (2007); Jonathon Giftos & Lello Tesema, *When Less Is More: Reforming the Criminal Justice Response to the Opioid Epidemic*, 57 AM. BAR ASS'N JUDGES' J. 28, 28 (2018) ("The criminal justice system confers significant additional health risks to patients with an opioid use disorder. Forced detoxification from opioids while incarcerated lowers a patient's opioid tolerance and is associated with a 129-times increased risk of overdose death in the first two weeks after release into the community. And untreated opioid withdrawal—a syndrome characterized by vomiting, diarrhea, intense muscle cramps, and paralyzing anxiety—is a major risk factor for suicide in jails and prisons.").

[60] *See Administer Naloxone: Overdose Response*, HARM REDUCTION COALITION (2017), http://harmreduction.org/issues/overdose-prevention/overview/overdose-basics/responding-to-opioid-overdose/administer-naloxone/ [http://perma.cc/HC7Z-QJQQ] (explaining the step-by-step process of identifying and reversing an opioid overdose using naloxone, an antidote that reverses opioid overdoses).

[61] *See, e.g.*, Leo Beletsky et al., *Prevention of Fatal Opioid Overdose*, 308 J. AM. MED. ASS'N 1863, 1863–64 (2012) [hereinafter Beletsky et al., *Prevention of Fatal Opioid Overdose*].

[62] *See* FACING ADDICTION, *supra* note 29, at 4-12–4-13.

[63] *See* Carrie Arnold, *The Fight for the Overdose Drug*, ATLANTIC (Dec. 29, 2014), https://www.theatlantic.com/health/archive/2014/12/the-fight-for-the-overdose-drug/38 3467/ [http://perma.cc/7D6E-KWM6].

[64] Richard Knox, *Overdose Rescue Kit Saves Lives*, NPR: ALL THINGS CONSIDERED (Jan. 2, 2008, 1:00 PM), https://www.npr.org/templates/story/story.php?storyId=17578955 [http://perma.cc/978Y-N4NX].

[65] *See* Jennifer Doleac & Anita Mukherjee, The Moral Hazard of Lifesaving Innovations: Naloxone Access, Opioid Abuse, and Crime 4–5 (Mar. 31, 2019) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3135264 [http://perma.cc /A2EL-LCWT].

[66] *See, e.g.*, Robert Fenichel, *Which Drugs Should be Available Over the Counter?*, 329 BRITISH MED. J. (CLINICAL RES. EDITION) 182, 183 (2004) (posing the question of whether easy access to naloxone might lead to opiate abuse and opining that "much public discussion of moral hazards consists of baseless speculation"); Traci C. Green et al., *Barriers to Medical Provider Support for Prescription Naloxone as Overdose Antidote for Lay Responders*, 48

hazard reflect findings across various harm-reduction interventions, such as HPV vaccination[67] and HIV treatment as prevention,[68] showing that health benefits far outweigh hypothetical risks.[69] Much maligned by similarly misguided concerns, opioid agonist therapy (OAT) with maintenance medications including methadone and buprenorphine help to slash overdose risk by 50–80 percent.[70]

Harm reduction infrastructure, including syringe service programs (SSPs), facilitate overdose prevention by linking individuals with opioid use disorder to OEND, substance use treatment, and other services. But these programs have been embroiled in controversy and are subject to legal and policy resistance, limiting their number and scope in the United States.[71] The same goes for other measures known to facilitate overdose prevention, including safe consumption facilities (SCFs). These programs—which are linked to individual- and community-level overdose fatality reduction—provide a space for drug use under the supervision of trained

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SUBSTANCE USE & MISUSE 558, 562 (2013) (summarizing findings that "systematic evaluation of nonmonetary moral hazard, including easy availability of naloxone, shows that this concern is unfounded or creates little additional risk") (citation omitted).

[67] *See* Monica L. Kasting et al., *Tempest in a Teapot: A Systematic Review of HPV Vaccination and Risk Compensation Research*, 12 HUM. VACCINES & IMMUNOTHERAPEUTICS 1435, 1447 (2016).

[68] *See* Kelly Freeborn & Carmen Portillo, *Does Pre-Exposure Prophylaxis (PrEP) for HIV Prevention in Men Who Have Sex with Men (MSM) Change Risk Behavior? A Systematic Review*, 27 J. CLINICAL NURSING 3254, 3261 (2017).

[69] *See, e.g.*, Jermaine D. Jones et al., *No Evidence of Compensatory Drug Use Risk Behavior Among Heroin Users After Receiving Take-Home Naloxone*, 71 ADDICTIVE BEHAVIORS 104, 104–06 (2017) (finding that concerns of increased risk behavior among opioid users treated with naloxone are often unfounded).

[70] Leo Beletsky, *21st Century Cures for the Overdose Crisis: Promise, Impact, and Missed Opportunities*, 44 AM. J.L. & MED. 359, 365 (2018). For an overview of the evidence supporting the overdose prevention benefits of OAT, see *id.* at 361–63.

[71] *See* Beletsky et al., *Prevention of Fatal Opioid Overdose*, *supra* note 61, at 1863 (discussing the need for FDA action to approve syringe delivery systems). Nevertheless, syringe exchange—a vital public health tool—is only authorized in 21 U.S. states and in the District of Columbia. *Laws Related to Syringe Exchange*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/hepatitis/policy/SyringeExchange.htm [https://perma.cc/5GM9-5TWE] (last updated Sept. 28, 2017). Even when authorized by state or local law, SSPs remain substantially under-resourced. Until recently, SSPs could not be supported by federal funds, and funds still cannot be used to purchase of actual syringes. Traci C. Green et al., *Life After the Ban: An Assessment of US Syringe Exchange Programs' Attitudes About and Early Experiences with Federal Funding,* 102 AM. J. HEALTH e9, e9 (2012). The CDC estimates that the U.S. is in need of substantial additional syringe exchange capacity to bring this proven intervention up to scale. *See* Danae Bixler et al., *Access to Syringe Services Programs—Kentucky, North Carolina, and West Virginia, 2013–2017*, 67 MORBIDITY & MORTALITY WKLY. REP. 529, 532 (2018).

staff.[72] Not one such site is currently authorized to operate in the United States, however.[73] The bottom line is that, when it comes to policies that hold considerable empirical promise for addressing the overdose crisis, we know what to do; we just are not doing enough of it.[74]

B. Framing the "Opioid Epidemic"

The United States is a nation in pain,[75] with over 100 million adults complaining of pain in the last three months.[76] Puzzlingly, Americans report being in pain more frequently and at higher severity than "citizens of other advanced, and even not-so-advanced, countries."[77] It should come as no surprise that America's consumption of opioid painkillers—along with numerous other psychoactive medications[78]—tops world rankings.[79] Americans' love affair with opioids has

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[72] *See generally* THERESE C. FITZGERALD ET AL., MASS. MED. SOC'Y, ESTABLISHMENT OF A PILOT MEDICALLY SUPERVISED INJECTION FACILITY IN MASSACHUSETTS (2017); *see also* MASS. HARM REDUCTION COMM'N, FINAL REPORT 13 (2019), https://www.mass.gov/doc/harm-reduction-commission-report-3-1-2019/download [http://perma.cc/UB9B-VV7C] (noting that facilities have well-documented benefits in preventing overdose, addressing infectious disease associated with drug injection, and addressing community problems related to open-air drug use). Over 100 SCFs operate worldwide, with numerous facilities now emerging in Canada in response to that country's overdose crisis. Zachary Siegel, *It's Time to Bring Supervised Injection Sites Above Ground*, UNDARK (Jan. 11, 2018), [hereinafter Siegel, *Supervised Injection Sites Above Ground*] https://undark.org/article/supervised-injection-sites-study/ [http://perma.cc/D9GH-6N52]. Despite the mounting burden of overdose and its negative health and societal impact, no authorized SCF currently exists in the U.S. *See id.*

[73] Siegel, *Supervised Injection Sites Above Ground*, *supra* note 72.

[74] Carl Hart, *People Are Dying Because of Ignorance, Not Opioids*, SCI. AM. (Nov. 1, 2017), https://www.scientificamerican.com/article/people-are-dying-because-of-ignorance-not-because-of-opioids/ [http://perma.cc/7S3W-C2X3].

[75] *See generally* INST. OF MED. OF THE NAT'L ACAD., RELIEVING PAIN IN AMERICA: A BLUEPRINT FOR TRANSFORMING PREVENTION, CARE, EDUCATION, AND RESEARCH (2011).

[76] *See id.* at 4. *Cf.* Richard L. Nahin, *Estimates of Pain Prevalence and Severity in Adults: United States, 2012*, 16 J. PAIN 769, 769, 775–76 (2015) (noting that 25.3 million adults (11.2%) complain of daily (chronic) pain and 23.4 million adults (10.3%) complain of a lot of pain).

[77] DAVID G. BLANCHFLOWER & ANDREW OSWALD, INST. OF LABOR ECON., NO. 11184, UNHAPPINESS AND PAIN IN MODERN AMERICA: A REVIEW ESSAY, AND FURTHER EVIDENCE, ON CAROL GRAHAM'S *HAPPINESS FOR ALL?* 16 (2017).

[78] *See* Maia Szalavitz, *The Mystery of the Terrifying Xanax Resurgence in America*, VICE (Mar. 27, 2018), https://www.vice.com/en_us/article/paxg39/the-mystery-of-the-terrifying-xanaxresurgence-in-america [https://perma.cc/XPU4-8TVY].

[79] *See generally* Winfried Häuser et al., *The Opioid Epidemic and the Long-Term Opioid Therapy for Chronic Noncancer Pain Revisited: A Transatlantic Perspective*, 6 PAIN MGMT. 249 (2016); *see also* Dina Gusovsky, *Americans Consume Vast Majority of the*

experienced at least three previous cycles of booms and panics, followed by periods of recoil.[80] Addiction and other collateral negative consequences of opioid use are not novel public policy concerns.[81] Nevertheless, broad public recognition and sustained interest in overdose are new.[82]

What is deemed a drug "crisis" or "epidemic" worthy of concerted public policy focus is evidently arbitrary.[83] Even at its current—and projected—shocking levels,[84] opioid-involved overdoses kill far fewer Americans per year than other drugs. Yearly, alcohol-related overdose and disease are linked to approximately 88,000 U.S. fatalities,[85] while tobacco is responsible for a shocking 480,000 American deaths.[86] Though certainly noteworthy in human and financial terms, these critical public health issues receive far less legislative or media attention.[87]

For decades, rising drug overdoses were of only niche concern. Although long endemic in certain urban and rural communities,[88] public apathy towards overdose

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World's Opioids, CNBC (Apr. 27, 2016), https://www.cnbc.com/2016/04/27/americans-consume-almost-all-of-the-global-opioid-supply.html [http://perma.cc/FX92-EWSN].

[80] *See* PEMBELTON, *supra* note 43, at 4–6; *see also* DAVID MUSTO ET AL., ONE HUNDRED YEARS OF HEROIN xiii–xvi, 3–13 (2002).

[81] *See* PEMBELTON, *supra* note 43, at 4–6.

[82] Scott Burris et al., *Stopping an Invisible Epidemic: Legal Issues in the Provision of Naloxone to Prevent Opioid Overdose*, 1 DREXEL L. REV. 273, 274–76 (2009) (noting the number of high-profile deaths from heroin or prescription drug overdose over the course of the last several decades of the twentieth century, and the corresponding lack of action to address this issue).

[83] *See generally* Taleed El-Sabawi, *Defining the Opioid Epidemic: Congress, Pressure Groups, and Problem Definition*, 48 U. MEM. L. REV. 1357 (2018).

[84] *See* Max Blau, *STAT Forecast: Opioids Could Kill Nearly 500,000 Americans in the Next Decade,* STAT (June 27, 2017), https://www.statnews.com/2017/06/27/opioid-deaths-forecast/ [http://perma.cc/S2V6-YEH4].

[85] *Alcohol and Public Health: Alcohol-Related Disease Impact (ARDI)*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://nccd.cdc.gov/DPH_ARDI/Default/Report.aspx?T=AAM&P=f6d7eda7-036e-4553-9968-9b17ffad620e&R=d7a9b303-48e9-4440-bf47-070a4827e1fd&M=8E1C5233-5640-4EE8-9247-1ECA7DA325B9&F=&D= [https://perma.cc/AR6N-2GVN].

[86] U.S. DEP'T OF HEALTH & HUMAN SERVS., THE HEALTH CONSEQUENCES OF SMOKING—50 YEARS OF PROGRESS: A REPORT OF THE SURGEON GENERAL (2014).

[87] *See* German Lopez, *The Deadlier Drug Crises that We Don't Consider Public Health Emergencies*, VOX (Oct. 27, 2017, 2:30 PM), https://www.vox.com/policy-and-politics/2017/10/27/16557550/alcohol-tobacco-opioids-epidemic-emergency [https://perma.cc/K3E5-THMP].

[88] *See* Jose A. Del Real, *The Bronx's Quiet, Brutal War with Opioids*, N.Y. TIMES (Oct. 12, 2017), https://www.nytimes.com/2017/10/12/nyregion/bronx-heroin-fentanyl-opioid-overdoses.html [http://perma.cc/A7J8-ZMEW]; *see also* Theodore J. Cicero et al., *The Changing Face of Heroin Use in the United States: A Retrospective Analysis of the Past Fifty Years*, 71 J. AM. MED. ASS'N PSYCHIATRY 821, 822 (2014).

was pervasive, only to be interrupted by tragic celebrity deaths.[89] Meanwhile, by framing heroin and nonmedical opioid use as a moral failing,[90] criminal law codified societal stigma and stunted public health and other effective response to this long-standing problem.[91]

In the late 2000s, this apathy would give way to increasing visibility and alarm, as overdose deaths grew in number and shifted beyond their prior confinement to geographical and demographic realms of concentrated disadvantage.[92] The rapid and unexpected pace of this diffusion explains the popularity of the moniker "epidemic" being used to describe the phenomenon. As explored in detail elsewhere,[93] this figurative use of the word conjures up a literal contagion. By invoking this framing, thought leaders, members of the media, and the public embraced a discursive vision of the overdose crisis as being fueled by prescription medications and health care providers as vectors of a contagion.[94]

When it comes to framing public policy narratives, language matters.[95] As discussed in more detail elsewhere, the vector narrative foregrounds opioid supply, with a root cause analysis that focuses on overprescription of opioid painkillers. This narrative faults the health care system for its well-intentioned, but misguided efforts to better address undertreated pain.[96] Its prototypical villain is the pharmaceutical

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[89] *See* Burris et al., *supra* note 82, at 273–75*; see also Ledger's Death Caused by Accidental Overdose*, CNN (Feb. 6, 2008, 10:25 PM), http://www.cnn.com/2008/SHOW BIZ/Movies/02/06/heath.ledger/index.html [http://perma.cc/XVU7-8TMX] (noting Heath Ledger, a well-known Hollywood actor, famously died of an accidental overdose after consuming a combination of opioid analgesics and benzodiazepines). *See generally Nonpharmaceutical Fentanyl-Related Deaths–Multiple States, April 2005–March 2007*, 57 CTRS. FOR DISEASE CONTROL & PREVENTION MORBIDITY & MORTALITY WKLY. REP. 793 (2008), https://www.cdc.gov/mmwr/preview/mmwrhtml/mm5729a1.htm [http://perma.cc/72S5-SHQ3] (documenting prior outbreak of fentanyl-related deaths in what would be the precursor to the current fentanyl crisis); Leo Beletsky, *Deploying Prescription Drug Monitoring to Address the Overdose Crisis: Ideology Meets Reality*, 15 IND. HEALTH L. REV. 139, 155–58 (2018) [hereinafter Beletsky, *Deploying Prescription Drug Monitoring*].

[90] *See* Julie Netherland & Helena Hansen, *White Opioids: Pharmaceutical Race and the War on Drugs that Wasn't*, 12 BIOSOCIETIES 217, 217–38 (2017).

[91] *See* Katharine A. Neill, *Tough on Drugs: Law and Order Dominance and the Neglect of Public Health in U.S. Drug Policy*, 6 WORLD MED. & HEALTH POL'Y 375, 375–77 (2014).

[92] *See* Cicero et al., *supra* note 88, at 822, 825; Julie Netherland & Helena B. Hansen, *The War on Drugs that Wasn't: Wasted Whiteness, "Dirty Doctors," and Race in Media Coverage of Prescription Opioid Misuse,* 40 CULTURE, MED., & PSYCHIATRY 664, 665–70 (2016).

[93] Nabarun Dasgupta et al., *Opioid Crisis: No Easy Fix to Its Social and Economic Determinants*, 108 AM. J. PUB. HEALTH 182, 182–83 (2018).

[94] *Id.*

[95] *See* El-Sabawi, *supra* note 83, at 1364–68.

[96] *See* Dasgupta et al., *supra* note 93, at 184.

industry, whose malfeasance[97] and regulatory capture[98] helped exploit gaps in provider education[99] and perverse incentives.[100] These efforts did in fact sharply boost utilization of opioid analgesics,[101] making them the first-line treatment for many types of pain.[102] In 1999, accidental opioid poisonings began to grow in tandem.[103] This ushered in the era of the so-called "prescription drug epidemic" and subsequent remedial policy and programmatic interventions.[104]

By 2010, the year Joshua Banka reportedly shifted his opioid use from prescription drugs to heroin, the crisis entered its second phase. Driven by a variety of pull and push factors, use of opioid prescription drugs began transitioning to street

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[97] Katie Zezima & Lenny Bernstein, *Lawsuit Claims Sackler Family Disregarded Safety, Opioid Addiction in Purdue Push to Profit from OxyContin*, WASH. POST (Feb. 1, 2019), https://www.washingtonpost.com/national/lawsuit-claims-sackler-family-disregarded-safety-opioid-addiction-in-purdue-push-to-profit-from-oxycontin/2019/02/01/5d29e072-2660-11e9-90cd-dedb0c92dc17_story.html?noredirect=on&utm_term=.bf04c84d2054 [http://perma.cc/QL8B-U6P9]; *see also* Andrew Kolodny et al., *The Prescription Opioid and Heroin Crisis: A Public Health Approach to an Epidemic of Addiction*, 36 ANN. REV. PUB. HEALTH 559, 566 (2015), https://www.annualreviews.org/doi/abs/10.1146/annurev-publhealth-031914-122957 [http://perma.cc/8E4U-BG8U].

[98] Scott Higham & Lenny Bernstein, *Investigation: The Drug Industry's Triumph over the DEA*, WASH. POST (Oct. 15, 2017), https://www.washingtonpost.com/graphics/2017/investigations/dea-drug-industry-congress/?utm_term=.8af982716f8f [https://perma.cc/9RJY-Q9DZ].

[99] Ingrid A. Binswanger et al., *Overdose Education and Naloxone for Patients Prescribed Opioids in Primary Care: A Qualitative Study of Primary Care Staff*, 30 J. GEN. INT. MED. 1837, 1839 (2015).

[100] Jane C. Ballantyne & Mark D. Sullivan, *Intensity of Chronic Pain — The Wrong Metric?*, 373 NEW ENG. J. MED. 2098, 2098–99 (2015).

[101] Gery Guy Jr. et al., *Vital Signs: Changes in Opioid Prescribing in the United States, 2006–2015*, 66 CTRS. FOR DISEASE CONTROL & PREVENTION MORBIDITY & MORTALITY WKLY. REP. 703 (2017), https://www.cdc.gov/mmwr/volumes/66/wr/mm6626a4.htm?s_cid=mm6626a4_w [http://perma.cc/5BJU-UR3S].

[102] Gabe Gutierrez et al., *Welcome to Williamson, W.Va., Where There Are 6,500 Opioid Pills Per Person*, NBC NEWS (Feb. 1, 2018, 6:59 PM), https://www.nbcnews.com/news/us-news/welcome-williamson-w-va-where-there-are-6-500-opioid-n843821 [http://perma.cc/E2WT-4LGY]; Kristine Phillips, *The Pill Mill Doctor Who Prescribed Thousands of Opioids and Billed Dead Patients*, WASH. POST (Sept. 22, 2016), https://www.washingtonpost.com/news/to-your-health/wp/2016/09/22/deceitful-pill-mill-doctor-who-prescribed-thousands-of-opioids-and-billed-dead-patients-settles-civil-lawsuit/?utm_term=.6fbfa7b87b36 [http://perma.cc/3LSL-WCRP].

[103] Leonard J. Paulozzi et al., *Vital Signs: Overdoses of Presciption Opioid Pain Relievers – United States, 1999–2008*, 60 CTRS. FOR DISEASE CONTROL & PREVENTION MORBIDITY & MORTALITY WKLY. REP. 1487 (2011).

[104] *See generally* DEBORAH A. STONE, POLICY, PARADOX, AND POLITICAL REASON (1988).

opioids like heroin and counterfeit pills.[105] In the context of the ever-more restrictive policy and logistical barriers to prescription drug access, individuals dependent on—or addicted to—opioids found alternatives on the street.[106] At that juncture, despite decades of investment in drug-control measures at home and abroad, illicit alternatives to prescription opioids were widely available in many U.S. communities.[107]

Once exposed to clandestine supply chains,[108] people using opioids saw their overdose and other health risk skyrocket.[109] Around 2014, the crisis entered its third, most deadly, current phase: Illicitly manufactured fentanyl—a far more potent opioid than heroin—began to dominate the black-market supply.[110] Deaths linked to this and other synthetic analogues began their stratospheric rise, nearly tripling within a short time.[111] This deadly climb continues, largely uncontained, to this day.[112]

Under the vector model, contagion containment efforts focus on tracing and eliminating the disease agent and its vehicles—or vectors.[113] Both public health and criminal justice policies draw heavily on this model in framing drug-related

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[105] *See* Dasgupta et al., *supra* note 93, at 183–84; *see also* Beletsky, *Deploying Prescription Drug Monitoring*, *supra* note 89, at 155.

[106] *See* Zachary Siegel, *"Safer" OxyContin Caused Thousands of Heroin Deaths, Researchers Find*, DAILY BEAST (Jan. 14, 2017, 12:15 AM), https://www.thedailybeast.com/safer-oxycontin-caused-thousands-of-heroin-deaths-researchers-find [http://perma.cc/HY4W-W96X] (reporting of a study that demonstrated abuse-deterrent reformulation of prescription opioid pain relievers caused a mass exodus of users to transition into using injection heroin).

[107] *Id.*; Daniel Rosenblum et al., *The Entry of Colombian-Sourced Heroin into the US Market: The Relationship between Competition, Price, and Purity*, 25 INT'L J. DRUG POL'Y 1, 88–95 (2014).

[108] Nicholas Kristof, *'Drug Dealers in Lab Coats'*, N.Y. TIMES (Oct. 18, 2017), https://www.nytimes.com/2017/10/18/opinion/opioid-pharmaceutical-addiction-pain.html [http://perma.cc/CM9S-XFQ9].

[109] Dita Broz et al., *Multiple Injections Per Injection Episode: High-Risk Injection Practice Among People Who Injected Pills During the 2015 HIV Outbreak in Indiana*, 52 INT'L J. DRUG POL'Y 97, 97–101 (2018).

[110] Katherine Hempstead & Emel O. Yildirim, *Supply-side Response to Declining Heroin Purity: Fentanyl Overdose Episode in New Jersey*, 23 HEALTH ECON. 688, 688–705 (2014); *see also* Leo Beletsky & Corey S. Davis, *Today's Fentanyl Crisis: Prohibition's Iron Law, Revisited*, 46 INT'L J. DRUG POL'Y 156, 157 (2017).

[111] Daniel Ciccarone, *Fentanyl in the US Heroin Supply: A Rapidly Changing Risk Environment*, 46 INT'L J. DRUG POL'Y 107, 107–111 (2017).

[112] *Id.*

[113] Robert Lowes, *CDC Issues Opioid Guidelines for 'Doctor-Driven' Epidemic*, MEDSCAPE (2016), https://www.medscape.com/viewarticle/860452 [https://perma.cc/G2M8-G23K] (noting that the former Director of the Centers for Disease Control and Prevention, Dr. Thomas Frieden, declared the overdose crisis as "doctor driven," and could therefore be reversed by prescribing fewer opioids).

problems. This view of complex sociostructural problems reinforces simplistic public policy approaches.[114] By narrowly defining the "opioid epidemic" as a purely supply-driven phenomenon, decision-makers overlooked proven prevention and response tools.[115] These missteps led the crisis to morph from bad to worse.

The "epidemic" narrative is problematic insomuch as it deflects focus from the true scope and causes of the crisis. Take, for example, the structure and function of the healthcare and health insurance systems and the role they have played in the etiology of this crisis. The gaps in access; the high cost; the poor quality; and the poor cultural competence in provision of physical, mental, and behavioral health services[116] all increase an individual's demand for opioid analgesia.[117] In fact, economic distress, social isolation, concentrated disadvantage, occupational stress, and numerous other factors all contribute to demand for physical and emotional relief offered by opioids.[118] To be clear, high opioid utilization and overdose are *symptoms* of structural dysfunction in American society.

Instead of a renewed focus on such systems-level factors, policy response to the crisis has been principally operationalized through a suite of supply-side interventions of unclear utility, including the deployment of prescription limits,

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[114] *See* Zachary Siegel, *Is the U.S. Knee-Deep in Epidemics? Or Is that Just Wishful Thinking?*, N.Y. TIMES (2018), [hereinafter Siegel, *U.S. Knee-Deep in Epidemics?*] https://www.nytimes.com/2018/08/14/magazine/epidemic-disaster-tragedy.html [http://perma.cc/YLZ4-WMVH] (arguing that the term epidemic has been incorrectly applied to various social and health problems, leading policy down the wrong path of flawed solutions).

[115] *See* Beletsky, *Deploying Prescription Drug Monitoring*, *supra* note 89, at 158–60; *see also* Dasgupta et al., *supra* note 93; Siegel, *U.S. Knee-Deep in Epidemics?*, *supra* note 114; Anne Case & Angus Deaton, Conference Report, Brookings Panel on Economic Activity, Mortality and Morbidity in the 21st Century (March 23–24, 2017), https://www.brookings.edu/wp-content/uploads/2017/03/6_casedeaton.pdf [http://perma.cc/YAK6-UB97] ("The epidemic spread from the southwest, where it was centered in 2000, first to Appalachia, Florida and the west coast by the mid-2000s, and is now country-wide."); KENNETH D. KOCHANEK ET AL., CTRS. FOR DISEASE CONTROL & PREVENTION, U.S. DEP'T OF HEALTH & HUMAN SERVS., NCHS DATA BRIEF NO. 293, MORTALITY IN THE UNITED STATES, 2016, at 1 (2017), https://www.cdc.gov/nchs/data/databriefs/db293.pdf [http://perma.cc/59ML-CR7H]. These patterns have been both spurred by—and have paradoxically accelerated—government austerity and deregulatory policies. *See generally* Arne Ruckert & Ronald Labonté, *Health Inequalities in the Age of Austerity: The Need for Social Protections Policies*, 187 SOC. SCI. & MED. 306, 307–09 (2017) (tracing the diffusion of declining life expectancy patterns from their origins in highly-disadvantaged groups and geographic locales has traced the expansion of economic and social fissures in the fabric of American society).

[116] Ling Ding et al., *Predictors and Consequences of Negative Physician Attitudes Toward HIV-Infected Injection Drug Users*, 165 J. AM. MED. ASS'N INTERNAL MED. 618, 618–23 (2005).

[117] Sarah Bowman et al., *Reducing the Health Consequences of Opioid Addiction in Primary Care*, 126 AM. J. MED. 565, 565–66 (2013).

[118] Dasgupta et al., *supra* note 93, at 182–86.

prescription drug monitoring systems, and prosecutions of providers and patients.[119] These policy interventions to restrict opioid supply in the healthcare arena have caused the pendulum of access to swing rapidly in the opposite direction.[120] Applied to—deservedly unsympathetic—pharmaceutical companies, narratives focused on corporate malfeasance have generated enormous momentum for litigation.[121] The resulting "riptide" has engendered problems in providing adequate care for pain patients and maintaining patient engagement, explaining the transition to the black market.[122]

In the context of the overdose crisis, a rhetorical shift towards a "public health approach" began to take shape. However, as the next Part will show, this framing has been co-opted by the false promises of supply reduction. This has expanded the space for criminal justice measures such as drug-induced homicide, along with involuntary commitment statutes and others, to be recast into the role of public-health-oriented approaches.

II. THE DRUG CONTROL REGIME AND ITS ROLE IN THE OVERDOSE CRISIS

A. *The Origins of the U.S. Drug Control*

The first hundred years in the Republic's history were characterized by a relatively permissive regime for the use of drugs for medicinal and recreational purposes.[123] Around the turn of the twentieth century, social, cultural, and economic

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[119] Beletsky, *Deploying Prescription Drug Monitoring*, *supra* note 89, at 114.

[120] Kurt Kroenke & Andrea Cheville, Opinion, *Management of Chronic Pain in the Aftermath of the Opioid Backlash*, 317 J. AM. MED. ASS'N 2365, 2365 (2017).

[121] Derek Carr et al., *Reducing Harm Through Litigation Against Opioid Manufacturers? Lessons from the Tobacco Wars*, 133 PUB. HEALTH REP. 207, 208–10 (2018) (explaining how such litigation, though promising in terms of litigators' access to corporate deep pockets, will likely have limited impact on the crisis of overdose deaths, in both the immediate and longer-term future); *see also* Leo Beletsky, *The Benefits and Potential Drawbacks in the Approval of EVZIO for Reversal of Opioid Overdose*, 48 AM. J. PREVENTIVE MED. 357, 357–59 (2015) (explaining how aside from crowding out attention to meaningful solutions to the overdose crisis, this framing also obscures broader, systemic problems with how the pharmaceutical industry is regulated, as illustrated in the pricing of the opioid antidote naloxone); Aaron S. Kesselheim et al., *The High Cost of Prescription Drugs in the United States: Origins and Prospects for Reform*, 316 J. AM. MED. ASS'N 858 (2016) (explaining how problems with pharmaceutical malfeasance and deregulation go far beyond the narrow set of concerns at issue in the opioid lawsuits).

[122] Alison Knopf, *Patients with Chronic Pain Forced into Opioid Tapers by Their Prescribers*, 30 ALCOHOL & DRUG ABUSE WKLY. 1, 1–2 (2018); *see also* Sally Satel & Stefan G. Kertesz, *Opioid Prescription Control: When the Corrective Goes Too Far*, HEALTH AFF. BLOG (Jan. 19, 2018), https://www.aei.org/publication/opioid-prescription-control-when-the-corrective-goes-too-far/ [https://perma.cc/9LEX-AK8L].

[123] *See generally* RICHARD DAVENPORT-HINES, THE PURSUIT OF OBLIVION: A GLOBAL HISTORY OF NARCOTICS 1500–2000 (2001) (explaining changes in U.S. drug laws from the

concerns spurred increasing efforts to regulate psychoactive substances.[124] In large part, these efforts were animated by disciplinarian and moralistic impulses operationalized through commodity control instruments.[125] In concert with the evolution of policy and enforcement regimes in the alcohol realm during Prohibition, criminal law and law enforcement came to dominate efforts to reduce drug-related harms.[126]

The popularity of opioids saw several booms and busts, eliciting public concern and an increasingly restrictive regulatory regime.[127] The first major federal statute to construct a punitive framework to control opioid consumption was the Harrison Narcotics Tax Act of 1914, which established a system for Pigouvian taxation and supply controls.[128] The same law and subsequent jurisprudence[129] also misguidedly placed severe restrictions on the prescription of heroin for opioid maintenance—a measure that had been effectively employed by U.S. physicians to reduce the negative consequences of addiction.[130]

During the Vietnam Era, public concern about the use of psychoactive substances and their wide availability through illicit supply chains led to the passage of the Controlled Substances Act (CSA),[131] which marked a substantial shift in drug

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late 19th Century through the early 20th Century); DAVID T. COURTWRIGHT, DARK PARADISE: A HISTORY OF OPIATE ADDICTION IN AMERICA (2001) (explaining changes and developments in opioid use among Americans between the late 19th and early 20th Centuries); DAVID F. MUSTO, THE AMERICAN DISEASE: ORIGINS OF NARCOTIC CONTROL (1973) (discussing opioid use in 19th Century America); David Musto, *Opium, Cocaine and Marijuana in American History*, 265 SCI. AM. 40 (1991) (providing additional analysis regarding opioid use prior to and during the 19th Century as compared to the present day).

[124] DAVENPORT-HINES, *supra* note 123.

[125] *Id.*

[126] *See* MUSTO ET AL., *supra* note 80.

[127] Jessica Glenza, *America's Opioid Epidemic Began More than a Century Ago – With the Civil War*, GUARDIAN (Dec. 30, 2017), https://www.theguardian.com/science/2017/dec/30/americas-opioid-epidemic-began-more-than-a-century-ago-with-the-civil-war [http://perma.cc/2C9V-92LN] (noting that the first such boom occurred in response to massive trauma of the Civil War and the upheaval wrought by the Industrial Revolution); Editorial, *An Opioid Crisis Foretold*, N.Y. TIMES (Apr. 21, 2018), https://www.nytimes.com/2018/04/21/opinion/an-opioid-crisis-foretold.html [http://perma.cc/B5KW-MDXR].

[128] Harrison Act, Pub. L. No. 63-223, 38 Stat. 785 (1914).

[129] *See generally* United States v. Jin Fuey Moy, 241 U.S. 394 (1916); Webb v. United States, 249 U.S. 96 (1919); United States v. Behrman, 258 U.S. 280 (1922).

[130] *See Webb*, 249 U.S. at 99.

[131] Pub. L. No. 91-513, 84 Stat. 1236 (1970) (codified in 21 U.S.C. § 801 (2018)).

regulation.[132] The CSA established a distinct architecture for the regulation of certain drugs, based on their "accepted medical use" and "potential for abuse."[133]

Long before President Nixon's famous proclamation of drugs as "public enemy number one,"[134] the Federal Bureau of Narcotics (FBN) had done considerable work to construct social panics over drug exposure.[135] These deep roots set the stage for 1973 when, as part of this major overhaul, the Food and Drug Administration (FDA), FBN, and other agencies ceded legal and functional authority over many enforcement activities to the much more powerful, and newly created Drug Enforcement Administration (DEA).[136] Using its consolidated power, the DEA would be charged with using criminal justice tools to suppress the illicit production and trafficking of drugs in the United States.[137] The DEA would also curate a risk schedule and a "closed system" for pharmaceutical products deemed to have substantial addictive potential in order to prevent their misuse and diversion.[138]

With this commodity problem focus, U.S. drug control came to be organized around two categories of policy and enforcement interventions: supply reduction and demand reduction.[139] Reflective of the Law and Economics framing, this model focuses on microeconomic levers to calibrate the relationship between supply, demand, price, and quantity.[140] It employs administrative and criminal law tools to maintain the supply chains[141] for controlled substances, with extensive controls on their availability in health care settings to prevent misuse and diversion.[142]

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[132] *Thirty Years of America's Drug War: A Chronology*, FRONTLINE (2000), https://www.pbs.org/wgbh/pages/frontline/shows/drugs/cron/ [http://perma.cc/AB8J-R7BJ].

[133] 21 U.S.C. § 812(b)(1) (2018).

[134] Conor Friedersdorf, *The War on Drugs Turns 40*, ATLANTIC (June 15, 2011), https://www.theatlantic.com/politics/archive/2011/06/the-war-on-drugs-turns-40/240472/ [https://perma.cc/V7R7-G2VR]; *see also* PEMBELTON, *supra* note 43, at 25.

[135] PEMBELTON, *supra* note 43, at 25–26.

[136] *Organization, Mission and Functions Manual: Drug Enforcement Administration,* U.S. DEP'T JUST. (Mar. 8, 2018), https://www.justice.gov/jmd/organization-mission-and-functions-manual-drug-enforcement-administration [http://perma.cc/9RP5-TLQ4].

[137] *Id.*

[138] *Drug Scheduling*, U.S. DRUG ENFORCEMENT ADMIN., https://www.dea.gov/drug info/ds.shtml [http://perma.cc/8NSD-E5G5].

[139] *See Community Outreach*, U.S. DRUG ENFORCEMENT ADMIN., https://www.dea.gov/community-outreach [https://perma.cc/BKE8-XLAM] ("DEA recognizes that not only reducing the quantity (supply) of drugs is essential to a safe and drug free country, but also reducing the desire (demand) for illicit drugs is a vital component to effectively reduce drug use in our Nation.").

[140] *See generally* HUBERT HENDERSON, SUPPLY AND DEMAND (1922).

[141] U.S. DRUG ENF'T ADMIN., PHARMACIST'S MANUAL: AN INFORMATIONAL OUTLINE OF THE CONTROLLED SUBSTANCES ACT 30 (2010), https://www.deadiversion.usdoj.gov/pubs/manuals/pharm2/pharm_manual.pdf [https://perma.cc/2CCH-X3QZ].

[142] *Id.*; *see also* Jane C. Ballantyne, *Regulation of Opioid Prescribing*, 33 BRITISH MED. J. 811 (2007), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1853184/ [http://perma.cc

There is little evidence that DEA efforts to monitor and regulate prescription and pharmacy practices as they relate to controlled substances have helped achieve a balance between adequate access and diversion control.[143] The DEA closely tracks and exerts active authority over manufacturer, distributor, prescriber, and pharmacist practices.[144] Yet, starting in the late 1990s, it failed to effectively respond to skyrocketing production, distribution, and clinical overreliance on opioid analgesics.[145]

Regulatory capture is a pervasive problem in the pharmaceutical space.[146] This, however, was not the principal culprit behind the DEA's dismal performance in preventing and responding to the mounting overdose crisis.[147] In the years since the establishment of this drug control framework, the availability and purity of illicit substances on the American black market have only increased, while their prices have fallen.[148] Ultimately, supply reduction interventions employed—and supported—by the United States have resulted in major collateral detriment in

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[143] *See* M. Mofizul Islam Ian & S. McRae, Commentary, *An Inevitable Wave of Prescription Drug Monitoring Programs in the Context of Prescription Opioids: Pros, Cons and Tensions*, 15 BMC PHARMACOLOGY & TOXICOLOGY 1, 4–5 (2014), https://bmcpharmacoltoxicol.biomedcentral.com/articles/10.1186/2050-6511-15-46 [http://perma.cc/7R47-Z2Q4].

[144] Ronald J. Friedman, *DEA Audits: "Coming to a Theatre Near You,"* 8 AM. BAR ASS'N HEALTH ESOURCE 1 (2011); *see also* Michael Gabay, *Federal Controlled Substances Act: Dispensing Requirements, Electronic Prescriptions, and Fraudulent Prescriptions*, 49 HOSP. PHARMACY 244, 244–45 (2014).

[145] RONALD T. LIBBY, CATO INSTITUTE, POL'Y ANALYSIS NO. 545, TREATING DOCTORS AS DRUG DEALERS: THE DRUG ENFORCEMENT AGENCY'S WAR ON PRESCRIPTION PAINKILLERS 4 (2005).

[146] *See* Lenny Bernstein & Scott Higham, *'We feel like our system was hijacked': DEA Agents say a Huge Opioid Case Ended in a Whimper*, WASH. POST (Dec. 17, 2017), https://www.washingtonpost.com/investigations/mckesson-dea-opioids-fine/2017/12/14/ab50ad0e-db5b-11e7-b1a8-62589434a581_story.html?utm_term=.3ff4d0130326 [http://perma.cc/6T39-DYDC].

[147] Leo Beletsky & Jeremiah Goulka, Opinion, *The Federal Agency that Fuels the Opioid Crisis*, N.Y. TIMES (Sept. 17, 2018), https://www.nytimes.com/2018/09/17/opinion/drugs-dea-defund-heroin.html [https://perma.cc/A4YM-4QPV] ("The [DEA] has been unable to balance legitimate access to and control of prescription drugs.").

[148] Leo Beletsky & Corey S. Davis, *Today's Fentanyl Crisis: Prohibition's Iron Law, Revisited,* 46 INT'L J. DRUG POL'Y 156, 157 (2017); *see also* Dan Werb et al., *The Temporal Relationship Between Drug Supply Indicators: An Audit of International Government Surveillance Systems*, 3 BRITISH MED. J. OPEN 1 (2013), http://bmjopen.bmj.com/content/bmjopen/3/9/e003077.full.pdf [http://perma.cc/AD2D-KT2S] (showing the supply of illegal drugs has increased through a decline in price and increase in drug purity).

spheres of overdose, injection-related blood-borne infection, drug-related violence, and mass incarceration.[149]

The impact of drug control policy on the explosion of the U.S. penal system cannot be understated. Since the 1980s, the number of Americans behind bars has risen by 500 percent.[150] At the peak of the national incarceration boom in 2008, there were more than seven million adults cycling in and out of U.S. jails and prisons.[151] Although this number has seen a recent decline, 6.5 million adults currently remain under the control of the criminal justice system, with 70 percent on probation and parole.[152] A substantial proportion of this turbo-charged carceral paradigm is attributed to the "War on Drugs,"[153] as well as to the sharp defunding and dismantling of publicly financed mental health treatment, substance use treatment, and other social safety net resources.[154] Many of those in the criminal justice system meet the clinical definition of substance use disorders and exhibit mental health comorbidities.[155]

Racial and economic disparities also underscore mass incarceration. In 2010, individuals sentenced to state prisons for drug-related crimes were disproportionately poor people of color.[156] Evidence that economically

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[149] Joanne Csete et al., *Public Health and International Drug Policy*, 387 LANCET COMMISSIONS 1427, 1427–28 (2016).

[150] LAUREN-BROOKE EISEN & JAMES CULLEN, BRENNAN CTR. FOR JUSTICE, UPDATE: CHANGES IN STATE IMPRISONMENT 1 (June 7, 2016), https://www.brennancenter.org/sites /default/files/analysis/UpdateChangesinStateImprisonment.pdf [http://perma.cc/45UM-CLPY].

[151] LAUREN E. GLAZE & ERIKA PARK, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 239972, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2011 (2012), http://www.bjs.gov/content/pub/pdf/cpus11.pdf [https://perma.cc/PH99-NY86].

[152] DANIELE KAEBLE, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 251148, PROBATION AND PAROLE IN THE UNITED STATES, 2016 (2018), https://www.bjs.gov/content/pub/pdf/ppus16.pdf [https://perma.cc/JZU4-8CMU].

[153] *See* ALEXANDER, *supra* note 45, at 6. Although drug-related charges account for a relatively minor proportion of the overall carceral burden, weapon, property, parole violation and other charges ancillary to drug crimes make up a substantial portion of the carceral burden. *See generally* JOHN PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION—AND HOW TO ACHIEVE REAL REFORM 21–50 (2017).

[154] KAREN DOLAN & JODI L. CARR, INST. FOR POL'Y STUDIES, THE POOR GET PRISON: THE ALARMING SPREAD OF THE CRIMINALIZATION OF POVERTY 12–14 (2015), https://ips-https://ips-dc.org/wp-content/uploads/2015/03/IPS-The-Poor-Get-Prison-Final.pdf [https:// perma.cc/X877-92UB].

[155] *Id.* at 14.

[156] E. ANN CARSON & WILLIAM J. SABOL, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 239808, PRISONERS IN 2011, at 7 tbl.7 (2012), https://www.bjs.gov/content/pub/pdf/p11.pdf [http://perma.cc/D9Z2-PLL7].

disadvantaged individuals[157] and minority individuals[158] are not systematically more likely to misuse drugs or engage in drug-related crimes underscores the gross and systemic injustice of these disparities.

B. *Criminalizing Addiction: From "Diseased Soul" to "Brain Disease"*

The use of substances to alter the human condition is as old as civilization itself.[159] Alcohol and other intoxicating substances were a core part of the American colonial experience—as medicinal, recreational, and performance-enhancing agents.[160] The Industrial Revolution's focus on productivity and discipline, however, began to bolster existing moralistic attitudes towards excessive substance use.[161] Enmeshed in increasing concerns about poverty, crime, and truancy in quickly urbanizing society, the "diseased soul"[162] view of addiction invoked criminal law responses.[163] Racialized and xenophobic sentiments further bolstered the framing of addiction as deviant, and antisocial;[164] the impulse for increased control paved the way for the Temperance Movement and the evolution of laws criminalizing various aspects of drug and alcohol at the local, state, and federal levels.[165]

It took decades for the scientific consensus to evolve from the conception of problematic substance use as a moral and character defect. Advances in psychology and other scientific disciplines gradually shifted this understanding towards a medicalized view, framing addiction as an actual disease, rather than a moral one. One codification of this evolution was the classification of addiction as a psychological disorder by the American Psychological Association with the publication of its first Diagnostic and Statistical Manual in 1952.[166]

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[157] *See* Jennifer L. Humensky, *Are Adolescents with High Socioeconomic Status More Likely to Engage in Alcohol and Illicit Drug Use in Early Adulthood?*, 5 SUBSTANCE ABUSE TREATMENT, PREVENTION, AND POL'Y 1, 7–8 (2010), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2924306/pdf/1747-597X-5-19.pdf [https://perma.cc/9U9N-458R].

[158] *See* Li-Tzy Wu et al., *Racial/Ethnic Variations in Substance-Related Disorders Among Adolescents in the United States*, 68 J. AM. MED. ASS'N GEN. PSYCHIATRY 1176, 1181–84 (2011).

[159] Sean M. Robinson & Bryon Adinoff, *The Classification of Substance Use Disorders: Historical, Contextual, and Conceptual Considerations*, 6 BEHAV. SCI. 18, 20 fig.1 (2016) (outlining the role of drugs and alcohol in ancient civilizations).

[160] *Id*. at 2–7 (describing the use of opium and cocaine in patent medicines, the complex relationship between religion and alcohol use, as well as the provision of cocaine to slaves to boost cotton production).

[161] *Id.*

[162] *Id*. at 7.

[163] *Id*.

[164] *Id.* (noting for instance, the trope of the "negro cocaine fiend" popular in the 19th century).

[165] *Id*.

[166] *Id.* at 20 fig.1 (depicting the evolution of the definition of substance use disorder/addiction).

This evolving understanding soon found its way into American jurisprudence. For instance, the 1962 U.S. Supreme Court decision in *Robinson v. California* struck down a law criminalizing addiction on Eighth Amendment grounds.[167] In a fragmented opinion, the Court held that it is cruel and unusual to criminalize addiction because it is an "illness."[168] Since *Robinson*, scientific advances in the understanding of problematic substance use have accelerated, though new knowledge has been slow to enter the realm of criminal law.

The dominant empirical view of substance use disorder is the "brain disease model of addiction" (BDMA), which faults impairments in the structure and function of the brain for poor impulse control.[169] But critics of the BDMA point to the importance of situational, environmental, and other factors, sometimes decrying the overreliance on "reductionist" brain pathology to explain a complex sociophysiological phenomenon.[170] An evolving framework integrates these views as complementary, rather than oppositional, by considering how a variety of environmental and situational stressors may neurologically impact impulsivity control and related brain function.[171]

Although this debate continues to evolve, there is broad agreement that severe substance use disorder (SUD) is a chronic illness, characterized by relapse and the rejection of a curative frame.[172] Critical to this discussion is that addiction—now defined as severe SUD—is characterized by continued, compulsive drug use *despite negative consequences*.[173] Such consequences include employment, family, or other problems resulting from drug consumption.[174] In other words, the established

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[167] Robinson v. California, 370 U.S. 660, 666 (1962).

[168] *Id.* ("It is unlikely that any State at this moment in history would attempt to make it a criminal offense for a person to be mentally ill, or a leper, or to be afflicted with a venereal disease. A State might determine that the general health and welfare require that the victims of these . . . afflictions be dealt with compulsory treatment, involving quarantine, confinement, or sequestration. But, in the light of contemporary human knowledge, a law which made a criminal offense of such a disease would doubtless be universally thought to be an inclination of cruel and unusual punishment . . . .").

[169] *See* Nora D. Volkow et al., *Neurobiologic Advances from the Brain Disease Model of Addiction*, 374 NEW ENG. J. MED. 363, 365 (2016); *see also* Nick Heather, *Q: Is Addiction a Brain Disease or a Moral Failing? A: Neither*, 10 NEUROETHICS 115, 115–23 (2017).

[170] *See* Heather, *supra* note 169, at 120–21.

[171] *Id*.

[172] Richard Saitz et al., *The Case for Chronic Disease Management for Addiction*, 2 J. ADDICTION MED. 55, 55 (2008) ("Like other chronic diseases (e.g, diabetes, congestive heart failure), substance dependence has no cure and is characterized by relapses requiring longitudinal care."); *see also* A. Thomas McLellan et al., *Drug Addiction as a Chronic Medical Illness: Implications for Treatment, Insurance and Evaluation*, 284 J. AM. MED. ASS'N 1689, 1689 (2000).

[173] *The Science of Drug Use and Addiction: The Basics*, NAT'L INST. DRUG ABUSE 1 (2018), https://www.drugabuse.gov/publications/media-guide/science-drug-use-addiction-basics [http://perma.cc/EHF5-GR5B].

[174] *Id.* at 2.

scientific consensus predicts that individuals affected by addiction will substantially discount—or totally disregard—legal risks and threats of punishment as a matter of course. Without needing to engage complex philosophical and epistemological questions about conceptions of free will and decisional capacity,[175] a system that relies on the instrument of punishment to regulate the behavior of people affected by severe SUD fundamentally misconstrues the nature of addiction.[176]

This scientific construct has yet to be translated into U.S. jurisprudence, however. Although *Robinson* introduced a minor crack in the conception that criminal law is a constitutionally appropriate instrument to address problematic substance use, U.S. criminal law and its judicial stewards have proved unreceptive to further efforts to disrupt the status quo: Despite a number of attempts, *Robinson* has been distinguished away in subsequent jurisprudence that has attempted to challenge the constitutionality of criminal laws that punish conduct emanating from SUD.[177]

The most prominent of such cases in U.S. Supreme Court jurisprudence, *Powell v. Texas*,[178] is broadly understood to have held that an *actus reus* resulting from addiction could be criminalized whereas a simple propensity could not.[179] It bears noting, however, this case was decided by a 5–4 vote.[180] In the dissent, four justices persuasively articulated the view that criminal laws punishing addicted individuals

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[175] *See, e.g.*, Dilip V. Jeste & Elyn Saks, *Decisional Capacity in Mental Illness and Substance Use Disorders: Empirical Database and Policy Implications*, 24 BEHAV. SCI. & L. 607, 621–23 (2006).

[176] Evidence supporting negative incentives and punishment in order to modify the behavior of people with addiction is substantially based on studies of limited generalizability. *See, e.g.*, Robert L. DuPont et al., *Setting the Standard for Recovery: Physicians' Health Programs*, 36 J. SUBSTANCE ABUSE TREATMENT 159, 165 (2009) (finding successful research in physician substance use treatment programs that use the threat of losing one's medical license as an incentive). Considering what it takes to become a physician in the United States, individuals in this profession are systematically selected for those who are the best equipped for impulse control and delayed gratification. Physicians are also supported by social, economic, and other systems that are a far cry from what is available to the average American.

[177] *See, e.g.*, Powell v. Texas, 392 U.S. 514, 514 (1968) (declining to invalidate a Texas law criminalizing public intoxication). Attempts to use this decision to invalidate substance use-related laws have also proven futile. *See, e.g.*, New Jersey v. Margo, 191 A.2d 43, 45 (N.J. 1963) (declining to invalidate a state statute that criminalized "being under the influence"); Salas v. Texas, 365 S.W.2d 174, 175 (Tex. Crim. App. 1963) (declining to invalidate a similar "under the influence" state statute); State v. Brown, 440 P.2d 909, 910–11 (Ariz. 1968) (declining to invalidate a statute that criminalized "use," rather than "addiction"); *see also* Brief on Behalf of the Mass. Med. Soc'y as Amicus Curiae at 47, Massachusetts v. Eldred*,* 101 N.E.3d 911 (Mass. 2018) (urging the court to consider the SUD is a chronic disease and is not effectively addressed by incarceration).

[178] 392 U.S. 514 (1968).

[179] *Id.* at 533.

[180] *Id.* at 516–17.

for conduct resulting from the "pattern of [their] disease" violates the Eighth Amendment.[181] It is remarkable just how narrowly that view missed becoming the guiding principle of U.S. criminal law in 1968.[182] By reviving this line of constitutional argument, litigation emerging out of the overdose crisis has the potential to bring some long-overdue change to this doctrinal realm.

C. Legal and Policy Responses to the Overdose Crisis

As a reflection of this historical and doctrinal context, the U.S. response to the overdose crisis has been primarily focused on suppression of opioid supply, with a distinct emphasis on criminal law tools.[183] Reflecting the "vector model," this response has drawn on multipronged policy and programmatic efforts to roll back patient access to opioids.[184] The structural determinant framework makes clear, however, that the opioid overdose crisis did not arise solely—or even principally—as a consequence of lax, unscrupulous prescribing and pharmaceutical marketing.[185] Framing health care providers and pharmaceutical companies as "pushers"[186] calls up a familiar but misleading War-on-Drugs trope that glosses over critical structural issues that helped spark and sustain overdose morbidity and mortality.[187]

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[181] *Id.* at 567–68 ("The statute [prohibiting public drunkenness] covers more than a mere status [at issue in *Robinson*]. But the essential constitutional defect here is the same as in *Robinson*, for in both cases the particular defendant was accused of being in a condition which he had no capacity to change or avoid.").

[182] ALEX KREIT, CONTROLLED SUBSTANCES: CRIME, REGULATION, AND POLICY 331–45 (2013).

[183] Abby Alpert et al., *Supply-Side Drug Policy in the Presence of Substitutes: Evidence from the Introduction of Abuse-Deterrent Opioids* 2–3 (2017) (Nat'l Bureau Econ. Res., Working Paper No. 23031, 2017), http://www.nber.org/papers/w23031 [http://perma.cc/E56Y-6WVZ].

[184] *See id.*; *see also FDA's Efforts to Address the Misuse and Abuse of Opioids*, FOOD & DRUG ADMIN. (Feb. 6, 2013), https://www.fda.gov/Drugs/DrugSafety/InformationbyDrugClass/ucm337852.htm [http://perma.cc/C7UP-8T69]; *Guideline for Prescribing Opioids for Chronic Pain*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/drugoverdose/pdf/Guidelines_Factsheet-a.pdf [https://perma.cc/PZ37-QWYL]; *Opioid Analgesic Risk Evaluation and Mitigation Strategy (REMS)*, FOOD & DRUG ADMIN. (Feb. 27, 2018), https://www.fda.gov/drugs/information-drug-class/opioid-analgesic-risk-evaluation-and-mitigation-strategy-rems [http://perma.cc/6Y58-4SFP]; Jan L. Losby et al., *Safer and More Appropriate Opioid Prescribing: A Large Healthcare System's Comprehensive Approach*, 23 J. EVALUATION CLINICAL PRAC. 1173 (2017).

[185] Dasgupta et al., *supra* note 93, at 182.

[186] Barry Meier, *Origins of an Epidemic: Purdue Pharma Knew Its Opioids Were Widely Abused*, N.Y. TIMES (May 29, 2018), https://www.nytimes.com/2018/05/29/health/purdue-opioids-oxycontin.html [https://perma.cc/6WA6-784X].

[187] Dasgupta et al., *supra* note 93, at 182.

Providers experience both internal and external pressure to sharply reduce opioid prescribing.[188] Mechanisms like patient contracts and random drug tests, when considered in combination with prescription monitoring efforts, aggravated stigmatization of substance users in health care settings, injecting suspicion and distrust within the provider-patient relationship.[189] Faced with the risk of judgment and criminalization, patients with unmet physical or mental health needs would be deterred from seeking care altogether.[190]

For the many opioid users whose dependence had been already established, efforts to rapidly restrict access proved catastrophic.[191] Inadvertently, but predictably, this strategy led many patients to transition from legitimate opioid supplies to black market supplies.[192] Opioid dependence and addiction did not simply recede with the contraction in the availability of opioid pills. Unintended, but foreseeable,[193] this transition from health care settings exposed users to much a higher risk of overdose because of the lack of regulation over the quality and dosage in black market opioid products.[194]

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[188] George Comerci Jr. et al., *Controlling the Swing of the Opioid Pendulum*, 378 NEW ENG. J. MED. 691, 691–92 (2018), http://www.nejm.org/doi/full/10.1056/NEJMp1713159 [http://perma.cc/B7SU-DBJD].

[189] *Id.*; *see also* Joanna L. Starrels et al., *Systematic Review: Treatment Agreements and Urine Drug Testing to Reduce Opioid Misuse in Patients with Chronic Pain*, 152 ANNALS INTERNAL MED. 712, 715–17 (2010).

[190] Jay Baruch, *Did I Just Feed an Addiction? Or Ease a Man's Pain? Welcome to Modern Medicine's Moral Cage Fight*, STAT NEWS (Oct. 23, 2017), https://www.statnews.com/2017/10/23/addiction-opioids-prescribing-doctors/ [http://perma.cc/UQG8-ESL2]; *see also* Sarah Frostenson, *The Crackdown on Opioid Prescriptions Is Leaving Chronic Pain Patients in Limbo*, VOX (Apr. 7, 2017), https://www.vox.com/science-and-health/2017/4/7/14738292/crackdown-opioid-prescriptions-chronic-pain [http://perma.cc/6JYK-4FZG].

[191] Alison Knopf, *Patients with Chronic Pain Forced into Opioid Tapers by their Prescribers*, 30 ALCOHOL & DRUG ABUSE WKLY. 1, 1–2 (2018); *see also* Sally Satel et al., *Opioid Prescription Control: When the Corrective Goes Too Far*, AM. ENTERPRISE INST. (Jan. 19, 2018), https://www.aei.org/publication/opioid-prescription-control-when-the-corrective-goes-too-far/ [https://perma.cc/6F5D-7FU3].

[192] *See e.g.*, Sarah G. Mars et al., *"Every 'Never' I Ever Said Came True": Transitions from Opioid Pills to Heroin Injecting*, 25 INT'L J. DRUG POL'Y 257, 258 (2014).

[193] Joshua Vaughn, *2016 Crime Review: Heroin Deaths Rise as Prescription Policies Go into Effect*, SENTINEL (Feb. 12, 2017), http://cumberlink.com/news/local/closer_look/digital_data/crime-review-heroin-deaths-rise-as-prescription-policies-go-into/article_fcde5d45-676a-54d4-873e-aac9a79b2cb0.html [http://perma.cc/9MH4-ZHF9].

[194] *See* Theodore J. Cicero et al., *The Changing Face of Heroin Use in the United States*, 71 J. AM. MED. ASS'N PSYCHIATRY 821, 822 (2014).

As heroin began to devastate largely white, nonurban communities,[195] its advent spurred a renewed emphasis on—and investment in—interdiction.[196] This included major scale-up in the staffing and funding of border control along the U.S.-Mexico border, where the amount of heroin seized quintupled between 2008 and 2015.[197] On the domestic front, law enforcement leaned on its toolkit of harsh criminal penalties to disrupt the black market for opioids,[198] including high-profile drug-induced homicide prosecutions like that of Marcus Burrage.[199]

This Article has already discussed how interventions informed by a singular focus on the supply of opioid drugs failed to accomplish their goals, in some ways inadvertently fueling the very problem they sought to control. But it would be incorrect to suggest that supply-reduction interventions have been the sole response advanced to prevent opioid fatalities. Before turning to an in-depth analysis of drug-induced homicide, it is useful to first examine innovative public health-driven innovations that have evolved.

D. The Emergence of a "Public Health" Approach

Public health focuses on data-driven solutions and the imperative to prevent harm before it happens.[200] In the realm of demand reduction, the "public health response" began with public and provider education and awareness.[201] A number of such informational campaigns focused on opioid misuse and overdose prevention.[202]

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[195] Katharine Q. Seelye, *In Heroin Crisis, White Families Seek Gentler War on Drugs*, N.Y. TIMES (Oct. 30, 2015), https://www.nytimes.com/2015/10/31/us/heroin-war-on-drugs-parents.html [http://perma.cc/U7ET-R353].

[196] *Id.*

[197] U.S. DRUG ENF'T ADMIN., 2016 NATIONAL DRUG THREAT ASSESSMENT SUMMARY 41, 57 (2016), https://www.dea.gov/sites/default/files/2018-07/DIR-001-17_2016_NDTA_Summary.pdf [https://perma.cc/V2KR-A36L]; *see also* PEW CHARITABLE TRUSTS, IMMIGRATION ENFORCEMENT ALONG U.S. BORDERS AND AT PORTS OF ENTRY: FEDERAL, STATE, AND LOCAL EFFORTS 4–5 (2015), http://www.pewtrusts.org/~/media/assets/2015/02/borderenforcement_brief_web.pdf [http://perma.cc/8288-5KYF].

[198] JIM PARSONS, VERA INST. OF JUSTICE, MINIMIZING HARM: PUBLIC HEALTH AND JUSTICE SYSTEM RESPONSES TO DRUG USE AND THE OPIOID CRISIS 2 (2017), https://storage.googleapis.com/vera-web-assets/downloads/Publications/for-the-record-public-health-justice-system-responses-opioid-crisis/legacy_downloads/Minimizing-Harm-Evidence-Brief.pdf [http://perma.cc/FPW5-3R2U].

[199] Burrage v. United States, 571 U.S. 204 (2014) (granting certiori on the prosecution and conviction of Marcus Andrew Burrage for dealing drugs that lead to the death of the person who used the drugs).

[200] *See, e.g.*, WORLD HEALTH ORG., THE PRECAUTIONARY PRINCIPLE: PROTECTING PUBLIC HEALTH, THE ENVIRONMENT AND THE FUTURE OF OUR CHILDREN 2–4 (Marco Martuzzi & Joel A. Tickner eds., 2004), http://www.euro.who.int/__data/assets/pdf_file/0003/91173/E83079.pdf [http://perma.cc/2NCB-9K3M].

[201] *See* Kolodny et al., *supra* note 97, at 566.

[202] *Id.* at 567.

The federal and state governments also took on a project to reduce the stigma of problematic drug use to encourage those affected and their families to seek help.[203]

Demand reduction efforts also focused on increasing access to evidence-based maintenance therapy.[204] One of the definitive paradoxes of the overdose crisis is that it is currently much easier to access pharmaceutical and black-market products that cause addiction and increase overdose risk than it is to access medications designed to reduce one's overdose risk.[205]

The sheer prevalence and incidence of opioid mortality also created urgency for decisive death prevention measures.[206] Expanding naloxone availability has been well-received by people who use drugs and other participants, including family members, partners, and friends of both medical and nonmedical opioid users.[207] Such

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[203] *See, e.g.*, *State without StigMA*, MASS.GOV, https://www.mass.gov/state-without-stigma [https://perma.cc/DM4P-4ZGF]; James D. Livingston et al., *The Effectiveness of Interventions for Reducing Stigma Related to Substance Use Disorders: A Systematic Review*, 107 ADDICTION 39, 39–40 (2011).

[204] Kirsten Beronio et al., *How the Affordable Care Act and Mental Health Parity and Addiction Equity Act Greatly Expand Coverage of Behavioral Health Care*, 41 J. BEHAV. HEALTH SERV. & RES. 410, 410–11 (2014).

[205] *See* Elizabeth M. Olivia et al., *Barriers to Use of Pharmacotherapy for Addiction Disorders and How to Overcome Them*, 13 CURRENT PSYCHIATRY REP. 374, 374–75 (2011); *see also* Beronio et al., *supra* note 204, at 411 (addressing increased overdose risk, the Affordable Care Act strengthened parity provisions and included substance use treatment as an essential health benefit); German Lopez, *We Really Do Have a Solution to the Opioid Epidemic — And One State Is Showing It Works*, VOX (Dec. 22, 2018, 2:10 PM), https://www.vox.com/policy-and-politics/2018/5/10/17256572/opioid-epidemic-virginia-medicaid-expansion-arts [http://perma.cc/L3K2-PE7D] (noting that Medicaid expansion made such services accessible to many more low-income and disabled Americans); *Proposed Patient Limit Raised to 275. ASAM Applauds Important Action to Help Close Addiction Treatment Gap*, AM. SOC'Y ADDICTION MED. (July 6, 2016), https://www.asam.org/resources/publications/magazine/read/article/2016/07/06/asam-applauds-important-action-to-help-close-addiction-treatment-gap.-proposed-patient-limit-raised-to-275 [http://perma.cc/Y7SZ-4LJZ] (noting the previously imposed 200-patient cap for prescribers of the maintenance drug buprenorphine was also recently lifted to 275 patients).

[206] *Surgeon General's Advisory on Naloxone and Opioid Overdose*, U.S. DEP'T HEALTH & HUMAN SERVS., https://www.surgeongeneral.gov/priorities/opioid-overdose-prevention/naloxone-advisory.html [http://perma.cc/6JZR-YDTP].

[207] This pattern counters moral hazard-based concerns that naloxone users will engage in riskier drug use, suggesting instead that the information and sense of empowerment acquired by trainees actually helps them attain the kind of self-efficacy that can help individuals dealing with substance use problems. *See*, *e.g.*, Karla Wagner et al., *Evaluation of an Overdose Prevention and Response Training Programme for Injection Drug Users in the Skid Row Area of Los Angeles, CA*, 21 INT'L J. DRUG POL'Y 186, 191 (2010); Traci Green et al., *Social and Structural Aspects of the Overdose Risk Environment in St. Petersburg, Russia*, 20 INT'L J. DRUG POL'Y 270, 273 (2009).

efforts have shown to reduce opioid overdose rates and be cost effective—even despite recent major spikes in the cost of naloxone.[208]

Though lay administration of naloxone is a vital step in the public health approach, the optimal response to an overdose is timely medical intervention.[209] But emergency medical assistance is too often not summoned when an overdose occurs. This could be because there is no one to make the call; however, even when there are bystanders who could call for help, they often fail to do so.[210] Witnesses of overdoses report they avoid contacting 911 because of concerns about police contact and a cascade of legal consequences.[211]

The fear of legal consequences to overdose victims or bystanders is of key relevance to drug-induced homicide and warrants special attention. By default, dispatcher systems in most U.S. jurisdictions distribute emergency calls regarding suspected overdoses to law enforcement.[212] Depending on the jurisdiction's emergency response design and geographical setting, the police may be the first to arrive on the scene. Their role has traditionally included providing security to emergency medical personnel, but also frequently includes various forms of intelligence gathering.[213] Police involvement at overdose scenes may result in arrests on drug, parole violation, weapons, and other charges.[214] It may also lead to loss of child custody, violation of community supervision conditions, and other legal consequences rooted in pervasive stigmatization of substance use, but not directly linked to criminal law.[215]

Research suggests that fear of police contact and legal detriment is actually *the single most important* reason why people who witnessed overdoses do not seek

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[208] Phillip O. Coffin & Sean D. Sullivan, *Cost-effectiveness of Distributing Naloxone to Heroin Users for Lay Overdose Reversal*, 158 ANNALS INTERNAL MED. 1, 3–4 (2013), http://prescribetoprevent.org/wp-content/uploads/Coffin_Cost-effectiveness-article.pdf [http://perma.cc/XZ47-EA7Z]; *see also* Beletsky et al., *Prevention of Fatal Opioid Overdose*, *supra* note 61 (providing an overview of the evidence behind the community benefits of naloxone access).

[209] Beletsky et al., *Prevention of Fatal Opioid Overdose*, *supra* note 61.

[210] Melissa Tracy et al., *Circumstances of Witnessed Drug Overdose in New York City: Implications for Intervention*, 79 DRUG & ALCOHOL DEPENDENCE 181, 181–82 (2005).

[211] *Id.* at 183.

[212] *See* Caleb 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. URB. HEALTH 1102, 1103 (2013); *see also* Karen E. Tobin et al., *Calling Emergency Medical Services During Drug Overdose: An Examination of Individual, Social And Setting Correlates*, 100 ADDICTION 397, 403 (2005).

[213] POLICE EXEC. RESEARCH FORUM, THE UNPRECEDENTED OPIOID EPIDEMIC: AS OVERDOSE BECOME A LEADING CAUSE OF DEATH, POLICE, SHERIFFS, AND HEALTH AGENCIES MUST STEP UP THEIR RESPONSE 23 (2017), http://www.policeforum.org/assets/opioids2017.pdf [https://perma.cc/Q9S2-6MS6].

[214] *See* Latimore & Bergstein, *supra* note 49, at 82.

[215] *Id.* at 86.

timely emergency medical help.[216] This is particularly true of events that involve heroin: out of all such overdoses, witnesses report calling 911 less than half the time.[217]

The fear of legal repercussions likely costs thousands of American lives each year. What fuels these deadly fears? At least in part, recent high-profile prosecutions tied to overdose events.[218]

E. Redefining the Role of Criminal Law and Policing Practice

Public-health-focused innovation in response to the overdose crisis has even impacted the stalwart focus on supply reduction laws and enforcement interventions.[219] Criminal justice professionals, including police and prosecutors, have spoken out in recent years about their frustration with the traditional drug control regime that emphasizes punishment and retribution.[220]

Public health innovation in the United States has the tendency to spring from local communities advocating for their needs. This is the level where frontline personnel engage in experimentation that defies traditional silos and, at times, contravenes formal and informal norms in search of pragmatic solutions.[221] As a result, the discourse around the overdose crisis has begun to frame it as a "public health problem, and not just a criminal problem."[222] Despite some recent shifts in

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[216] *Id.* at 84; *see also* Amy S.B. Bohnert et al., *Characteristics of Drug Users Who Witness Many Overdoses: Implications for Overdose Prevention*, 120 DRUG & ALCOHOL DEPENDENCE 168, 171 (2012).

[217] Bohnert et al., *supra* note 216; *see also* Latimore & Bergstein, *supra* note 49 (reviewing the evidence on law enforcement as a barrier to help-seeking during overdose events).

[218] *See* Bohner et al., *supra* note 216.

[219] *See* POLICE EXEC. RESEARCH FORUM, *supra* note 213, at 10–11.

[220] Leo Beletsky et al., *Attitudes of Police Officers Towards Syringe Access, Occupational Needle-sticks, and Drug Use: A Qualitative Study of One City Police Department in the United States*, 16 INT'L J. DRUG POL'Y 267, 271–72 (2005).

[221] Alex H. Kral & Peter J. Davidson, *Addressing the Nation's Opioid Epidemic: Lessons from an Unsanctioned Supervised Injection Site in the U.S.*, 53 AM. J. PREVENTATIVE MED. 919–22 (2017), https://www.ajpmonline.org/article/S0749-3797(17)30316-1/fulltext [https://perma.cc/598K-52TX].

[222] *See* Jon Shuppe, *Obama Pushes for More Treatment for Opioid Addiction*, NBC News (Mar. 29, 2016, 2:18 PM), https://www.nbcnews.com/storyline/americas-heroin-epidemic/obama-pushes-more-treatment-opioid-addiction-n547441 [https://perma.cc/7GQF-PYZZ]. President Barack Obama reaffirmed his Administration's position in a speech to the National Rx and Heroin Summit, *President Obama Remarks on Prescription Drug Abuse*, C-SPAN (Mar. 29, 2016), http://www.c-span.org/video/?407358-1/president-obama-remarks-prescription-drug-abuse [https://perma.cc/5L38-7JEP]. The Police Executive Research Forum committed to teaming up with health agencies to address opioid overdoses. *See supra* note 213.

the opposite direction,[223] the adage that "we can't arrest our way out" of an overdose and addiction crisis now figures prominently into policy discussions at all levels of government.[224]

To remove barriers to help-seeking, almost all states have now passed 911 or Good Samaritan laws, which carve out immunity from a limited set of criminal provisions to reduce the legal consequences of calling 911.[225] As part of a comprehensive overdose package, New Mexico enacted one of the first such laws exempting both the caller and the victim from drug possession charges.[226] However, this law and all others are limited to drug possession charges and do not extend to drug trafficking charges.[227] More progressive provisions also cover parole violations and actual arrest, not just amnesty from prosecution.[228]

The role of risk perception is critical in this area. Research demonstrates that people who use drugs—as well as, to a considerable extent, police officers—lack an accurate understanding of Good Samaritan policies.[229] When weighing the risk of arrest during an overdose event, users' assessment of their risk of arrest is substantially higher than that of police.[230] Some officers report using their enforcement discretion to not arrest or charge individuals for various violations in the spirit of the law, even if these are not covered by the scope of the Good Samaritan amnesty.[231] The extent to which such selective law enforcement decisions are articulated and communicated to the broader public is unclear. Ultimately, it is the perception of bystanders about legal risks to self or the victim that drives help-seeking behavior.[232]

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[223] Sari Horwitz & Scott Hingham, *DEA Launches New Crackdown on Pharmacies and Opioid Over-Prescribers*, WASH. POST (Jan. 30, 2018), https://www.washingtonpost.com/world/national-security/dea-launches-new-crackdown-on-pharmacies-and-opioid-over-prescribers/2018/01/30/14cc20be-0600-11e8-94e8-e8b8600ade23_story.html?utm_term=.064a40f5196f [https://perma.cc/Q9TM-HM8Y] (noting that the Trump Administration has called for harsher criminal penalties as a response to the crisis).

[224] Joe Davidson, *Obama Anti-Heroin Strategy Shifts Focus to Treatment from Arrests*, WASH. POST (Mar. 29, 2016), https://www.washingtonpost.com/news/powerpost/wp/2016/03/29/obama-unveils-anti-heroin-strategy/?utm_term=.5f63bbdc15f9 [https://perma.cc/X69E-5FSG].

[225] *Good Samaritan Overdose Prevention Laws*, PRESCRIPTION DRUG ABUSE POL'Y SYS. (2016), http://pdaps.org/datasets/good-samaritan-overdose-laws-1501695153 [https://perma.cc/5ZY5-3JB9].

[226] *Id.*

[227] *911 Good Samaritan Fatal Overdose Prevention Law*, DRUG POL'Y ALLIANCE (2017), http://www.drugpolicy.org/issues/911-good-samaritan-fatal-overdose-prevention-law [https://perma.cc/83UD-VDYD].

[228] *Id*.

[229] *Id.*

[230] *See* Banta-Green et al., *supra* note 212, at 1107–08.

[231] *Id.*

[232] *See generally* Latimore & Bergstein, *supra* note 49.

The primary public health innovation in the criminal justice realm has been police training and access to naloxone.[233] Popularized as the "Quincy Model" after its successful adoption in 2010,[234] it has rapidly expanded to police forces across the country.[235] Police are especially likely to be the first to arrive on the scene of an overdose in rural locales and other settings like tribal areas, where emergency medical service response times can be substantially longer than those of law enforcement personnel.[236] Nationwide, law enforcement officers outnumber medical first responders by approximately a factor of three.[237] Over 2,400[238] police agencies have now trained and equipped officers to resuscitate individuals during an overdose, and they have done so in countless overdose events.[239]

Aside from this direct role in rescue operations, law enforcement can also contribute to overdose prevention through other activities. These could include disseminating information about signs and symptoms of overdose,[240] advice on

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[233] Corey S. Davis et al., *Engaging Law Enforcement in Overdose Reversal Initiatives: Authorization and Liability for Naloxone Administration*, 105 GOV'T L. & PUB. HEALTH 1530, 1531 (2015), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4504282/ [https://perma.cc/X5V7-PTZY].

[234] Editorial, *The 'Quincy Model': Saving the Lives of Addicts,* BOSTON GLOBE (Apr. 21, 2014), https://www.bostonglobe.com/opinion/editorials/2014/04/20/quincy-use-anti-overdose-medicine-has-become-national-model/1sC0FR4lsQ5btMdtW0BPTK/story.html [https://perma.cc/Z5DJ-L64Q].

[235] *See* Davis et al., *supra* note 233, at 1534; LEO BELETSKY, BUREAU OF JUSTICE ASSISTANCE, ENGAGING LAW ENFORCEMENT IN OPIOID OVERDOSE RESPONSE: FREQUENTLY ASKED QUESTIONS 5–6 (2014), https://www.bjatraining.org/naloxone/engaging-law-enforcement-opioid-overdose-response-frequently-asked-questions [https://perma.cc/QS93-B442].

[236] Daniel M. Lindberg, *EMS Response Times Are Double in Rural vs. Urban Areas*, J. AM. MED. ASS'N SURGERY (2017), https://www.jwatch.org/na44696/2017/08/04/ems-response-times-are-double-rural-vs-urban-areas [https://perma.cc/JUN8-LK46].

[237] SUSAN A. CHAPMAN ET AL., NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., EMS WORKFORCE FOR THE 21ST CENTURY: A NATIONAL ASSESSMENT 1, 39 (2008).

[238] *US Law Enforcement Who Carry Naloxone*, N.C. HARM REDUCTION COALITION, http://www.nchrc.org/law-enforcement/us-law-enforcement-who-carry-naloxone/ [https://perma.cc/W2SM-6LUR].

[239] TARLISE TOWNSEND ET AL., IMPROVING NALOXONE DISTRIBUTION IN THE OPIOID EPIDEMIC: A COST-EFFECTIVENESS ANALYSIS OF NALOXONE DISTRIBUTION TO FIRST RESPONDERS AND LAYPEOPLE 27 (2017), https://academyhealth.confex.com/academyhealth/2017arm/mediafile/Presentation/Paper19853/Townsend_Naloxone_AcademyHealth.pdf [https://perma.cc/75H5-85GJ] (critiquing emphasis on law enforcement-based naloxone distribution programs).

[240] *See, e.g.*, David C. Lott & Jonathan Rhodes, *Opioid Overdose and Naloxone Education in a Substance Use Disorder Treatment Program*, 25 AM. J. ADDICTION 221, 225 (2016), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5071651/ [https://perma.cc/C78K-7WZV].

accessing naloxone,[241] promoting Good Samaritan policies,[242] and facilitating linkage to drug treatment and other services.[243]

Although Good Samaritan policies may have limited impact on actual arrest practices, concerns about being arrested at the scene of an overdose may or may not be based on the correct perception of risk.[244] In fact, research suggests that users may estimate such risk as higher than self-reported practices by police.[245]

Another notable example of police innovation is the Law Enforcement Assisted Diversion (LEAD) model.[246] This intervention emerged as a result of a deliberation process between criminal justice and public defender organizations.[247] The LEAD model offers police a structure for prearrest diversion that can be discretionarily applied to people who use drugs and other nonviolent offenders.[248] This structure is distinct from other service linkage interventions in that it gives police the tools to facilitate access to a case manager, who then acts as a navigator for broad range of housing, job training, health, and other social services above and beyond

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[241] *See generally* Rebecca E. Giglio et al., *Effectiveness of Bystander Naloxone Administration and Overdose Education Programs: A Meta-Analysis*, 2 INJ. EPIDEMIOLOGY 1, 8 (2015), https://link.springer.com/article/10.1186/s40621-015-0041-8 [https://perma.cc/47JV-NJB9] (assessing the effectiveness of bystander naloxone administration and presenting data supporting increased odds of recovery with naloxone administration).

[242] *See generally* Daniel I. Rees et al., *With a Little Help from My Friends: The Effects of Naloxone Access and Good Samaritan Laws on Opioid-Related Deaths* (Nat'l Bureau of Econ. Res., Working Paper No. 23171, 2017), http://www.nber.org/papers/w23171 [https://perma.cc/G3HE-YNB5].

[243] Jessica Reichert & Lily Gleicher, *Rethinking Law Enforcement's Role on Drugs: Community Drug Intervention and Diversion Efforts*, ILL. CRIM. JUST. INFO. AUTHORITY (Jan. 25, 2017), http://www.icjia.state.il.us/articles/rethinking-law-enforcement-s-role-on-drugs-community-drug-intervention-and-diversion-efforts [https://perma.cc/D2K4-Z8M6].

[244] Banta-Green et al., *supra* note 212, at 1108.

[245] *Id.* As new programs linking police to treatment navigation and other resources, the risk of arrest may decline. *See, e.g.*, Press Release, N.Y. Police Dep't, Groundbreaking Heroin Overdose Prevention & Education ("HOPE") Program Announced on Staten Island (Feb. 16, 2017), http://nypdnews.com/2017/02/groundbreaking-heroin-overdose-prevention-education-hope-program-announced-on-staten-island/ [https://perma.cc/LC7Q-YJUB] (discussing how a growing number of departments are embracing these kinds of outreach activities, such as in the Staten Island precinct in New York, where NYPD recently instituted a special unit that provides follow-up education and resources to overdose victims and their families).

[246] *Law Enforcement Assisted Diversion (LEAD): Reducing the Role of Criminalization in Local Drug Control,* DRUG POL'Y ALLIANCE (Feb. 9, 2016), https://www.drugpolicy.org/resource/law-enforcement-assisted-diversion-lead-reducing-role-criminalization-local-drug-control [https://perma.cc/G5D5-S3JT].

[247] *What Is Lead?*, LAW ENFORCEMENT ASSISTED DIVERSION (LEAD) BUREAU, https://www.leadbureau.org/about-lead [https://perma.cc/4CME-6EHG].

[248] *Id.*

treatment.[249] It thus begins to address the structural drivers of substance use, but without involving the criminal justice system.

All of these innovations occurred in the context of broader criminal justice reform. The last decade has been characterized by a gradual bipartisan shift in numerous jurisdictions away from the philosophy of harsh punishment and incarceration.[250] This has included sentencing reforms, such as repealing mandatory minimums and three-strikes laws, as well as reducing the disparity in penalties for powder cocaine vis-à-vis crack.[251] It has also included clemency and pardon for individuals incarcerated on drug-related charges, along with a broader momentum towards prosecutorial reform.[252]

Drug courts represent one additional diversionary mechanism. However, in taking on addiction as part of the drug court system, jurists are basically taking on the role of medical professionals, which they are not technically licensed, nor equipped, to do.[253] The results are tragic,[254] as what has resulted is highly undesirable from a health care and public health perspective. For example, many drug courts mandate that to be classified as "clean," individuals are prohibited from engaging opioid maintenance therapy, including medications like methadone and buprenorphine.[255]

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[249] *Id.*

[250] Joycelyn Pollock et al., *Examining the Conservative Shift from Harsh Justice*, 4 LAWS 107, 107–08 (2015), http://www.mdpi.com/2075-471X/4/1/107/pdf [https://perma.cc/7JFJ-CQVS].

[251] *See generally* Michael Tonry, *Remodeling American Sentencing: A Ten-Step Blueprint for Moving Past Mass Incarceration*, 13 CRIMINOLOGY & PUB. POL'Y 503 (2014) (discussing the steps forward in the event America moves towards rolling back mass incarceration and mandatory minimums).

[252] Ryan J. Reilly, *Obama Grants Clemency for Drug Offenders, Including Four Who Were Set to Die Behind Bars*, HUFFINGTON POST (Dec. 18, 2014), https://www.huffington post.com/2014/12/17/obama-clemency-drug-defendants_n_6343722.html [https://perma.cc /MK7Y-WXGG]; s*ee also* Allie Malloy, *Obama Grants Clemency to 231 Individuals, Largest Single Day Act*, CNN (Dec. 20, 2016, 7:02 AM), https://www.cnn.com/2016/12/19/politics/obama-clemency/index.html [https://perma.cc/ RE7R-7S4C].

[253] Christine Mehta, *Neither Justice Nor Treatmen*t, PHYSICIANS FOR HUM. RTS. (June 15, 2017), https://phr.org/resources/niether-justice-nor-treatment/ [https://perma.cc/GR2F-CNMM].

[254] Maia Szalavitz, *How America Overdosed on Drug Courts*, PAC. STANDARD (May 18, 2015), https://psmag.com/news/how-america-overdosed-on-drug-courts [https://perma.cc/39UV-UQS6].

[255] MARIANNE MØLLMANN & CHRISTINE MEHTA, PHYSICIANS FOR HUM. RTS., NEITHER JUSTICE NOR TREATMENT: DRUG COURTS IN THE UNITED STATES 13 (2017), https://phr.org/wp-content/uploads/2017/06/phr_drugcourts_report_singlepages.pdf [https://perma.cc/QA4A-JG74].

These medications are FDA-approved to treat opioid addiction and are the gold standard for such treatment,[256] but evidently do not comport with what many drug court judges and administrators consider abstinence.

This folly in the drug court system has received considerable—though perhaps niche—attention as of late.[257] There has been positive progress towards creating some semblance of standardization through proposed federal requirements.[258] For example, refusing drug court participants medication can run the risk of losing federal funding.[259] The bottom line is that most of these courts have done a very poor job of actually doing what they purport to be doing, which is offering those affected by addiction the help they need and deserve.[260]

Ultimately, these various innovations have certainly expanded the traditional criminal justice toolkit towards policies and practices closer aligned with public health goals.[261] Despite their symbolic and rhetorical importance, however, these changes have been relatively marginal and fragile.[262] Except for substantial state policy shifts on marijuana and the limited immunity provisions described above, the basic policy regime for drug control has remained intact.[263]

Although government budgets saw some shifts towards harm and demand reduction, the enormous outlays on supply-side interventions and correctional costs

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[256] *See generally* Angela L. Stotts et al., *Opioid Dependence Treatment: Options in Pharmacotherapy*, 10 EXPERT OPINION PHARMACOTHERAPY 1727 (2009), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2874458/ [https://perma.cc/D2X6-8QHW] (discussing pharmacological methods and their success in treating opioid addiction).

[257] Jason Cherkis, *Dying To Be Free*, HUFFINGTON POST (Jan. 28, 2015), http://projects.huffingtonpost.com/dying-to-be-free-heroin-treatment [http://perma.cc/RNK9-KPPM]; Steven W. Varney, *Practicing Medicine Without a License: Medication-Assisted Treatment in the Courts*, FIX (Oct. 28, 2015), https://www.thefix.com/practicing-medicine-without-license-medication-assisted-treatment-courts [https://perma.cc/AMM4-XEQJ].

[258] Ryan Grim & Jason Cherkis, *Federal Government Set to Crack Down on Drug Courts that Fail Addicts*, HUFFINGTON POST (Feb. 5, 2015, 8:51 PM), http://www.huffingtonpost.com/2015/02/05/drug-courts-suboxone_n_6625864.html [https://perma.cc/XG34-KJSV].

[259] *See, e.g.*, Ryan Grim & Jason Cherkis, *New York Law Blocks Judges from Practicing Medicine from the Bench*, HUFFINGTON POST (Sept. 29, 2015, 8:30 PM), http://www.huffingtonpost.com/entry/common-sense-wins-in-ny_us_560ae76ce4b0dd8503097d54 [http://perma.cc/JH4U-7FU7].

[260] Jag Davies, *Expanding Drug Courts Won't Help Ease the Opioid Crisis*, STAT (Nov. 1, 2017), https://www.statnews.com/2017/11/01/drug-courts-opioid-crisis/ [https://perma.cc/6HGB-Z4H7].

[261] *See generally* Jonathan Giftos & Lello Tesema, *When Less Is More: Reforming the Criminal Justice Response to the Opioid Epidemic*, 57 AM. BAR ASS'N JUDGES' J. 28 (2018) (discussing various methods of treatment for opioid addiction, and concluding that the reliance on the criminal justice system is the least effective for lasting change).

[262] *Id.*

[263] *Id.*

have continued to dwarf these public health investments.[264] The failure to translate evidence into policy has meant that law—especially criminal law—and its enforcement is a major structural barrier to the deployment of proven public health strategies.

Perhaps the most vivid illustration of the flawed operationalization of the "public health approach" has been the expansion in scope of drug-induced homicide laws and prosecutions. Although these measures are billed as overdose prevention, they lack the requisite elements incumbent on public health measures, namely evidence, or at the very least, solid promise, of positive impact.

III. DRUG-INDUCED HOMICIDE: AN INTERDISCIPLINARY CRITIQUE

The implied mission of criminal justice professionals and institutions is to safeguard the constituencies they serve.[265] The same goes for elected and administrative policymakers.[266] Significant threats to that safety create a strong impetus to mount decisive and remedial action, using persuasive policy narratives and resonant tropes.[267] Such action is shaped by the choice architecture,[268] where incentives like electioneering strategies, financial resources, and the broader policy environment drive prosecutorial decision-making.

When faced with the mounting death toll from opioid overdose, some criminal justice systems and professionals have innovated by adopting novel approaches, policies, and rhetorical tools.[269] Pertinent to this Article are legal provisions and their deployment against individuals who supply drugs to overdose victims. After defining these instruments, the following Sections interrogate their deployment from both theoretical and empirical perspectives.

A. Drug-Induced Homicide: The Legacy of Len Bias

In 1970, Congress first established penalties for the distribution of controlled substances in section 401 of the Controlled Substances Act; however, the law passed without a "death results" enhancement.[270] Nevertheless, concerns about heroin

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[264] *Id.*; *see also* PARSONS, *supra* note 198 at 2–3.

[265] *See, e.g.*, *Mission & Priorities*, FED. BUREAU INVESTIGATION, https://www.fbi.gov/about/mission [https://perma.cc/T6W7-Y66G]; *Mission Statement,* N.J. STATE POLICE, http://www.njsp.org/about/mission-statement.shtml [https://perma.cc/F29S-KDZP].

[266] *See, e.g.*, *Constituent Services*, MARCO RUBIO, https://www.rubio.senate.gov/public/index.cfm/services [https://perma.cc/A27E-Q86Z]; *Find Assistance*, ELIZABETH WARREN, https://www.warren.senate.gov/services/findassistance [https://perma.cc/JP3P-CWHP].

[267] *See* El-Sabawi, *supra* note 83, at 1364–68.

[268] RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WELFARE, AND HAPPINESS 81–100 (2008).

[269] *See generally* Giftos & Tesema, *supra* note 261.

[270] Brief for the United States, *supra* note 2, at 3.

overdose did figure into the legislative debate about the law, with a special concern about metropolitan youth, for whom heroin overdose was then one of the leading causes of death.[271]

As often happens in policymaking,[272] the impetus for reform came from an especially visible and shocking event. In 1986, a widely admired rising basketball star Len Bias died of a cocaine overdose just two days after he had been drafted into the NBA.[273] Set within the context of unfolding concern over crack in American inner cities, the "public outcry" about Bias' death motivated the drafting of the new death results enhancement.[274] It was this provision—§ 841(b)(1)(C)—that federal prosecutors would years later use to charge Marcus Burrage.[275]

Today, almost half of U.S. state jurisdictions have a specific statute to facilitate drug-induced homicide prosecutions.[276] Although they all use an analogous instrumental framework, these provisions use a variety of criminal law constructs, including felony-murder,[277] depraved heart offenses,[278] or involuntary or voluntary

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[271] *Id.*

[272] *See, e.g.*, *Ryan White HIV/AIDS Program Legislation*, HEALTH RES. & SERV. ADMIN. (Feb. 2019), https://hab.hrsa.gov/about-ryan-white-hivaids-program/who-was-ryan-white [https://perma.cc/4KF5-MRZC] (noting that after Ryan White contracted HIV through a blood transfusion, the national conversation surrounding HIV/AIDS intensified, resulting in the 1990 Ryan White CARE Act).

[273] Bryan Polcyn & Stephen Davis, *The Legacy of Len Bias: Police Treating Overdoses as Homicides*, FOX6NOW (Oct. 31, 2013), http://fox6now.com/2013/10/31/the-legacy-of-len-bias-police-treating-drug-ods-as-homicides/ [https://perma.cc/C86G-RK4N] (providing a picture of Bias on the cover of *Sports Illustrated* magazine, with the headline "Death of the Dream").

[274] *Id.*; *see also* Brief for the United States, *supra* note 2, at 3.

[275] Burrage v. United State, 541 U.S. 204, 206 (2014).

[276] As of this writing, extant statutes include: ALASKA STAT. § 11.41.120(a)(3) (2018); COLO. REV. STAT. § 18-3-102(e) (2019); FLA. STAT. §§ 782.04(1)(a)(3)–(4) (2019); 720 ILL. COMP. STAT. 5/9-3.3 (2019); LA. STAT. ANN. § 14:30.1(3) (2018); MICH. COMP. LAWS § 750.317(a) (2019); MINN. STAT. § 609.195(b) (2019); N.H. REV. STAT. ANN. § 318-B:26(IX) (2019); N.J. STAT. ANN. § 2C:35-9 (2019); N.C. GEN. STAT. § 14-17(b)(2) (2019); 18 PA. CONS. STAT. ANN. § 2506 (2019); R.I. GEN. LAWS § 11-23-6 (2019) (only applies to drug delivery to a minor); TENN. CODE ANN. § 39-13-210(a)(2) (2019); VT. STAT. ANN. TIT. 18, § 4250 (2019); WASH. REV. CODE ANN. § 69.50.415 (2019); W. VA. CODE ANN. § 61-2-1 (2019); WIS. STAT. § 940.02(2)(a) (2018); WYO. STAT. ANN. § 6-2-108 (2019). For generic statutes used to charge drug-induced homicides in other states, see LASALLE, *supra* note 31, at 61–63.

[277] FLA. STAT. §§ 782.04(1)(a)(2)–(3) (2019).

[278] *See, e.g.*, Arelis R. Hernandez, *Selling Opioids in this Rural Maryland County Could Get You a Murder Charge*, THE WASH. POST (Aug. 9, 2017), https://www.washingtonpost.com/local/md-politics/selling-opioids-in-this-rural-maryland-county-could-get-you-a-murder-charge/2017/08/09/cd3d3830-7d30-11e7-83c7-5bd5460f0d7e_story.html?utm_term=.b8bf821703bb [http://perma.cc/XVB4-VB9Z].

manslaughter.[279] At the extreme end of the punitive spectrum, states like West Virginia prosecute drug-induced homicide under first-degree murder provisions, punishable by life in prison, and possibly the death penalty.[280]

In the context of the overdose crisis, an increasing number of jurisdictions have proposed entirely new or enhanced drug-induced homicide provisions to add to their arsenal. The number of such proposals has significantly increased in recent years.[281]

B. Trends in Deployment of Drug-Induced Homicide Prosecutions

Aside from the surging policy reform push, there have been concerted efforts to disseminate the prosecutorial strategy across the country. For instance, prosecutors have led workshops focused on how to conduct overdose death scene investigations and to work up drug-induced homicide charges.[282] The U.S. Department of Justice specifically recommended prosecuting heroin dealers in cases of overdose by more actively utilizing the "death results" enhancement that was used in *Burrage*.[283] In addition to these dissemination strategies, the infrastructure for these investigations has increasingly been reliant on interagency "task forces," which have been funded by both criminal justice and public health funds earmarked for overdose crisis response.[284]

The principal supposed impact channel for the deployment of drug-induced homicide deployment is informational. It is no accident that "sending a message" is the stated legislative and prosecutorial objective of these instruments and their applications.[285] This is why lawmakers, prosecutors, and law enforcement officials package their policy narratives about these laws and prosecutions into press

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[279] Maria Cramer, *Lynn Drug Dealer Convicted of Involuntary Manslaughter in Overdose Case*, BOSTON GLOBE (Sept. 28, 2017), https://www.bostonglobe.com/metro/2017/09/28/drug-dealer-convicted-involuntary-manslaughter-overdose-case/wfeX2uhY0qFZ3HpAiEZzIO/story.html [http://perma.cc/WS3N-VRTS].

[280] W. VA. CODE ANN. § 61-2-1 (2018). There have been no death penalty sentences handed out in these cases.

[281] LASALLE, *supra* note 31, at 64–65 (listing 17 different proposals in state legislatures between 2015 and 2017).

[282] *See, e.g.*, Patricia Daugherty & Nick Stachula, Drug-Related Homicides: Investigative and Prosecutorial Strategies, National Rx and Heroin Summit (Apr. 19, 2017), https://naloxonestudy.org/resources/Drug-Related_Homicides_Investigative_and_Prosecutorial_Strategies.pdf [https://perma.cc/BK8D-9RYB].

[283] U.S. DEP'T OF JUSTICE, NATIONAL HEROIN TASK FORCE FINAL REPORT AND RECOMMENDATIONS 12 (2015), https://www.justice.gov/file/822231/download [http://perma.cc/P59K-B7QD].

[284] Walker, *supra* note 33.

[285] *See, e.g.*, *supra* notes 23–24 and accompanying text.

materials[286] and hold high-profile press conferences[287] when discussing drug-induced homicide charges and convictions. Whatever the eventual impact of the message, mass media plays a vital function in delivering this message to its audiences.[288] Before proceeding to critique this approach, it is worth assessing the intensity and content of these signals.

Accurate quantification of the actual deployment of these provisions is limited by a number of factors.[289] The analysis within this Article relies on online news trends between 2000 and 2016 as a proxy for frequency and amplification. Although not always optimal in presenting a generalizable picture of real-world events, big data techniques analyzing online informational ecosystems are being used with increasing frequency and precision.[290] The utilization of these techniques to track the deployment of prosecutorial strategies is novel, however, and—to the author's knowledge—is being used in a law review article for the first time.

Based on the review of existing literature, the incidence of drug-induced homicide deployments has risen sharply since 2010.[291] Predictably, the rise is especially notable in jurisdictions hard-hit by the overdose crisis, like those in

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[286] *See, e.g.*, Press Release, U.S. Attorney's Office, S. Dist. of N.Y., Sullivan County Man Sentenced in White Plains Federal Court to Over 21 Years In Prison for Distribution of Heroin and Fentanyl Causing the Death of an Individual (Oct. 31, 2016), https://www.justice.gov/usao-sdny/pr/sullivan-county-man-sentenced-white-plains-federal-court-over-21-years-prison [http://perma.cc/BF3L-5ZAC].

[287] Press Release, U.S. Attorney's Office, S. Dist. of N.Y., Manhattan U.S. Attorney and NYPD Commissioner Announce Charges Against Narcotics Dealer Responsible for Heroin and Fentanyl Overdose Death (Oct. 20, 2016), https://www.justice.gov/usao-sdny/pr/manhattan-us-attorney-and-nypd-commissioner-announce-charges-against-narcotics-dealer [http://perma.cc/WY7D-RXTS].

[288] Lauren Krisal, *The Media Narrative Around Drug Use Is Shifting, But the Harsh Policies for Drug Crimes Are Not*, REASON (Feb. 21, 2016), http://reason.com/blog/2016/02/21/the-media-narrative-around-heroin [http://perma.cc/KM4A-HNZN]; *see also* STONE, *supra* note 104, at 158–59.

[289] First, it is important to identify the correct variable of interest—one could consider the number of individuals convicted, charged, or arrested on suspicion of these crimes. Each of these sources is problematic. Published cases are easiest to track, but only a small proportion of state-level criminal convictions are published. In addition, there is substantial variability in publication selection criteria among jurisdictions. There is no centralized dataset to enable tracking the number of charge filings, arraignments, and other procedural steps in the criminal process; such undertaking is unworkable for the purposes of this Article.

[290] Sudhakar v. Nuti et al., *The Use of Google Trends in Health Care Research: A Systematic Review*, PLOS ONE (Oct. 22, 2014), https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0109583 [http://perma.cc/8W8M-5LPM].

[291] *See* LASALLE, *supra* note 31, at 11–15.

Oregon,[292] New Jersey,[293] New York,[294] and Wisconsin—where they doubled between 2012 and 2013.[295]

This signaling element makes media reports a key proxy for the deployment of drug-induced homicide instruments. A systematic analysis of news report searches mentioning key search terms[296] for each year between 2000 and 2017 was conducted. Each positive hit was followed by manual review to avoid Type I error; reviewers also coded each entry on a set of characteristics, including state, relationship of the accused to the overdose victim, drugs implicated, and whether the story specified the resolution of the case. Since the dataset focused on online news reports, this information reflects a subsample of all media coverage.

Between 2000 and 2006, online media coverage ranged from just a few articles annually, then beginning a sharp upward trend in 2009, increasing at a rising rate to 2017.[297] This spike in prosecutions mentioned coincided with sharp rises in overdose fatalities.[298]

Many of the states hardest hit by this surge in overdose fatalities have also embraced drug-induced homicide prosecutions.[299] The analysis of news trends shows that Ohio, which saw 4,854 overdose deaths in 2017 alone,[300] ranked as the leader in news mentions of prosecutions, followed by Louisiana and Minnesota with sixteen mentions each.[301]

In addition to these geographic trends, the present analysis considered the nature of the relationship between the accused and the deceased. Data suggests that

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[292] Les Zaitz, *Drug Cartels in Oregon: 'Len Bias' Strategy a Potent Tool for Law Enforcement*, OREGON LIVE (June 21, 2013), http://www.oregonlive.com/pacific-northwest-news/index.ssf/2013/06/drug_cartels_in_oregon_len_bia.html [http://perma.cc/5X4R-QY2A].

[293] Scott A. Coffina, Opinion, *We're Prosecuting Drug Dealers for Homicide After Seeing Too Many Overdoses*, NJ.COM (Mar. 16, 2018), https://www.nj.com/opinion/index.ssf/2018/03/as_over_doses_climb_in_our_county_were_prosecuting.html [http://perma.cc/YZ25-AW66].

[294] LASALLE, *supra* note 31, at 11–12.

[295] *Id.*

[296] *See infra* Part IV. app. 1 for detailed methodology.

[297] *Id.*; *see* Figure 1.

[298] HOLLY HEDEGAARD ET AL., NAT'L CTR. FOR HEALTH STATISTICS, U.S. DEP'T OF HEALTH & HUMAN SERVS., NCHS DATA BRIEF NO. 190, DRUG-POISONING DEATHS INVOLVING HEROIN: UNITED STATES, 2000–2013, at 2 (2015), https://www.cdc.gov/nchs/data/databriefs/db190.pdf [https://perma.cc/SUY6-RTEQ].

[299] *See infra* Part IV app. Figure 5 for 2019 statistics by state.

[300] OHIO DEP'T OF HEALTH, 2017 OHIO DRUG OVERDOSE DATA: GENERAL FINDINGS 1 (2017), https://odh.ohio.gov/wps/wcm/connect/gov/5deb684e-4667-4836-862b-cb5eb59acbd3/2017_OhioDrugOverdoseReport.pdf?MOD=AJPERES&CONVERT_TO=url&CACHEID=ROOTWORKSPACE.Z18_M1HGGIK0N0JO00QO9DDDDM3000-5deb684e-4667-4836-862b-cb5eb59acbd3-moxPbu6 [http://perma.cc/HJP6-NL2Y].

[301] *Drug-Induced Homicide*, HEALTH JUST. (2018), https://www.healthinjustice.org/drug-induced-homicide [https://perma.cc/BTS9-2ZDW].

half of those charged with drug-induced homicide were not, in fact, "dealers" in the traditional sense, but friends and partners to the deceased.[302] Bringing these cases to conviction requires a close nexus between the accused and the deceased,[303] as well as a relatively quick resolution to respond to community pressure. Thus, these prosecutions often ensnare those who are closest to the deceased, such as the partners, coworkers, and friends.[304]

In our dataset, of the 47 percent of the cases that do involve drug distribution by a "traditional" dealer, half (forty-three) of the individuals were either black or Hispanic, and selling to whites.[305] These statistics are not reflective of the racial demographics of the United States,[306] nor drug dealers as a population.[307] In view of that context, these findings suggest that drug-induced homicide charges are being selectively and disproportionately deployed to target people of color. This disparate application can further reinforce already dire racial disparities, particularly in the enforcement of drug laws and the length of sentencing for drug-related crimes.[308] This is especially notable, given that findings reflect sentencing for people of color to be more than two years longer, on average, than for whites.[309]

To understand the extent to which this dataset of 263 online media mentions was reflective of the entire ecosystem of drug-induced homicide cases, the analysis triangulated this sample with Pennsylvania's state court records for 2016. While only seven cases in Pennsylvania received online news coverage in 2016, state

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302 *See infra* Part IV app. Figure 2.

303 Demonstrating the chain of custody, but for causation, and other elements depending on the statutory design makes it unlikely that anyone but the most proximate link in the drug supply chain could be convicted. However, law enforcement can use the provisions to upcharge.

304 *See* LASALLE, *supra* note 31, at 26, 41 (detailing the indiscriminate practices of prosecutors, some of whom charge friends or family as dealers even if no money was exchanged).

305 Where race data was available. This also ties in with research on "race of victim" effect in capital charging.

306 SONYA RASTOGI ET AL., U.S. CENSUS BUREAU, THE BLACK POPULATION: 2010, at 3 (2011), https://www.census.gov/prod/cen2010/briefs/c2010br-06.pdf [http://perma.cc/6JSZ-7LGJ].

307 Christopher Ingraham, *White People Are More Likely to Deal Drugs, But Black People Are More Likely to Get Arrested for It*, WASH. POST (Sept. 30, 2014), https://www.washingtonpost.com/news/wonk/wp/2014/09/30/white-people-are-more-likely-to-deal-drugs-but-black-people-are-more-likely-to-get-arrested-for-it/?utm_term=.f91f6c746800 [http://perma.cc/CUJ4-32YB].

308 *See infra* Part IV. app. Figure 6; *see also* Jamie Fellner, *Race, Drugs, and Law Enforcement in the United States*, HUM. RTS. WATCH (2009), https://www.hrw.org/news/2009/06/19/race-drugs-and-law-enforcement-united-states [http://perma.cc/9RXT-HUUJ].

309 *See infra* Part IV app. Figure 3, *Rates of Convictions (2000–2017)*; *see also Drug-Induced Homicide*, *supra* note 301.

records reveal eighty-nine prosecutions in that year alone.[310] This indicates that the extent to which these provisions are being utilized nationally is far greater than reflected in the online news database.[311]

Now that the trajectory and key elements of these interventions have been established, what follows is a discussion of the theoretical and empirical elements to estimate their probable impact. Such impact has never been evaluated empirically.

C. Mapping Drug-Induced Homicide onto Intended Objectives of Criminal Law

1. Deterrence

The primary objective of drug-induced homicide prosecutions, as stated by the vast majority of legislators and law enforcement, is one of deterrence: to put drug dealers on notice in order to nudge—or scare—them away from black market activity, thus averting future harm.[312] The operative mechanism for this intervention is the severity of punishment, typically mandated by the statute, imposed for supplying drugs to overdose victims.[313]

The literature on the impact of punishment in general, and mandatory minimums in particular, on criminal behavior[314] suggests that the signaling intended in the drafting and application of these harsh provisions fails for several reasons. First, the Law and Economics model of criminal punishment conceptualizes the deterrent effect to be a function of the penalty's severity and the individual's perceived risk of getting caught.[315]

Second, in order for the deterrence effect to become operational under the Law and Economics model, there must be a stable and transparent informational

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[310] THE UNIFIED JUDICIAL SYS. OF PA., DRUG DELIVERY RESULTING IN DEATH CITATIONS AT FIVE-YEAR HIGH (Mar. 9th, 2018), http://www.pacourts.us/news-and-statistics/news?Article=959 [http://perma.cc/VD9C-LBAV] (comparing the total number of drug induced homicide cases filed in Pennsylvania). Local media rarely covered these cases. So far, analyses tracking the uptick in cases have only analyzed media reports, which means they are happening at a much higher frequency than has been documented.

[311] *See Drug-Induced Homicide*, *supra* note 301.

[312] John H. Tucker, *Angela Halliday Was a Junkie. Does that Make Her a Murderer?*, RIVERFRONT TIMES (Aug. 4, 2011), https://www.riverfronttimes.com/stlouis/angela-halliday-was-a-junkie-does-that-make-her-a-murderer/Content?oid=2495594 [http://perma.cc/X2S6-757G] ("We intend to absolutely make an example of these people in public. I want to scare people from getting into this.").

[313] U.S. DEP'T OF JUSTICE, U.S. ATTORNEY'S BULL., NO. 64-5, ADDRESSING THE HEROIN AND OPIOID CRISIS (2016), https://www.justice.gov/usao/file/895091/download [https://perma.cc/6UVT-R55E].

[314] Michael Tonry, *The Mostly Unintended Effects of Mandatory Penalties: Two Centuries of Consistent Findings*, 38 CRIME & JUST. 65, 93 (2009).

[315] Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 180–84 (1968).

environment about the components of the penalty calculus.[316] The imposition of the drug-induced homicide provisions depends on several nested events, each with an unknown—and unknowable—probabilistic setting.[317] This includes the probability that the drug provided will cause an overdose, whether the overdose will be fatal, and whether the toxicology will identify the drug and link it to the dealer. Each of these nested probabilities is neither stable nor transparent. For instance, the vast majority of overdoses are due to polydrug toxicity.[318] Even if the dealer could predict the risk profile of their own product, they have no way of predicting what other substances the user may consume at a later time and how these substances may interact with the product.

Third, Behavioral Economics provides an additional basis for critique.[319] In a Classical Economics framework, the aim of criminal penalty is to impose an additional cost to drug dealing, thus nudging the individual towards a suitable and less costly alternative.[320] This implies that the person impacted is indeed a "drug dealer"—a somewhat ambiguous notion, given the fluidity of transactional relationships between people who use drugs.[321] From a structural perspective, many street-level dealers—the kinds of actors who are typically on the receiving end of these penalties—engage in subsistence black market activity precisely because of the lack of other suitable employment alternatives.[322]

Fourth, there is a basis to question whether or not the "rational actor model" is applicable as an empirical matter.[323] Some of those impacted by these prosecutions—including many of the "dealers"—may themselves be affected by severe forms of SUD.[324] No matter whether one ascribes to the fully medicalized BDMA described above, there is little question that individuals with SUD do not

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[316] *See id.*

[317] *See* RASTOGI, *supra* note 306.

[318] Shane Darke, *Opioid Overdose and the Power of Old Myths: What We Thought We Knew, What We Do Know, and Why It Matters*, 33 DRUG & ALCOHOL REV. 109, 112 (2014).

[319] *See* THALER & SUNSTEIN, *supra* note 268.

[320] Frank Chaloupka & Rosalie Liccardo Pacula, *Economics and Anti-Health Behavior: The Economic Analysis of Substance Use and Abuse*, *in* REFRAMING HEALTH BEHAVIOR CHANGE WITH BEHAVIORAL ECONOMICS, 79–80 (Bickel & Vuchinich, eds., 2000).

[321] Jonathon Caulkins & Peter Reuter, *Illicit Drug Markets and Economic Irregularities*, 40 SOCIO-ECON. PLAN. SCI. 1, 5–7 (2006).

[322] Jeff Winkler, *Drug Dealer Explains Economics of Selling Part-Time*, HUFFINGTON POST (Aug. 14, 2017), https://www.huffingtonpost.com/2012/08/14/drug-dealer-economics-part-time_n_1775811.html [http://perma.cc/ZTQ5-LMWE] ("[E]ssentially it is the same as living paycheck-to-paycheck, which is sort of a sad fact and kind of why I'm [selling drugs] in the first place, because you know what, paycheck-to-paycheck isn't enough anymore.").

[323] *See generally* Jonathan Gruber & Botond Koszeg, *Is Addiction "Rational"? Theory and Evidence* (Nat'l Bureau Econ. Research, Working Paper No. 7507, 2000), https://www.nber.org/papers/w7507.pdf [http://perma.cc/WX39-PBFA].

[324] *See* LASALLE, *supra* note 31, at 51.

comport with the Classical Economics view of *homos economicus*.[325] This substantially undermines the application of Law and Economics model of deterrence in this realm.[326] If assuming the rational actor model is operative, this leads to an absurd result because a rational seller who depends on a consistent clientele would never intentionally sell a product that cuts his consumer base.[327]

Fifth, the additional cost may also be conceptualized to incentivize a shift away from a certain drug supply chain that is especially risky (e.g., because the product is laced with fentanyl).[328] This depends on two factors: one, knowledge of the contents in the product; and two, ability to shift to an alternative supplier. Neither of these conditions typically reflect reality. Low-level dealers rarely know the contents of the product in their supply chain or can predict its risk.[329] These contents also frequently fluctuate—often as a result of interdiction activities and other law enforcement efforts to disrupt the market,[330] further complicating any rational decision-making.

From an empirical perspective, we saw a massive failure of this choice architecture model in the context of the powder cocaine versus crack cocaine disparity.[331] This provision did not impact the availability or consumption of crack but did fuel mass incarceration of mostly impoverished African-American men.[332]

2. *Incapacitation*

The incapacitation objective of enhanced and prolonged mandatory sentences is similarly vulnerable to several critiques. It has long been discredited by empirical

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[325] *See generally* Redonna Chandler et al., *Treating Drug Abuse and Addiction in the Criminal Justice System: Improving Public Health and Safety*, 301 J. AM. MED. ASS'N 183 (2009).

[326] *See generally* Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471 (1998).

[327] David Hillier, *We Asked Dealers If They Care About Their Customers' Safety*, VICE (July 14, 2017, 1:49 PM), https://www.vice.com/en_us/article/bjxz4v/we-asked-dealers-if-they-care-about-their-customers-safety [http://perma.cc/WT7T-TDHV] (interviewing drug dealers that said they did not care about their clients because they sold to older groups or because they never directly met their customers).

[328] *See generally* Jennifer J. Carrol et al., *Exposure to Fentanyl-Contaminated Heroin and Overdose Risk Among Illicit Opioid Users in Rhode Island: A Mixed Methods Study*, 46 INT'L J. DRUG POL'Y 136 (2017).

[329] U.S. Sentencing Comm'n, Public Data Presentation for Synthetic Cathinones, Synthetic Cannabinoids, and Fentanyl and Fentanyl Analogues Amendments 24 (Jan. 2018), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/data-briefings/2018_synthetic-drugs.pdf [http://perma.cc/2D5B-TFXL].

[330] Daniel Ciccarone, *Fentanyl in the US Herion Supply: A Rapidly Changing Risk Environment*, 46 INT'L J. DRUG POL'Y 107, 107–08 (2017).

[331] *See generally* CARL HART, HIGH PRICE: A NEUROSCIENTIST'S JOURNEY OF SELF-DISCOVERY THAT CHALLENGES EVERYTHING YOU KNOW ABOUT DRUGS AND SOCIETY (2013).

[332] *Id.*

research,[333] though it is now resurgent at the center of some states' and the current federal administration's strategy to combat the overdose crisis.[334]

The stated objectives for some policy and prosecutorial deployments is to incapacitate major dealers, not street-level sellers.[335] The feasibility of this is questionable. As *Burrage* and subsequent cases[336] illustrate, evidentiary parameters constrain the scope of application of these provisions.[337] In his opinion in *Burrage*, Justice Scalia provided an engaging illustration of this problem in terms of layers of causation that can be attributed for hitting a home run.[338]

The analysis of the cases suggests that the application of drug-induced homicide provisions is constrained by evidentiary concerns only to tightly proximate individuals.[339] Finally, from a historical perspective, the emergence of the overdose crisis just as the United States had reached the zenith of mass incarceration on drug-related offenses[340] severely undercuts the broader incapacitation rationale.

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[333] *See generally* Rucker Johnson & Steven Raphael, *How Much Crime Reduction Does the Marginal Prisoner Buy?*, 55 J.L. & ECON. 275 (2012) (proposing that long-term incarceration demonstrates the law of diminishing returns).

[334] Memorandum from the Office of the Attorney General to All Federal Prosecutors on Commitment to Targeting Violent Crime (Mar. 8, 2017), https://www.justice.gov/opa/press-release/file/946771/download [http://perma.cc/4Y7W-SA3H] (stating, in face of evidence to the contrary, that "disrupting and dismantling . . . drug organizations through prosecutions under the Controlled Substances Act can drive violent crime down.").

[335] David Ovalle, *Drug Dealers as Murderers? Proposed Florida Law Targets Sellers Fueling Overdose Crisis*, MIAMI HERALD (Mar. 6, 2017), https://www.miamiherald.com/news/local/crime/article136809238.html [http://perma.cc/3KBT-XJU4].

[336] Santillana v. Upton, 846 F.3d 779 (5th Cir. 2017) (reversing and remanding an enhancement under 21 U.S.C. § 841(b)(1)(C) because *Burrage* applied retroactively).

[337] Ovalle, *supra* note 335.

[338] Burrage v. United States, 571 U.S. 204, 211–12 (2014) ("Consider a baseball game in which the visiting team's leadoff batter hits a home run in the top of the first inning. If the visiting team goes on to win by a score of 1 to 0, every person competent in the English language and familiar with the American pastime would agree that the victory resulted from the home run. This is so because it is natural to say that one event is the out-come or consequence of another when the former would not have occurred but for the latter. It is beside the point that the victory also resulted from a host of other necessary causes, such as skillful pitching, the coach's decision to put the leadoff batter in the lineup, and the league's decision to schedule the game. By contrast, it makes little sense to say that an event resulted from or was the outcome of some earlier action if the action merely played a nonessential contributing role in producing the event.").

[339] *Id.*

[340] James Cullen, *The History of Mass Incarceration*, BRENNAN CTR. FOR JUST. (July 20, 2018), https://www.brennancenter.org/blog/history-mass-incarceration [http://perma.cc/T4AJ-8KGK].

3. Retribution

Retribution is arguably the most central objective of these interventions, whereby the action itself and its communication is designed to assure those bereaved by the particular overdose that "justice is being done."[341] By speaking to members of the public, these actors are also seeking to shape the policy narrative in a reassuring way to signal that someone is being held responsible for the victim's death, as well as for the ongoing carnage.[342]

The actual application of the retribution rationale is probably the most aligned out of all of the implied objectives. Many—though by no means all[343]—victims' families and others express support[344] for drug-induced homicide prosecutions. But considering many of the accused are themselves marginalized and may suffer from addiction, the application of this intervention only further traumatizes already vulnerable people.[345] This pattern fits with the broader critique of "the politics of victimhood," which uses the victims' rights framework to rationalize policy narratives that emphasize retributive, rather than rehabilitative approaches.[346]

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[341] Zachary Siegel, *In an Upstate New York Community Wracked by Overdoses, Prosecutor Pursues Users in Homicides Cases*, APPEAL (Mar. 23, 2018), https://injusticetoday.com/in-an-upstate-new-york-community-wracked-by-overdoses-prosecutor-pursues-users-in-homicides-cases-a0a9f473 [http://perma.cc/6SRR-YCWQ] (discussing a District Attorney's rationale for drug-induced homicide prosecutions).

[342] Memorandum from the Office of the Attorney General to United States Attorneys on Guidance Regarding Use of Capital Punishment in Drug-Related Prosecutions (Mar. 20, 2018), https://www.justice.gov/file/1045036/download [http://perma.cc/FF84-WAMZ] (requesting action to execute drug dealers).

[343] Daniel Denvir, *Heroin, Murder, and the New Front in the War on Drugs*, VICE (Sept. 28, 2015), https://www.vice.com/en_us/article/qbxwnp/heroin-murder-and-the-new-front-in-the-war-on-drugs-928 [http://perma.cc/8T84-G6EQ].

[344] Joshua Miller, *AG's Opioid Proposal Targets Fentanyl Trafficking*, BOSTON GLOBE (Aug. 17, 2015), https://www.bostonglobe.com/metro/2015/08/17/maura-healey-proposes-new-law-targeting-opioid-traffickers/geOZTEmdm5lC6KX9eeOKhK/story.html [http://perma.cc/H2UJ-BV4C].

[345] Daniel Denvir, *The Opioid Crisis Is Blurring the Legal Lines Between Victim and Perpetrator*, SLATE (Jan. 15, 2018), https://slate.com/news-and-politics/2018/01/the-opioid-crisis-is-blurring-the-legal-lines-between-victim-and-perpetrator.html [http://perma.cc/WLJ7-9N8X].

[346] Christopher Moraff, *Moraff: The Politics of Victimhood*, SIMPLE JUST. (May 10, 2018), https://blog.simplejustice.us/2018/05/10/moraff-the-politics-of-victimhood/ [https://perma.cc/GNE6-KLWS] ("The crime epidemic threat [that] has spread throughout our country . . . is in large measure a cumulative result of too much emphasis on rights of the accused . . . We should be proud that our constitutional system protects the rights of the accused, but over the past few years that system has allowed the safeguards protecting the rights of the innocent to be torn away.") (quoting Ronald Reagan).

Finally, the application of a harsh sentence for an action considered by most to be a minor offense violates the principle of proportionality.[347] Surely, the death of any person is tragic. Singling out friends, dealers, or doctors who may have contributed to that fatality is both unfair and arbitrary, resulting in misplaced blame that muddles effective remedial action.

4. Population Health Impact

In addition to the theoretical and empirical critiques articulated above, the discussion of public health imperatives and structural drivers of the crisis implies additional concerns.[348] Treating every overdose event as a crime scene and charging overdose witnesses with drug-induced homicide can deter help-seeking during overdose emergencies.[349] From the public health point of view, the benefit of saving the life of an overdose victim outweighs any retributive, deterrent, or other criminal justice rationale for prosecuting bystanders for their potential role in an unintentional overdose event.[350]

Despite their prominent place in materials put forward by other agencies on the overdose crisis,[351] it is no accident that the former Surgeon General's landmark report on the overdose crisis does not mention drug-induced homicide as an overdose prevention strategy. Its absence among researchers who have studied the roots of the crisis is simple: it isn't a strategy.[352]

But because law enforcement perceives them as an effective signaling vehicle, such counterproductive efforts receive wide media coverage.[353] Contrast this to Good Samaritan laws, which typically receive little exposure and are only marginally known and understood by the members of the public.[354] Lack of clarity about the technical implications of these competing provisions likely leads to overestimation of legal risk. This scrambling of competing behavioral signals may, in part, explain the relatively anemic impact of Good Samaritan laws on help-seeking observed thus far.[355]

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[347] *See generally* E. THOMAS SULLIVAN & RICHARD S. FRASE, PROPORTIONALITY PRINCIPLES IN AMERICAN LAW: CONTROLLING EXCESSIVE GOVERNMENT ACTIONS (2009) (discussing the application of proportionality principles in courts in the United States).

[348] *See* Dasgupta et al., *supra* note 93.

[349] *See* Latimore & Bergstein, *supra* note 49.

[350] *See* Giftos & Tesema, *supra* note 261.

[351] *See, e.g.*, U.S. DEP'T OF JUSTICE, *supra* note 283.

[352] *See* FACING ADDICTION, *supra* note 29.

[353] Zachary A. Siegel, *Despite "Public Health" Messaging, Law Enforcement Increasingly Prosecutes Overdoses as Homicides*, APPEAL (Nov. 8, 2017), https://theappeal.org/despite-public-health-messaging-law-enforcement-increasingly-prosecutes-overdoses-as-homicides-/ [http://perma.cc/GHX9-LFQV].

[354] *See* Banta-Green et al., *supra* note 212.

[355] *See* Rees et al., *supra* note 242 and accompanying text.

Although 911 Good Samaritan laws hold promise, their impact is limited by several factors. First, they only apply to a limited set of drug possession violations, typically involving small-scale drug possession;[356] state laws also have no bearing on criminal liability under federal law, and there is no analogous 911 Good Samaritan provision on the federal level.[357] Secondly, the vast majority of people who use drugs, the public, and even many police officers may not be aware of such laws.[358] In this context, aggressive and mounting application of criminal prosecutions following overdose events totally thwart any positive public health impact of Good Samaritan legislation and other efforts to encourage overdose witnesses and people who use drugs to seek help.[359]

It is also imperative to mention that the application of these interventions also appears to violate racial justice. Although the racial profiles of the accused were seldom available, preliminary analysis suggests that drug-induced homicides prosecutions disproportionately target people of color.[360] For instance, Marcus Burrage is black,[361] while Joshua Banka was white.[362] These patterns harken back to the most egregious elements of the War on Drugs.[363]

From the public health perspective, the racial dynamics of these prosecutions may also inadvertently worsen disparities in access to care. For example, disparate application of these prosecutions may further undermine trust in police among people of color.[364] To the extent that criminal justice institutions and actors can now

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[356] *See* Latimore & Bergstein, *supra* note 49.

[357] *See* DRUG POL'Y ALL., OPIOID OVERDOSE: ADDRESSING THE GROWING PROBLEM OF PREVENTABLE DEATHS 1 (2015), https://www.unodc.org/documents/ungass2016/Contributions/Civil/DrugPolicyAlliance/DPA_Fact_Sheet_Opioid_Overdose-Addressing_a_National_Problem_June2015.pdf [https://perma.cc/95ZL-MCKG] (discussing state immunity laws but noting that they do not expand to drug selling or trafficking charges, which are federal laws).

[358] *See* Banta-Green et al., *supra* note 212.

[359] Merris Badcock, *Critics Say Charging Fentanyl Dealers with Murder Could Backfire*, WPTV (Aug. 30, 2017), https://www.wptv.com/news/region-c-palm-beach-county/critics-say-charging-fentanyl-dealers-with-murder-could-backfire [https://perma.cc/53NN-46HC].

[360] *Drug-Induced Homicide*, *supra* note 301.

[361] Grant Rodgers, *U.S. High Court Reverses Iowan's Drug Conviction*, THE DE MOINES REG. (Jan. 27, 2014), http://www.desmoinesregister.com/story/news/crime-and-courts/2014/01/28/us-high-court-reverses-iowans-drug-conviction/4956117/ [https://perma.cc/5WS6-QDH9].

[362] *Id.*; *see also Joshua Abraham Banka*, LEGACY.COM, http://www.legacy.com/obituaries/name/joshua-banka-obituary?pid=1000000142045292&view=guestbook [https://perma.cc/DN55-3FHU].

[363] *See* Friedersdorf, *supra* note 134.

[364] *See generally* Jonathan W. Hutto, Sr. & Rodney D. Green, *Social Movements Against Racist Police Brutality and Department of Justice Intervention in Prince George's County, Maryland*, 93 J. URB. HEALTH 89, 90–92 (2016) (discussing the relationship between police and people of color and its impact on public health).

facilitate access to assistance, this distrust can create a service barrier for those groups. So, although an "angel program" of the type popularized by PAARI may work in Gloucester, Massachusetts, it would not likely enjoy the same level of popularity in a locale like Ferguson, Missouri.[365]

Surging reliance on drug-induced homicide charges is also a dangerous distraction, which threatens to crowd out other evidence-driven efforts.[366] These prosecutions are resource intensive,[367] all the while many public health agencies and nonprofits already operate in an environment of extreme scarcity.[368] The price of naloxone is rising at a time when a large proportion of funds is being spent on distributing this lifesaving drug to law enforcement agencies, rather than people most likely to be at overdose events at a time of the emergency.[369] Although punishing specific individuals for overdose events may make us feel that we are making progress, public resources are too limited to be spent on policy theater.

Drug-induced homicide is perhaps the most vivid illustration of a larger structural problem. Doubling down on punishment and coercion as an antidote to drug crises has been the go-to choice for criminal justice actors.[370] Other law enforcement actions in this realm have included vast scale-up in drug interdiction efforts, charges levied against overdose victims for "inducing panic,"[371] and advent of new operating policies to detain overdose victims for admission to treatment.

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[365] *See generally* NANCY LA VIGNE ET AL., URBAN INST., HOW DO PEOPLE IN HIGH-CRIME, LOW-INCOME COMMUNITIES VIEW THE POLICE? 1 (2017), https://www.urban.org/sites/default/files/publication/88476/how_do_people_in_high-crime_view_the_police.pdf [https://perma.cc/ZBL6-DJCT] (describing the general distrust in police in high-crime, low-income communities).

[366] *See* Bandy X. Lee et al., *Connecting Criminal Justice, Mental Health, and Family Support for Better Delivery of Human Services*, 63 INT'L J. PUB. HEALTH 897 (2018) (describing one of the evidence-driven efforts that might be ignored–a state-wide agency that provides comprehensive services like behavioral health, housing, and community justice).

[367] Zachary A. Siegel, *"You Want to Get Them While the Teardrops are Warm:" Prosecutors Swap Strategies for Turning Overdose Deaths into Homicides*, APPEAL (Nov. 21, 2017), [hereinafter Siegel, *Turning Overdose Deaths into Homicides*] https://injusticetoday.com/you-want-to-get-them-while-the-teardrops-are-warm-prosecutors-swap-strategies-for-turning-942a783ae87c [https://perma.cc/HZ4A-G2Q9] (describing successful prosecutorial strategies and methods in drug-induced homicide cases).

[368] *See generally* Wendy Mariner, *Rationing Health Care and the Need for Credible Scarcity: Why Americans Can't Say No*, 85 AM. J. PUB. HEALTH 1439, 1441–42 (1995) (discussing the scarcity of resources and the need for health care rationing).

[369] *See generally* Daniel Denvir, *These Pharmaceutical Companies Are Making a Killing Off the Opioid Crisis*, NATION (Dec. 15, 2017), https://www.thenation.com/article/these-pharmaceutical-companies-are-making-a-killing-off-the-opioid-crisis/ [https://perma.cc/83C5-F27V] (discussing the rising price of opioids).

[370] *See* Siegal, *Turning Overdose Deaths into Homicides*, *supra* note 367 (describing a recent webinar hosted by the Association of Prosecuting Attorneys that featured strategies to investigate all overdoses as homicides).

[371] S. 2635, 115th Cong. § 5 (2018).

Legislative efforts have paralleled such law enforcement activity, advancing involuntary commitment, involuntary treatment, and other coercive mechanisms.[372] Urgent actions are needed to challenge these efforts on both the individual and structural levels.[373]

IV. CRISIS AS OPPORTUNITY: RE-ENVISIONING U.S. DRUG CONTROL FOR THE TWENTY-FIRST CENTURY

Choosing the right remedy is dependent on first being able to accurately identify the ailment. By failing to properly "diagnose" the problem, we have thus far largely failed in formulating effective remedies. Short-sighted interventions to curb overdose have primarily focused on reducing prescription opioid supply because that was believed to be the primary culprit of the crisis.[374] These interventions included crackdowns on unscrupulous providers, new prescription course limits and guidelines, prescription monitoring efforts, and reformulation of medications to make them more difficult to misuse.[375]

Despite modest shifts towards a public health frame, the policy and programmatic response to the crisis indicates that the change has remained largely rhetorical. Policymakers, prosecutors, and the police have continued to draw on the arsenal of carceral and punitive tools in mounting the response.[376] These actions reflect established dynamics of policy theater,[377] where public figures tend towards

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[372] Leo Beletsky et al., *Expanding Coercive Treatment Is the Wrong Solution for the Opioid Crisis*, HEALTH AFF. (Feb. 11, 2016), https://www.healthaffairs.org/do/10.1377/hblog20160211.053127/full/ [https://perma.cc/N82W-NHQ9]; *see also* John C. Kramer, *The State Versus the Addict: Uncivil Commitment*, 50 B.U. L. REV. 1, 10 (1970) (noting that California's involuntary treatment system was indistinguishable from correctional settings); Leo Beletsky et al., *Involuntary Treatment for Substance Use Disorder: A Misguided Response to the Opioid Crisis*, HARV. HEALTH BLOG (Jan. 25, 2018, 9:56 AM), https://www.health.harvard.edu/blog/involuntary-treatment-sud-misguided-response-2018012413180 [https://perma.cc/696Y-UGJ4].

[373] To this end, Health in Justice Action Lab at Northeastern University School of Law is currently developing a Defense Toolkit to assist counsel in defending individuals charged with drug-induced homicide and similar crimes. *See Drug-Induced Homicide*, *supra* note 301 (noting that our system of tracking drug-induced homicide cases is being automated and will continue updating visual analyses of these cases on www.healthinjustice.org going forward).

[374] CTRS. FOR DISEASE CONTROL & PREVENTION, PREVENTING OPIOID OVERDOSES AMONG RURAL AMERICANS 2 (2018), https://www.cdc.gov/ruralhealth/drug-overdose/policybrief.html [https://perma.cc/3C67-KFNP].

[375] *See* Dasgupta et al., *supra* note 93, at 182–83.

[376] *Id.*

[377] *See generally* Sara Sun Beale, *The News Media's Influence on Criminal Justice Policy: How Market-Driven News Promotes Punitiveness*, 48 WM. & MARY L. REV. 397 (2006) (discussing prosecutors, politicians, police, and the politics of prosecution).

actions that are visible and noteworthy, regardless of their ultimate impact.[378] Such actions are characterized by immediate benefits in terms of elevated public approval and community well-being, but deferred actual cost.[379] Continued and relapsing reliance on approaches that lead to negative consequences in our policy response to drug crises is indeed akin to the very definition of addiction.[380]

This analysis fits squarely within the discourse on the urgent need for criminal justice reform, especially as it relates to systems-level change in areas like the outsized power of prosecutors as arbiters of public policy. A better theoretical and practical vision for the "Public Health Approach" to the overdose crisis is necessary. Such an approach implies a move away from a Law-and-Economics-based framework towards a population health policy framework. As Wendy Parmet articulates, population health considerations should animate judicial and policy decision-making.[381] Conceptualization of law as vested with the historical, ethical, and instrumental ammunition to pursue this goal implies that the welfare of populations, rather than solely individuals, be used as the unit of legal analyses.[382] Parmet's conceptualization of the population-based legal framework also implies the need to internalize and integrate public health epistemology into law in the form of probabilistic and epidemiological thinking.[383]

Since the heyday of major disease threats, public health in general and public health regulation in particular have been victims of their own success. As the tangible threats of communicable disease have receded, the impact of public health interventions has become less visible and more diffuse.[384] Just as public health science and public health research are generating an increasingly robust evidence base, translating this evidence into policy and practice is another matter entirely.

The "prevention paradox"[385] is that the impact of successful public health and other preventative interventions is often in avoidance of a potential harm; it is therefore virtually "invisible." In contrast to medicine or criminal law, the beneficiaries of public health efforts are often unidentified, and the benefits temporarily removed from the actions by years, if not decades.[386] Costs of these diffuse benefits to unnamed beneficiaries are nonetheless borne by all taxpayers,

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[378] *See* Siegel, *Turning Overdose Deaths into Homicides*, *supra* note 367.

[379] *See* Beale, *supra* note 377, at 445.

[380] AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 483–85 (5th ed. 2013).

[381] *See* PARMET, *supra* note 53, at 52–53.

[382] *Id.*

[383] *See* Wendy Parmet, *Population-Based Legal Analysis: Bridging the Interdisciplinary Chasm Through Public Health Law*, 358 NORTHEASTERN UNIV. SCH. L. FACULTY PUBLICATIONS 100, 108–09 (2016).

[384] *See* PARMET, *supra* note 53, at 51–54.

[385] Scott Burris, *The Invisibility of Public Health: Population-Level Measures in a Politics of Market Individualism*, 87 AM. J. PUB. HEALTH 1607, 1609 (1997).

[386] David Hemenway, *Why We Don't Spend Enough on Public Health*, 362 NEW ENG. J. MED. 1657, 1657–58 (2010).

who tend to resent them.[387] Finally, aside from highly visible catastrophic events, the rationale driving public health action is often based on probabilistic evidence that is in conflict with many people's understanding of what causes ill health or their moral views and values.[388] Americans generally favor the idea of investing in public health prevention;[389] when asked about specific program expenditures, however, support markedly diminishes to a relatively small minority of respondents.[390]

Criminal law interventions do not suffer from many of the same "prevention paradox" problems.[391] They are highly visible, decisive, and do not require the kind of leap of faith about prevented harm that is critical to bolstering public health prevention policies.[392] Criminal law interventions like successful prosecutions build on persuasive, if simplistic policy narratives, creating a perception of a tangible success to a number of key stakeholders.[393] Those directly affected by the overdose may experience a sense of vindication. Prosecutorial and law enforcement incentives are highly aligned with such actions, rather than prevention or "public health" approaches.[394]

And yet, investment in public health regulation and infrastructure produces not only improvements in quality of life and its duration, but also substantial return on investment.[395] These data have supported arguments for shoring up existing—and building new—tools to pursue population health under a new framework.[396] Public health advocates have maintained that, in the context of wider social change on the

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[387] *Id.* at 1657.

[388] *See generally* Robert J. Blendon & John M. Benson, *The Public and the Conflict over Future Medicare Spending*, 369 NEW ENG. J. MED. 1066 (2013).

[389] Robert J. Blendon et al., *Americans' Conflicting Views About the Public Health System, and How to Shore Up Support*, 29 HEALTH AFF. 2033, 2034 (2010), https://www.healthaffairs.org/doi/full/10.1377/hlthaff.2010.0262 [https://perma.cc/G3XF-HRWY].

[390] *Id.* at 2037.

[391] Burris, *supra* note 385, at 1609.

[392] Thomas R. Oliver, *The Politics of Public Health Policy*, 27 ANN. REV. PUB. HEALTH 195, 195–97 (2006).

[393] William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 507 (2001).

[394] *Id.* at 534.

[395] Glen P. Mays & Sharla A. Smith, *Evidence Links Increases in Public Health Spending to Declines in Preventable Health*, 30 HEALTH AFF. 1585, 1589–91 (2011).

[396] *See, e.g.*, Lindsay F. Wiley, *Rethinking The New Public Health*, 69 WASH. & LEE L. REV. 207, 207 (2012) (advocating for re-consideration of the use of public nuisance theory to pursue public health objectives); *see also* Lainie Rutkow & Stephen P. Teret, *The Potential for State Attorneys General to Promote the Public's Health: Theory, Evidence, and Practice*, 30 ST. LOUIS U. PUB. L. REV. 267, 274 (2011) (discussing the emergent role of parens patriae law suits).

national and global levels, emerging public health threats require agility and authority in public health programming and regulatory response.[397]

A corollary development has been in the field of public health law research, where sophisticated empirical methods are being used to assess the direct or incidental impact of laws on health.[398] Today, more than at any other time, the growing empirical evidence base can be used to shape policy decisions.[399] Given that the evidence has already established several key elements of a policy response that holds the most promise, these tools should be brought to bear on the overdose crisis.

Beyond the most immediate interventions, the structural determinant framework is critical to engage in addressing root causes. For instance, better access to health care, reducing income inequality, and assuring healthy work and living environments are all critical to meaningful efforts to address the overdose crisis and other drug-related harms.[400] However, there is currently substantial opposition to the kinds of tax policy, regulatory policy, and social policy actions that hold the most promise to advance this agenda. The use of labels like "totalitarianism" or "nanny-statism" is routinely misdirected at government attempts to impact structural determinants of health.[401]

In contrast, addressing structural determinants implies a communitarian vision. But the "every man for himself" stark individualism attacks the social contract that is foundational to the theory and practice of public health.[402] This framing also encourages the view of classes, races, and regions different from one's own as "the other."[403] The trope of individualism also runs counter to government efforts to ameliorate one of the most significant public health challenges of our time—health disparities.[404]

Drawing on the maxim that "no crisis should go to waste," the overdose crisis presents a unique opportunity to deploy population-based health legal analysis in

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[397] James G. Hodge Jr., *Implementing Modern Public Health Goals Through Government: An Examination of New Federalism and Public Health Law*, 14 J. CONTEMP. HEALTH L. & POL'Y 93, 122–26 (1998); *see also* PARMET, *supra* note 53, at 212–14.

[398] *See, e.g.*, Scott Burris, *From Health Care Law to the Social Determinants of Health: A Public Health Law Research Perspective*, 159 U. PA. L. REV. 1649, 1651–52 (2011).

[399] Michelle Mello & Katheryn Zeiler, *Empirical Health Law Scholarship: The State of the Field*, 96 GEO. L.J. 649, 656 (2008).

[400] *See* Dasgupta et al., *supra* note 93, 182–84.

[401] Consider the example of the FDA rules mandating the inclusion of a balanced set of information about the risks and benefits of prescription drugs in television advertising. The benefits are usually touted by images of healthy, happy people, luscious landscapes, or other pleasing visuals. There are no images of actors doubled-over with stomach pain or experiencing other unpleasant side-effects to communicate the risks, however.

[402] Dabney P. Evans, *The Right to Health: The Next American Dream*, *in* THE RIGHT TO HEALTH: A MULTI-COUNTRY STUDY OF LAW, POLICY & PRACTICE 233 (2014).

[403] *Id.* at 242.

[404] *Id.* at 245–46.

rethinking how we regulate drugs. The crisis has vividly demonstrated that the systems we have in place fail to meet patient needs in access to pain, substance use treatment, and other pharmacotherapy, while the regulation of black markets for drugs could hardly be any more harmful.[405]

Despite overlapping mandates and functions, the DEA and the FDA now each consume annual federal appropriations in the billions of dollars. Aside from an opportunity to improve public health outcomes and generate significant cost-savings, several current trends further rationalize the exploration of FDA-DEA consolidation. The regulatory landscape for marijuana is undergoing a historic transformation.[406] Simultaneously, the calls to advance a "public health approach" to drug misuse imply a move away from the criminal justice-based framework that serves as the DEA's *raison d'être*. Some principal challenges to such consolidation, however, would include the extensive legal reforms that would be necessary to effectuate it.

Adoption of a public health approach to drug regulation must also include a redesign of the Controlled Substances Act. The negative impact of this statutory regime and criminal law in general goes beyond its instrumental collateral harms. Doing so confronts the stark reality that the core function of criminal law is normative, intended to stigmatize drug use and people who use drugs. Decades after *Robinson*, this criminal law framework remains largely in place. If the goal is to reduce stigma, then revisiting the criminal law framework must be part of that imperative.

CONCLUSION

As the overdose crisis lays bare, history has proven drug control regulation rooted in supply-side interventions a dismal failure. Widespread adoption and aggressive enforcement of punitive drug laws have done little to reduce drug-related harms. In the context of the overdose crisis, an increasing number of jurisdictions has proposed entirely new, or enhanced, drug-induced homicide provisions. Both in their design and their application, these provisions promise to do far more harm than good. Notably, this analysis reframes the need for criminal justice reform as a public health imperative, critical to improving the response to the worst drug crisis in America's history.

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[405] *See* Dasgupta et al., *supra* note 93, at 83–84.

[406] Beau Kilmer, *Policy Designs for Cannabis Legalization: Starting with the Eight Ps*, 40 AM. J. DRUG & ALCOHOL ABUSE 259, 259 (2014).

APPENDIX: VISUALIZING DRUG-INDUCED HOMICIDE PROSECUTIONS 2000-2017

Figure 1. Individuals Accused of Drug-Induced Homicide* Overtime (Online News Reports 2000-2017)

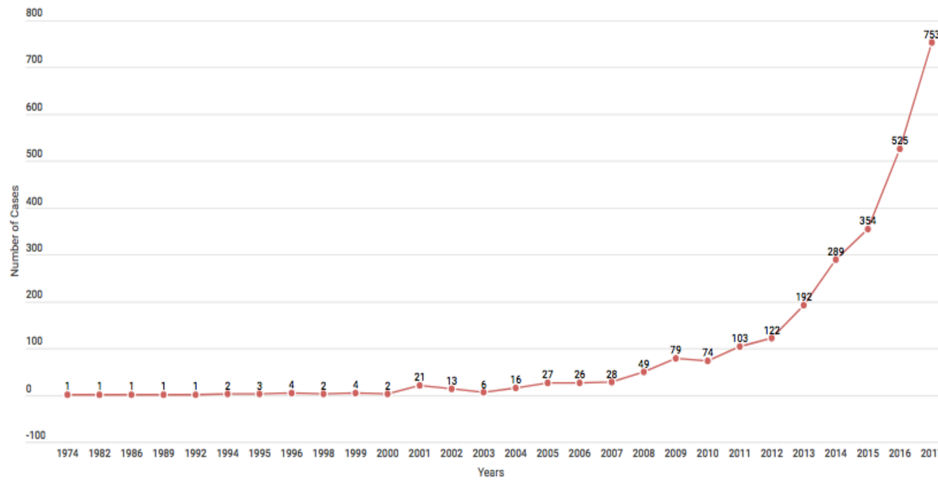

Figure 2. Accused-Deceased Dyads in Drug-induced Homicide* Cases, by Relationship (N=213) (Online News Reports 2000-2017)

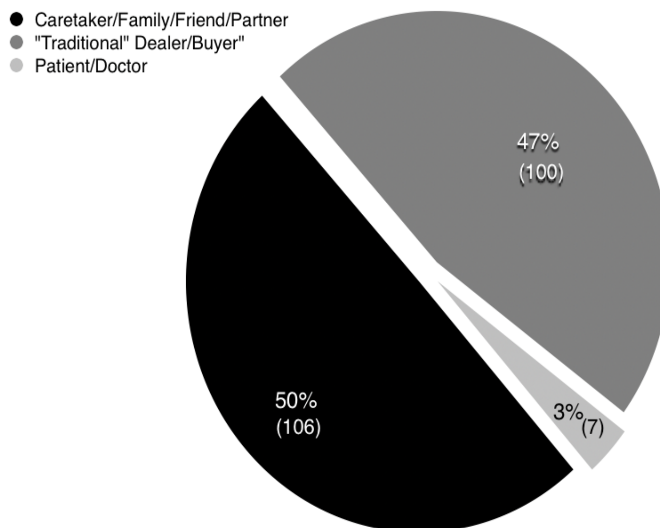

Figure 3. Dealer-Deceased Dyads in Drug-induced Homicide* Cases, By Race (N=86) (Online News Reports 2000-2017)

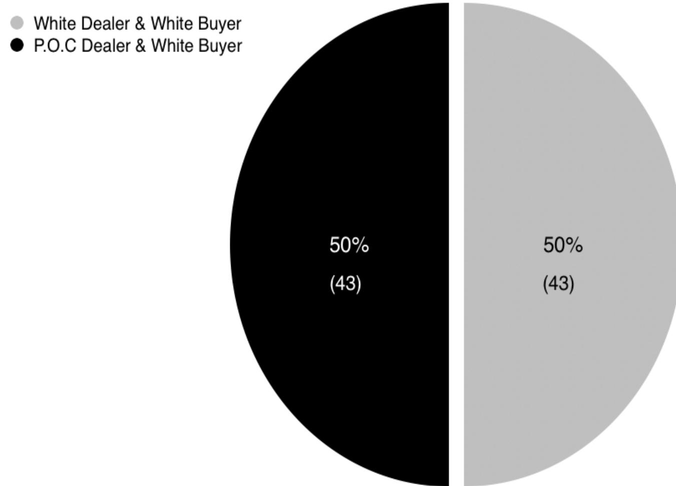

Figure 4. Average Sentence for Individuals Charged with Drug-induced Homicide*, By Race (N=114) (Online News Reports 2000-2017)

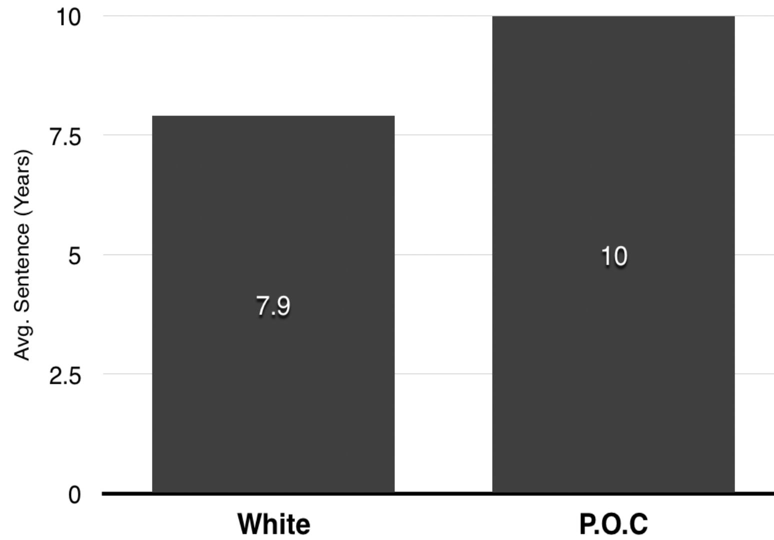

Figure 5: Drug-induced Homicide Cases by State

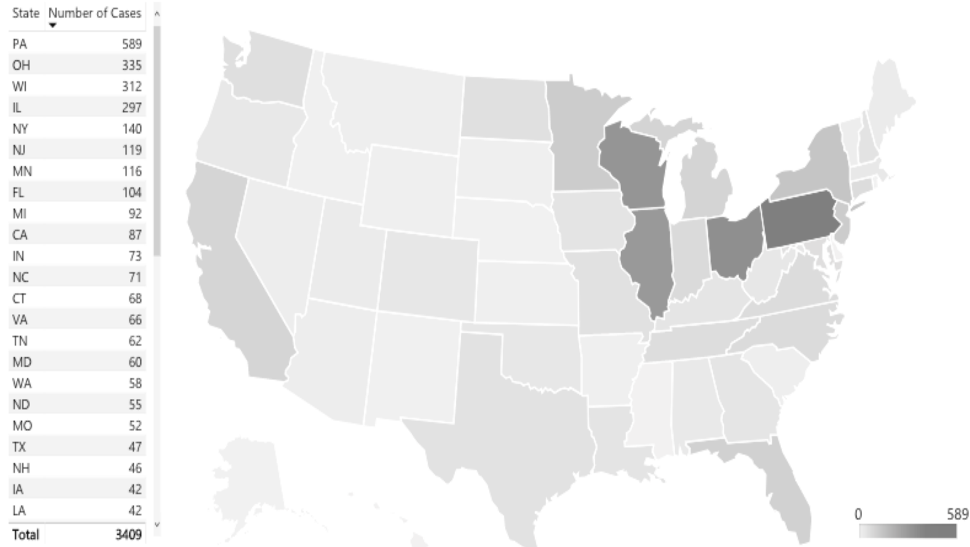

Figure 6: Median Sentencing by Accused Race