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CHASING THE DEADLY DRAGON: HOW THE OPIOID CRISIS IN  
THE UNITED STATES IS IMPACTING THE ENFORCEMENT OF  
DRUG-INDUCED HOMICIDE STATUTES

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*In response to the opioid crisis gripping our country, numerous states have been pursuing charges against drug dealers in situations where someone has overdosed on the drugs they received. Not only are prosecutors looking to press drug charges against these dealers, but surprisingly to most people, these prosecutors are looking to hold them responsible for murder. Whether by advancing new state legislation or reviving existing state statutes, prosecutors in at least twelve states are pursuing these charges, as is the federal government under the Controlled Substances Act. Rather than offering any sort of deterrence effects, these homicide statutes are inappropriately holding drug dealers strictly liable for homicide due to the lack of a mens rea requirement in the statute. They are turning drug dealers, who are many times interchangeable with users, into murderers and leaving them with lengthy prison sentences. When one dealer becomes incarcerated, another one takes his place to keep up with the demand. As a result, the number of overdoses is not decreasing, and these statutes are not doing what the legislatures intended them to do. Rather, they are needlessly punitive in nature for everyone involved. These statutes should be either repealed or completely revamped to incorporate some form of an intent requirement.*

TABLE OF CONTENTS

|     |   |      |
|-----|---|------|
| I.  | INTRODUCTION .....  | 1800 |
| II. | BACKGROUND .....  | 1803 |
|     | A. Prescription Painkillers to Heroin, Pill to Needle ..... | 1803 |
|     | 1. Who is Impacted? .....                                   | 1805 |
|     | 2. Where Do They Live? .....                                | 1806 |
|     | 3. What is Being Done? .....                                | 1807 |

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|      |  |      |
|------|--|------|
| B.   | <i>Drug-Induced Homicide Statutes</i> .....        | 1808 |
| 1.   | <i>A Closer Look at the Statutory Texts</i> .....  | 1808 |
| 2.   | <i>Mens Rea Requirement</i> .....                  | 1811 |
| 3.   | <i>Causation: But-for and Foreseeability</i> ..... | 1812 |
| 4.   | <i>Is Sharing Considered Delivery?</i> .....       | 1814 |
| 5.   | <i>Severity of the Punishment</i> .....            | 1816 |
| III. | ANALYSIS.....                                      | 1818 |
| A.   | <i>What Do Proponents Say?</i> .....               | 1818 |
| B.   | <i>What Do Opponents Say?</i> .....                | 1819 |
| 1.   | <i>Punish the Victims</i> .....                    | 1819 |
| 2.   | <i>Fentanyl-Laced Heroin</i> .....                 | 1821 |
| 3.   | <i>Disincentive to Take Precaution</i> .....       | 1821 |
| 4.   | <i>Lack of any Deterrent Effect</i> .....          | 1822 |
| 5.   | <i>Proof Issues</i> .....                          | 1823 |
| IV.  | RECOMMENDATION.....                                | 1825 |
| V.   | CONCLUSION.....                                    | 1826 |

## I. INTRODUCTION

It was just another day in small town New Jersey. Kim Farinick and her husband, Marc, woke up at 6:45 AM, ate breakfast together, and left for work at the same time, just as they always did, but only after Kim went into their daughter's room to kiss her goodbye. The night before, Marc and Kim had a heart-to-heart with their daughter, Dana, during which she spoke positively about her future and her aspirations. That conversation gave her parents hope that she was on the road to recovery.

Dana was an accomplished twenty-two-year-old woman and a wonderful daughter, according to Marc and Kim. She was a member of her high school swim team, a cheerleader in junior high and high school, and had her whole life ahead of her. She had been working as a waitress since she graduated high school but had dreams of becoming a nurse or a teacher. It was only within the past two years that Dana had spiraled out of control. She was caught in a cycle of treatment, addiction, and relapse, and her parents had tried everything they could to help their daughter, including maxing out their credit cards on treatment costs.

Nothing seemed to work. It wasn't until Dana disappeared for a few months, got into legal trouble, and served time in jail that she finally returned home to her parents. They helped her detox, she got clean, and the family even took a vacation together for the first time in years. Everything seemed to be looking up for the Sutton family until the dreaded day that still haunts Marc and Kim.

Kim returned home from work to find, what she thought to be, Dana and her boyfriend, Brandon, asleep on the couch. As she approached them, she noticed that Dana's eyes were open and her skin was a grayish-blue color. Dana

was cold to the touch. Kim immediately started CPR on her daughter while Marc called 911, but it was too late—they had already lost her.

The Farinick's story is based off real events and real people,<sup>1</sup> and unfortunately, it is not the only one of its kind. Brandon was initially booked on second-degree murder charges for dispensing an illegal drug to his girlfriend who died as a result of taking the drug, but he ended up pleading guilty to a lesser charge and is now serving a six-year prison sentence.<sup>2</sup> There is absolutely no doubt that Dana's death was tragic and premature, yet it raises many questions: Was it Brandon's fault? Should or could he have done something? Does Dana have any culpability for her own death? What do her parents think about this? Did he want her to die? One thing is for certain: this drug that killed Dana and that contributed to the life sentence hanging over Brandon's head is not something to be taken lightly.

This life-sucking, dream-crushing, all-encompassing drug is also known as heroin, big H, dope, the dragon, or black tar. When a user smokes it, snorts it, or shoots it in order to feel its effects, they are getting high, getting their "fix" or "chasing the dragon."<sup>3</sup> Heroin is sweeping the nation—rural towns and big cities alike. It is killing hundreds of thousands of people each year around the world.<sup>4</sup> Most people believe that motor vehicle accidents or firearm-related deaths lead to the most injury deaths per year in this country, however, this is not what statistics show.<sup>5</sup> Deaths due to drug overdose are the leading cause of injury death in the United States, resulting in the deaths of 46,471 people in 2013.<sup>6</sup> Prescription painkillers and heroin were the cause of more than half of those deaths in 2013, which is nearly triple the amount of deaths involving heroin in 2010.<sup>7</sup> According to an empirical study using data provided by twenty-eight states, the death rate due to heroin overdose doubled from the year 2010 to the year 2012,

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1. See *Man Faces Murder Charge After Girlfriend Dies of Heroin Overdose*, WAFB (Feb. 4, 2014, 7:35 AM), <http://www.wafb.com/story/24625916/man-faces-murder-charge-after-girlfriend-dies-of-heroin-overdose>; see also Kim Farinick, *Kim Farinick: My Daughter's Story*, DRUG POL'Y ALLIANCE, [http://www.drug-policy.org/sites/default/files/documents/Kim\\_Testimonial\\_re\\_Dana\\_Naloxone.pdf](http://www.drug-policy.org/sites/default/files/documents/Kim_Testimonial_re_Dana_Naloxone.pdf) (last visited Aug. 13, 2019).

2. Joe Gyan Jr., *Baton Rouge Man Sentenced for Giving Heroin to Girlfriend, Who Died of an Overdose*, THE ADVOCATE (Mar. 24, 2015, 7:01 PM), [http://www.theadvocate.com/baton\\_rouge/news/article\\_d5c925aabf84-58bf-81ee-b61f588dc4e6.html](http://www.theadvocate.com/baton_rouge/news/article_d5c925aabf84-58bf-81ee-b61f588dc4e6.html); *Man Faces Murder Charge After Girlfriend Dies of Heroin Overdose*, *supra* note 1.

3. *Nicknames for Heroin*, NARCONON, <http://www.narconon.org/drug-abuse/heroin/nicknames.html> (last visited Aug. 3, 2019).

4. Susan Jones, *46,471: Drug Overdoses Killed More Americans Than Car Crashes or Guns*, CNS NEWS (Nov. 5, 2015, 7:52 AM), <http://www.cnsnews.com/news/article/susan-jones/dea-drug-overdoses-kill-more-americans-car-crashes-or-firearms>.

5. *Id.*

6. *Id.*

7. *Id.*; PATRICK RADDEN KEEFE, THE NEW OPIATE EPIDEMIC, THE CENTURY FOUND. 1 (Feb. 4, 2016), <https://tcf.org/assets/downloads/TheNewOpiateEpidemic.pdf> [hereinafter THE NEW OPIATE EPIDEMIC] ("Drug overdoses now kill more Americans than car accidents, and most of those overdoses are from opiates. Heroin-related deaths have quadrupled since 2000, leading to what the *New York Times* has suggested may be the worst drug overdose epidemic in United States history.").

and nearly quadrupled from 2010 to 2014, leaving approximately 11,000 Americans dead in 2014.<sup>8</sup>

It is clear through the statistics alone that the United States is facing an unprecedented and ever-increasing drug use and addiction problem. In an attempt to push back, numerous states have been pursuing hefty criminal charges against the drug dealers in situations where someone has overdosed on the drugs they received.<sup>9</sup> Not only are states looking to press drug charges against these dealers, but these prosecutors are also looking to hold them responsible for *murder*.<sup>10</sup> Whether they are advancing new state legislation or reviving existing state statutes, prosecutors in at least twelve states are relentlessly pursuing these types of charges.<sup>11</sup>

The statutes under which prosecutors are bringing these charges are commonly referred to as “drug delivery resulting in death,” “death by dealer,” and “drug dealer liability” statutes.<sup>12</sup> This Note addresses what the proponents and opponents of these statutes have to say, why the statutes are inappropriately holding drug dealers strictly liable for the unintended death of another,<sup>13</sup> and how they are turning drug dealers, who are oftentimes interchangeable with users, into murderers. These statutes do not deter dealers or users, but rather is strictly punitive and harms everyone involved.<sup>14</sup> Part II provides relevant and necessary factual and legal background information, which will be helpful in understanding *why* these statutes are being relentlessly used and enforced. Part II also includes statistics about opioids, specifically prescription painkillers and heroin, and touches on those impacted by the heroin epidemic, where they live, and what is being done to combat the problem. Part III analyzes these types of statutes, weighs their pros and cons, and discusses why they first came about, as well as how they have changed in recent years. Part III also discusses the reasons behind the recent increase in charges brought under these statutes and the potential effects, or lack thereof, that this trend has had on both users and sellers. Part IV recommends repealing these statutes and suggests alternatives to these harsh statutes, including an increase in the availability of drug courts and forms of rehabilitation for addicts, such as treatment centers with intense, in-patient addiction therapy, fact-based education programs, and support groups.

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8. THE NEW OPIATE EPIDEMIC, *supra* note 7, at 2.

9. Patrick Radden Keefe, *Death by Dealer: When Addicts Overdose, Should Dealers be Charged with Murder?*, THE CENTURY FOUND. (Mar. 24, 2016), <https://tcf.org/content/report/death-by-dealer/> [hereinafter *Death by Dealer*].

10. *Id.*

11. *Id.*

12. *Id.*

13. Clarence Walker, *The New War on Drug Dealers: Charging Them with Murder when Their Customers Die of Overdose*, ALTERNET (May 31, 2015), <http://www.alternet.org/drugs/overdose-murder-new-war-drug-dealers>.

14. *See id.*; *Death by Dealer*, *supra* note 9.

## II. BACKGROUND

A. *Prescription Painkillers to Heroin, Pill to Needle*

This increase in recent years in the number of deaths caused by prescription painkillers or heroin has not only been referred to as an epidemic, but rather, the worst “drug overdose epidemic in United States history.”<sup>15</sup> Prescription painkillers, such as Morphine or OxyContin, and heroin are often lumped together when discussed in conversation surrounding the heroin epidemic because heroin addiction stems from a much larger problem facing this country: the abuse of legally and professionally prescribed painkillers.<sup>16</sup> Annually, almost 260 million prescriptions are written for opioids, which is enough for every American to have their own bottle of pills.<sup>17</sup> Potentially even more shockingly, four out of five, or 80%, of new heroin users in 2014 started out misusing prescription painkillers and switched over to using heroin because the painkillers were “far more expensive and harder to obtain.”<sup>18</sup> Of course, this then lead to further and continued illicit drug use.<sup>19</sup> Controlled prescription drug abusers, however, should not be seen as quitting one type of drug and using another.<sup>20</sup> These heroin addicts simply start their abuse with one type of opioid and switch to another opioid, which is cheaper and more accessible: heroin.<sup>21</sup>

A substantial number of overdoses that lead to death come about in the same way: a success story followed by a relapse.<sup>22</sup> These stories typically begin with an addict who goes to treatment to receive the help and support that is needed to get clean, and end with death as a result of the addict’s “diminished tolerance.”<sup>23</sup> The first time that many recovering addicts use heroin after getting clean, they inject, snort, or ingest the same amount of the drug that they were regularly using before rehab, and it kills them.<sup>24</sup> Unsurprisingly, their newly “sober” body simply cannot handle the same amount of poison as it once could.<sup>25</sup> This conclusion is supported by a study performed by Italian researchers in 1998

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15. THE NEW OPIATE EPIDEMIC, *supra* note 7, at 1 (“The spike in heroin abuse is an outgrowth of a much broader and in some ways more pernicious problem—the widespread addiction to prescription painkillers. The suppliers of these drugs are not street-corner dealers, but ostensibly respectable physicians, and behind them, multibillion-dollar pharmaceutical companies, with squadrons of lawyers and lobbyists.”).

16. Wayne Drash & Max Blau, *In America’s Drug Death Capital: How Heroin is Scarring the Next Generation*, CNN (Sept. 16, 2016), <http://www.cnn.com/2016/09/16/health/huntington-heroin> (noting that in Huntington, twenty-six people overdosed on heroin in a single four-hour period recently).

17. *Opioid Addiction 2016 Facts & Figures*, AM. SOC’Y OF ADDICTION MED., <http://www.asam.org/docs/default-source/advocacy/opioid-addiction-disease-facts-figures.pdf> (last visited Aug. 13, 2019).

18. *Id.*

19. *Id.*

20. U.S. DEP’T OF JUSTICE DRUG ENFORCEMENT AGENCY, 2015 NATIONAL DRUG THREAT ASSESSMENT SUMMARY 31–39 (Oct. 1, 2015), <https://www.dea.gov/sites/default/files/2018-07/2015%20NDTA%20Report.pdf>.

21. *Id.* at 15.

22. Lauren F. Friedman, *Why Heroin Relapse Often Ends in Death*, BUS. INSIDER (Feb. 3, 2014, 6:06 PM), <http://www.businessinsider.com/philip-seymour-hoffman-overdose-2014-2>.

23. *Id.*

24. *Id.*

25. *Id.*

who were determined to learn why people overdose with all different levels of heroin in their blood.<sup>26</sup> They found the answer they were searching for,<sup>27</sup> and concluded that “[t]he risk of opioid overdose was higher after periods of sobriety, likely due to lowered tolerance or a lack of tolerance from irregular use.<sup>28</sup> Additionally, the researchers found that the majority of people who died from heroin overdose had almost exclusively abstained from drug use during the four months leading up to their death.<sup>29</sup> Other studies have confirmed these findings, suggesting that the risk of overdose is especially high subsequent to an addict’s release from prison or a detox program.<sup>30</sup>

Unlike prescription medications distributed by professionals, heroin is often mixed with other deadly substances in order to increase the potency of heroin that has been diluted.<sup>31</sup> Fentanyl-laced heroin is the most dangerous mix, and this combination is worsening this country’s overdose crisis.<sup>32</sup> Fentanyl is the most potent of all opioids and, according to the Drug Enforcement Agency (“DEA”), is lethal even in small doses.<sup>33</sup> The combination of its lethality and the fact that it is being added to heroin is the reason why fentanyl was added to the DEA’s federal list of banned substances in 2015.<sup>34</sup> In fact, in March of 2015, the DEA issued a nationwide alert in response to the rapid increase in deaths due to fentanyl-laced heroin.<sup>35</sup> The fact of the matter, though, is that heroin is dangerous and deadly regardless of whether or not it is laced with another poisonous substance. Opioid addiction is killing thousands of Americans every year and should not be taken lightly.<sup>36</sup>

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26. *Id.*

27. *See id.* (“Opioids like heroin linger in human hair for months after they’ve left the bloodstream, so the researchers analyzed the hair of people who had died from a heroin overdose and compared it to the hair of current users, former addicts, and a control group. Most fatal heroin overdoses, they found, occurred in people with lower levels of drugs in their hair than in that of current (living) users.”).

28. *Id.*

29. *Id.*

30. *Id.*

31. *Fentanyl-Laced Heroin Worsening Overdose Crisis, Officials Say*, PARTNERSHIP FOR DRUG-FREE KIDS (Sept. 10, 2015), <http://www.drugfree.org/news-service/fentanyl-laced-heroin-worsening-overdose-crisis-officials-say/>.

32. *Id.* (“Fentanyl-laced heroin is worsening the nation’s overdose crisis, officials tell NPR. Some drug dealers are using an illicit version of fentanyl, an anesthesia drug, to increase the potency of heroin that has been diluted. In March, the Drug Enforcement Administration (DEA) issued a nationwide alert in response to a surge in overdose deaths from heroin laced with fentanyl, the most potent opioid available for medical use. According to the DEA, fentanyl and fentanyl analogues produced in illicit clandestine labs are up to 100 times more powerful than morphine and 30-50 times more powerful than heroin.”).

33. *Id.*

34. *Id.*

35. *Id.*; *see, e.g., 25 Arrested in Raids Targeting Fentanyl-Laced Heroin*, NBC CHI. (Sept. 23, 2016, 6:00 PM), <http://www.nbcchicago.com/news/local/25-arrested-in-raids-targeting-fentanyl-laced-heroin-394557751.html> (“Detectives from the Chicago Police Department’s Narcotics Division organized an investigation and undercover drug buys following an increase in overdose deaths linked to the dangerous combination of fentanyl and heroin, officials said in a release.”).

36. *See* Press Release, Barack Obama, Presidential Proclamation—Prescription Opioid and Heroin Epidemic Awareness Week, 2016, The White House (Sept. 16, 2016), <https://www.whitehouse.gov/the-press-office/2016/09/16/presidential-proclamation-prescription-opioid-and-heroin-epidemic> (“NOW, THEREFORE, I, BARACK OBAMA, President of the United States of America, by virtue of the authority vested in me by the

1. *Who is Impacted?*

The victims of this epidemic are not who many people may think they are.<sup>37</sup> The heroin epidemic has had a surprisingly noticeable impact on special populations, such as adolescents ranging from twelve to seventeen years of age, women, and Caucasians.<sup>38</sup> Many people who are legally prescribed opioids, especially adolescents, share their extra, unused pain relievers without realizing the serious implications and dangers associated with opioid use and addiction.<sup>39</sup> This contributes to the fact that most adolescent abusers receive their drugs for free by someone they know, such as a friend or family member.<sup>40</sup>

Although the number of deaths caused by heroin poisoning was four times higher for men than it was for women in 2012, women are more likely to get hooked on prescription painkillers because, as statistics show, women are more likely to have chronic pain, receive prescriptions of higher doses, and be advised to use them for longer periods of time.<sup>41</sup> Furthermore, in 2013, the rate for drug-poisoning deaths involving heroin (7.0 per 100,000) was the highest among white people ranging from eighteen years of age to forty-four years of age.<sup>42</sup> In contrast, in the year 2000, the rate (2.0 per 100,000) was the highest among black people ranging from forty-six years of age to sixty-four years of age.<sup>43</sup> As made clear through these statistics, the demographics of those who overdose on heroin and die changed drastically during this thirteen-year span. In fact, nearly 99% of those who have tried using heroin in the past decade have been Caucasian.<sup>44</sup>

Ironically, this racial demographic shift “has led [some] officials to characterize the problem as a public health crisis, rather than a law enforcement crisis.”<sup>45</sup> Restated more frankly: now that white people’s children are most severely impacted by the heroin crisis, white families are seeking a “gentler war on drugs.”<sup>46</sup> Interestingly enough, the public has become less in favor of “zero tolerance and stiff prison sentences” compared to the past when the nation’s crack

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Constitution and the laws of the United States, do hereby proclaim September 18 through September 24, 2016, as Prescription Opioid and Heroin Epidemic Awareness Week. I call upon all Americans to observe this week with appropriate programs, ceremonies, and activities that raise awareness about the prescription opioid and heroin epidemic.” [hereinafter Obama Proclamation].

37. *Opioid Addiction 2016 Facts & Figures*, *supra* note 17 (“Heroin overdose deaths among women have tripled in the last few years. From 2010 through 2013, female heroin overdoses increased from 0.4 to 1.2 per 100,000.”) (citing Holly Hedegaard et al., *Drug-Poisoning Deaths Involving Heroin: United States, 2000–2013*, CTR. FOR DISEASE CONTROL AND PREVENTION (Mar. 2015), <https://www.cdc.gov/nchs/products/databriefs/db190.htm>).

38. *Id.*

39. *Id.*

40. *Id.*

41. *Prescription Opioid Data*, CTR. FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/drugoverdose/data/prescribing.html> (last visited Aug. 13, 2019).

42. Hedegaard et al., *supra* note 37.

43. *Id.*

44. *Id.*

45. *Death by Dealer*, *supra* note 9.

46. 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?\\_r=2](https://www.nytimes.com/2015/10/31/us/heroin-war-on-drugs-parents.html?_r=2) (quoting Michael

problem was based in predominantly black urban areas.<sup>47</sup> Rather, the rapidly increasing number of families of those lost to heroin are attempting to alter the conversation around addiction in an effort to prompt the government to treat it as a disease rather than a crime.<sup>48</sup> Viewing addiction as a medical condition is a topic that this Note discusses later.<sup>49</sup> Nonetheless, it is important to point out, early on, that the public's more liberal understanding of addiction correlates to the dramatic racial demographic shift that has occurred among heroin overdose victims in recent years.<sup>50</sup>

## 2. *Where Do They Live?*

In addition to demographics such as sex and race, there are also regions of the United States that are more harshly impacted by this epidemic than others. Since 2000, the Midwest has experienced a greater spike in heroin overdose deaths than any other region in the country.<sup>51</sup> In addition to demographics, this could be, in part, attributed to the fact that the levels of heroin availability are highest in the Northeast and areas of the Midwest.<sup>52</sup>

Still, not one part of the country is immune to this drug emergency. In fact, a cluster of communities within the affluent suburbs of Atlanta, Georgia is known as the "Heroin Triangle."<sup>53</sup> In an attempt to bring awareness to the rise of the nation's opioid crisis, A&E Network is currently airing a new season of the Emmy Award-winning docuseries, *Intervention*, which follows addicts and their families living in these communities of Atlanta suffering at the hands of this crisis.<sup>54</sup> The show focuses on the journey of those drowning under their addictions to opioids, their family members who are left to pick up the pieces, as well as city officials and community leaders who are on the ground fighting to save the lives of those affected and to help heal the communities they call home.<sup>55</sup>

Not only is this epidemic affecting big cities like Atlanta, Chicago, New York City, and San Francisco, but it is also something that rural areas and small and mid-size towns know all too well.<sup>56</sup> For example, nearly everyone in Huntington, West Virginia, a small town with a population of about 50,000 people,<sup>57</sup>

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Botticelli, Director of the White House Office of National Drug Control Policy, saying that "[b]ecause the demographic of people affected are more white, more middle class, these are parents who are empowered").

47. *Id.*; *Death by Dealer*, *supra* note 9 ("One fascinating byproduct of the whiteness of this new crisis has been the emergence of a more humane vocabulary for understanding—and combating—drug addiction.").

48. Seelye, *supra* note 46.

49. *See infra* Part IV.

50. Seelye, *supra* note 46.

51. Hedegaard et al., *supra* note 37 ("Heroin-related drug-poisoning deaths increased for all regions of the country from 2000 through 2013, with the greatest increase seen in the Midwest.").

52. U.S. DEP'T OF JUST. DRUG ENFORCEMENT AGENCY, *supra* note 20, at 25–26.

53. *Intervention*, (A&E television broadcast Feb. 27, 2018), <https://www.aetv.com/shows/intervention>.

54. *Id.*

55. *Id.*

56. Drash & Blau, *supra* note 16.

57. *Quick Facts Huntington City, West Virginia*, U.S. CENSUS BUREAU, <http://www.census.gov/quick-facts/table/PST045215/5439460> (last visited Aug. 13, 2019).



is a victim of this epidemic in one way or another.<sup>58</sup> Sadly, babies are the youngest and most vulnerable victims of all.<sup>59</sup> As heroin addiction shakes the town, Cabell Huntington Hospital has had no other choice but to create a neonatal therapeutic unit for “heroin babies”: babies born addicted to the deadly drug.<sup>60</sup> One in ten babies born at the Huntington hospital suffers from the effects of withdrawal, whether from heroin, opiates, cocaine, or a combination of many.<sup>61</sup> Although Huntington has been forced to take extreme measures because of heroin addiction, Huntington is not alone—cities, towns, and people of all types are similarly affected.<sup>62</sup>

### 3. *What is Being Done?*

On a national scale, there are some things being done to bring awareness to this problem that people all over the country and their loved ones are facing, but is it enough?<sup>63</sup> On September 16, 2016, then-President Obama proclaimed one week in the month of September as Prescription Opioid and Heroin Epidemic Awareness Week.<sup>64</sup> He also implemented initiatives, as some other countries have, in order to fight this epidemic.<sup>65</sup>

Unfortunately, though, since President Trump’s inauguration on January 20, 2017, not much has changed.<sup>66</sup> After officially declaring a 90-day public health emergency and promising to “liberate” Americans from the “scourge of addiction,” Trump has yet to formally propose any new resources or funding.<sup>67</sup> Although acknowledging that a problem exists is a good first step in problem solving, the question still remains: how do we, as a nation, actually combat this epidemic?<sup>68</sup> Of course, this is an extremely complex question with an even more complex answer that is far beyond the scope of this Note. As a result, this Note will highlight one place where the answer to this question does *not* lie, which is in the heightened enforcement of federal and state-level drug-induced homicide statutes.

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58. Drash & Blau, *supra* note 16 (noting that twenty-six people in Huntington, Virginia overdosed on heroin in a span of four hours).

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. Obama Proclamation, *supra* note 36.

64. *Id.*

65. Ruth Dreifuss, *The Secret to Fighting U.S. Heroin Epidemic*, CNN (April 19, 2016, 4:54 PM), <http://www.cnn.com/2016/04/19/opinions/preventing-heroin-overdose-u-n-drugs-dreifuss/> (“Drug overdose deaths in the United States have tripled since 2010. And so it makes sense that President Obama has announced, as he did late last month, new initiatives to fight the epidemic of prescription drug and heroin abuse in the United States.”).

66. Brianna Ehley, *Trump Declared an Opioid Emergency. Then Nothing Changed*, POLITICO (Jan. 11, 2018, 5:01 AM), <https://www.politico.com/story/2018/01/11/opioids-epidemic-trump-addiction-emergency-order-335848>.

67. *Id.*

68. *Id.*

*B. Drug-Induced Homicide Statutes*

In an effort to decrease the number of deaths due to drug overdoses, as well as to hold people responsible for overdose deaths, one trend that many states have recently turned to is their drug-induced homicide laws.<sup>69</sup> These laws, while varying from state to state, all serve one purpose: to hold drug dealers, including street-level dealers, responsible for the death of another when they sell drugs that cause an overdose.<sup>70</sup> Regardless of whether the state decides to consider this form of homicide to be murder or manslaughter, these statutes require strict penalties nationwide.<sup>71</sup> If charged and convicted under a drug-induced homicide statute, a dealer will likely receive a much more extensive prison sentence than he or she would have received as a result of a drug dealing conviction.<sup>72</sup> For example, in Illinois, a person who commits drug-induced homicide, a class X felony, will be sentenced between fifteen to sixty years in prison.<sup>73</sup> Meanwhile, a person who violates section 401 of the Illinois Controlled Substances Act by manufacturing, delivering, or possessing with the intent to deliver heroin will be sentenced to no less than six years in prison depending on the amount of heroin.<sup>74</sup>

*1. A Closer Look at the Statutory Texts*

Many states, including Illinois,<sup>75</sup> have had these types of laws on the books since the 1980s but are just recently beginning to revive them.<sup>76</sup> Illinois passed its drug-induced homicide statute in 1988.<sup>77</sup> It makes it unlawful to deliver “a controlled substance to another, and . . . [if a] person’s death is caused by the injection, inhalation, absorption, or ingestion of any amount of that controlled substance[,]” then the deliverer has committed drug-induced homicide and faces

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69. *Death by Dealer*, *supra* note 9.

70. *Id.*

71. *Id.*

72. *Id.*

73. 720 ILL. COMP. STAT. 5/9-3.3 (2018).

74. 720 ILL. COMP. STAT. 570/401(a)(1)(A) (2018).

75. 720 ILL. COMP. STAT. 5/9-3.3. Illinois’s drug-induced homicide statute says, “A person commits drug-induced homicide when [they violate] . . . Section 401 of the Illinois Controlled Substances Act or Section 55 of the Methamphetamine Control and Community Protection Act by unlawfully delivering a controlled substance to another, and any person’s death is caused by the injection, inhalation, absorption, or ingestion of any amount of that controlled substance.” *Id.*

76. *Death by Dealer*, *supra* note 9.

77. 720 ILL. COMP. STAT. 5/9-3.3; James Buikema, *Punishing the Wrong Criminal for Over Three Decades: Illinois’ Drug-Induced Homicide Statute*, 2014 N. ILL. U. L. REV. 1, 1 (“The 85th General Assembly . . . passed the drug-induced homicide statute in 1988. Representative McCrackin expressed his disgust that the death penalty was taken out of the Drug Induced Homicide statute. McCrackin criticized the sponsor of the bill, Representative Shaw, as he presumed that some “scurrilous defense lawyer” made him take the death penalty out of the bill. Then Representative Countryman from DeKalb County, stepped in and said that ‘if defendants don’t have rights [to lobby] then our constitution doesn’t mean much.’ The purpose of addressing these legislative transcripts is not to show fault in what any legislator said, but to reveal exactly what the legislators intended to make a crime with this statute, and secondly to show how this intended purpose of the statute compares to how the statute has been used since 1988.”).

fifteen to sixty years in prison.<sup>78</sup> In numerous states over the past couple of years, prosecutors' focus has been on charging dealers with murder under these statutes as the heroin epidemic continues to permeate communities.<sup>79</sup>

The spotlight is on Illinois and a few other states because they have been leaders in prosecuting these heroin overdoses as murders in recent years.<sup>80</sup> Pennsylvania is another state that has been known for heavily prosecuting cases under its homicide statute, which was recently amended after the Pennsylvania Supreme Court ruled that it was unconstitutional, in part, because it did not contain the elements that are typically required to prove that a person committed an intentional murder.<sup>81</sup> The decision came in 1996 when Gloria Highhawk was convicted of homicide under Pennsylvania's "drug delivery causing death" statute as it existed at the time.<sup>82</sup> Highhawk was not a dealer and had not sold drugs before, but Steven Wilson, the decedent, had requested her to inject him with heroin, and she complied.<sup>83</sup>

On appeal, the Pennsylvania Supreme Court held that her conviction violated the Due Process Clause of the Fourteenth Amendment of the United States Constitution, and the decision prompted the state legislature to quickly revise its statute.<sup>84</sup> Under the new version of the Pennsylvania law, the state no longer has to prove that the dealer intentionally or recklessly caused the death of the overdose victim, but rather, need only prove that the drugs causing death were knowingly delivered.<sup>85</sup> States other than Illinois and Pennsylvania have also been amending their old laws or creating new legislation in an attempt to combat the heroin problem.<sup>86</sup>

Although the majority of these cases are prosecuted by the state's attorney under state drug laws, in recent years, the federal government has also been prosecuting these types of cases under Title 21 of the United States Code, The Controlled Substances Act of 1970.<sup>87</sup> The Act is a combination of over 200 federal

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78. 720 ILL. COMP. STAT. 5/9-3.3 ("A person who unintentionally kills an individual without lawful justification commits involuntary manslaughter if his acts whether lawful or unlawful which cause the death are such as are likely to cause death or great bodily harm to some individual, and he performs them recklessly, except in cases in which the cause of the death consists of the driving of a motor vehicle or operating a snowmobile, all-terrain vehicle, or watercraft, in which case the person commits reckless homicide. A person commits reckless homicide if he or she unintentionally kills an individual while driving a vehicle and using an incline in a roadway, such as a railroad crossing, bridge approach, or hill, to cause the vehicle to become airborne.").

79. *Death by Dealer*, *supra* note 9.

80. Millie Joy Humphrey, *Dead on Arrival: Illinois' Drug-Induced Homicide Statute*, 14 T.M. COOLEY J. PRAC. & CLINICAL L. 277, 279 (2013).

81. Ford Turner, *Harsh Anti-drug Law Applied Unevenly*, READING EAGLE (Apr. 29, 2016, 1:18 PM), <http://www.readingeagle.com/news/article/harsh-anti-drug-law-applied-unevenly&template=mobileart>; Walker, *supra* note 13.

82. *Commonwealth v. Highhawk*, 687 A.2d 1123, 1124 (Pa. Super. Ct. 1996).

83. *Id.*

84. *Id.*

85. Walker, *supra* note 13.

86. Humphrey, *supra* note 80, at 289; *see, e.g.*, 18 PA. CONS. STAT. § 2506 (2012) (illustrating Pennsylvania's amendment to their "Drug Delivery Resulting in Death" statute in 2014).

87. 21 U.S.C. § 841 (2018); Susan Zalkind, *Heroin Dealers Could Face Murder Charges Amid Crisis in New Hampshire*, THE GUARDIAN (Feb. 9, 2016, 9:51 AM), <https://www.theguardian.com/us-news/2016/feb/09/new-hampshire-heroin-fentanyl-drug-dealers-murder-charges> ("[S]tates, such as West Virginia,

drug laws that regulate the manufacture and distribution of controlled substances.<sup>88</sup> It separates the drugs into five categories, or “schedules,” based on their status in international treaties and their potential for abuse in relation to the medical benefits, if any, that they provide.<sup>89</sup> The schedules descend from Schedule I to Schedule V.<sup>90</sup> Schedule I includes the most harmful substances which have a high potential for abuse and provide no medical benefit whatsoever, such as heroin, ecstasy, LSD and, surprisingly to some, marijuana.<sup>91</sup> In contrast, Schedule V includes substances that are currently used for treatment in the United States and have a relatively low potential for abuse.<sup>92</sup>

As it was originally enacted, the Controlled Substances Act “tied the penalties for drug offenses to both the type of drug and the quantity involved, with no provision for mandatory minimum sentences.”<sup>93</sup> In 1986, sixteen years after the creation of the Controlled Substances Act and in response to the emergence of crack-cocaine, Congress enacted the Anti-Drug Abuse Act.<sup>94</sup> The Anti-Drug Abuse Act provided mandatory minimum sentences for offenses involving specific quantities of controlled-substances.<sup>95</sup> For example, it provided a mandatory ten-year sentence for certain drug offenses involving at least five kilograms of a substance or mixture containing a detectable amount of cocaine-related parts, such as coca leaves, cocaine, and cocaine salts.<sup>96</sup>

Additionally, and directly relevant to the focus of this Note, the Anti-Drug Abuse Act also included a “death results” enhancement, which appears and functions like a drug-delivery resulting in death offense, as discussed directly above.<sup>97</sup> Section 841 of the Anti-Drug Abuse Act contains both the minimum penalties for many offenders as well as the “death results” enhancement and the harsh penalty that goes along with it.<sup>98</sup> In subsection (a), the Act makes it unlawful for any person to “knowingly or intentionally manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance . . . [and] to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.”<sup>99</sup> If subsection (a) is violated involving one “kilogram or more of a mixture or substance containing a detectable amount of heroin,” then the person in violation will receive a sentence of ten

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Pennsylvania, and New York have passed or are working to pass new laws to go after suppliers in cases of fatal overdoses. Meanwhile, federal prosecutors who have leverage to charge dealers in cases of fatal overdose under the Controlled Substance Act are taking on similar cases across the country.”).

88. 21 U.S.C. § 812 (2018).

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *DePierre v. United States*, 564 U.S. 70, 74 (2011).

94. *Id.* at 74–75.

95. *Id.* at 75.

96. 21 U.S.C. § 841(b)(1)(A)(ii) (2018).

97. *Id.* § 841(b).

98. *Id.* § 841.

99. *Id.* § 841(a).

years to life in prison.<sup>100</sup> If, however, “death or serious bodily injury results from the use of such substance,” then the person in violation will receive a sentence of twenty years to life in prison.<sup>101</sup> Thus, if death results from the drug transaction, the seller will automatically receive a sentence that is ten years longer than the sentence they would have otherwise received.

## 2. *Mens Rea Requirement*

As can be seen through the language of the Anti-Drug Abuse Act, which is very similar to the language of Illinois’s, Pennsylvania’s, and many other states’ drug-induced homicide statutes, there is no mens rea (“guilty mind”) requirement included. In other words, the mental component involved in causing the death of the person that overdosed, which is typically an essential part of a murder statute, does not exist under these statutes.<sup>102</sup>

Rather, according to the statutory language, if death “results from” the use of such substance, then the suspect’s mental state with regards to the death is irrelevant.<sup>103</sup> There is, however, a “knowing or intentional” mens rea required for the manufacture and distribution of the drug.<sup>104</sup> This means that one must *knowingly* or *intentionally* manufacture, distribute, or dispense a controlled substance in order to be charged under subsection (a) of this part of the Act.<sup>105</sup> Thus, if someone dies as a result of the use of such substance, then the person who manufactured, distributed, or dispensed it will likely be on the hook for homicide.<sup>106</sup> Accordingly, if convicted, he or she will face twenty years to life in prison depending on the amount of drugs involved and the defendant’s prior convictions.<sup>107</sup>

Given that the mens rea element of a crime allows for differentiation between someone who set out to commit a crime and someone who did not want or mean to,<sup>108</sup> it is difficult to understand how a homicide statute can be lacking a mens rea requirement.<sup>109</sup> After all, the vast majority of homicide cases do not end in convictions without the government first proving that the defendant had the requisite mens rea as set forth in the statute.<sup>110</sup> In *Faircloth v. Starnes*, the defendant, Faircloth, argued that Illinois’s drug-induced homicide statute was

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100. *Id.*

101. *Id.*

102. *Id.* § 841.

103. *Id.* § 841(b).

104. *Id.* § 841(a).

105. *Id.*

106. *Id.* § 841(b).

107. *Id.*

108. *Mens Rea—A Defendant’s Mental State*, FINDLAW, <http://criminal.findlaw.com/criminal-law-basics/mens-rea-a-defendant-s-mental-state.html> (last visited Aug. 13, 2019).

109. See, e.g., Blair Talty, *New Jersey’s Strict Liability for Drug-Induced Deaths: The Leap from Drug Dealer to Murderer*, 30 RUTGERS L.J. 513, 524 (1999) (explaining that the most serious problem facing New Jersey’s drug-induced death statute is “the fact that a person can be subject to between ten and twenty years in prison without having had any knowledge or intent that the person to whom he sold drugs would die from a drug overdose attributable to those particular drugs”).

110. See *id.*

unconstitutionally vague because it is the only Illinois murder statute lacking a mens rea requirement that the defendant have “specific intent to kill or inflict great bodily harm.”<sup>111</sup> In that case, Faircloth gave the overdose victim, Sandra Parise, the cocaine that caused her death.<sup>112</sup> As a result, Faircloth was charged with drug-induced homicide under Illinois’s state statute, was convicted of all charges against him, and was sentenced to three consecutive prison terms totaling sixty years.<sup>113</sup> On appeal, the Illinois Appellate Court rejected Faircloth’s arguments, holding that “the drug-induced homicide statute is not so vague or overbroad as to render the statute unconstitutional.”<sup>114</sup>

The court relied on the analysis set forth in *People v. Boand*,<sup>115</sup> in which the defendant argued that the statute was vague for two reasons. First, it did not fulfill its intended purpose, which was to stop drug traffickers, but rather “improperly punished casual drug users who shared drugs with their fellow users.”<sup>116</sup> Second, it did not specify a mental state required to be guilty of the offense.<sup>117</sup> In agreement with the *Boand* court, and focusing on the latter of the defendant’s arguments, the *Faircloth* court concluded that the statute incorporates the “knowing” mental state from Section 401 of the Act—the manufacture or delivery portion.<sup>118</sup> It made a comparison to the felony murder statute, noting that “[j]ust as the felony murder statute imposes criminal liability for a death resulting from a forcible felony, the drug-induced-homicide statute imposes criminal liability for a death resulting from the knowing delivery of certain controlled substances.”<sup>119</sup> In other words, consistent with other strict liability crimes, the defendant derives his or her mental state from the underlying offense, which is intended.<sup>120</sup> Although the *Faircloth* court’s ruling seems plausible, it ignores the fact that drug-induced homicides are very distinguishable from murders that occur during the course of a felony and fall under the “felony murder rule.”

### 3. Causation: *But-for* and Foreseeability

Courts have struggled not only with the fact that 21 U.S.C. § 841 does not require a culpable mens rea, but also with the causation piece of a prosecutorial analysis.<sup>121</sup> In 2014, the Supreme Court of the United States addressed this issue head on.<sup>122</sup> In *Burrage v. United States*,<sup>123</sup> the overdose victim and long-time

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111. 720 ILL. COMP. STAT. 5/9-3.3 (2018); 853 N.E.2d 878, 883 (Ill. App. Ct. 2006).

112. *Faircloth*, 853 N.E.2d at 880.

113. *Id.*

114. *Id.* at 883.

115. See 838 N.E.2d 367 (Ill. App. Ct. 2005).

116. *Faircloth*, 853 N.E.2d at 883.

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. See *Burrage v. United States*, 571 U.S. 204, 216–18 (2014); see also *United States v. Burkholder*, 816 F.3d 607, 611 (10th Cir. 2016).

122. *Burrage*, 571 U.S. at 206.

123. *Id.*

drug user, Josh Banka, died after smoking and injecting a variety of drugs.<sup>124</sup> Accompanied by his wife, Banka purchased one gram of heroin from petitioner, Marcus Burrage, and immediately cooked and injected himself with some of the heroin.<sup>125</sup> Then, upon returning home, Banka used more heroin before his wife, hours later, found him dead on the bathroom floor.<sup>126</sup> As a result of his death, Burrage was charged with two counts of distributing heroin in violation of 21 U.S.C. § 841(a)(1), to which he pled guilty.<sup>127</sup> Count two, which was at issue on appeal, alleged that “Burrage unlawfully distributed heroin . . . and that ‘death . . . resulted from the use of th[at] substance’—thus subjecting him to the twenty-year statutory minimum.<sup>128</sup>

Considering Banka had used many different drugs directly leading up to his death, Burrage motioned for a judgment of acquittal arguing that Banka’s death did not “result from” heroin as required by the statute.<sup>129</sup> In other words, Burrage argued heroin was not the “but-for” cause of Banka’s death.<sup>130</sup> To speak to this at trial were two medical experts who testified regarding the cause of death.<sup>131</sup> Forensic toxicologist, Dr. Schwilke, “could not say whether Banka would have lived had he not taken the heroin . . . [but he] nonetheless concluded that heroin was a ‘contributing factor’ in Banka’s death, since it interacted with the other drugs” to cause Banka to stop breathing.<sup>132</sup> Medical examiner, Dr. McLemore, came to similar conclusions, stating that, had Banka not taken the heroin, his death would have been “[v]ery less likely.”<sup>133</sup> Burrage insisted that the court give a jury instruction requiring the government to prove that the heroin use “was the proximate cause of [Banka’s] death,” but the court rejected this and instead gave an instruction requiring proof that the heroin was a contributing cause of Banka’s death.<sup>134</sup> As a result, Burrage was convicted on both counts and sentenced to the mandatory minimum of twenty years in prison.<sup>135</sup> The Court of Appeals for the Eighth Circuit affirmed the convictions.<sup>136</sup>

The Supreme Court granted certiorari to determine whether one can be convicted under the “death results” provision “(1) when the use of the controlled substance was a ‘contributing cause’ of the death [rather than the sole or proximate cause], and (2) without separately instructing the jury that it must decide

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124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.* at 207.

130. *Id.*

131. *Id.* at 207–08.

132. *Id.* at 207.

133. *Id.*

134. *Id.* at 208.

135. *Id.*

136. *Burrage v. United States*, 687 F.3d 1015, 1018 (8th Cir. 2012).

whether the victim's death by drug overdose was a foreseeable result of the defendant's drug-trafficking offense."<sup>137</sup> The government argued that because addicts regularly take drugs in combination, like Banka did, that the statute should not require the typical but-for causation.<sup>138</sup> The Court, however, did not agree, holding instead that, "at least where use of the drug distributed by the defendant is not an independently sufficient cause of the victim's death or serious bodily injury, a defendant cannot be liable under the penalty enhancement provision . . . unless such use is a but-for cause of the death or injury."<sup>139</sup> The Court simply read Congress's language—death "resulting from" use of the drug that was unlawfully distributed (as opposed to a combination of factors)—and noted that, even when but-for causation cannot be proven, defendants may still likely serve substantial sentences for drug offenses.<sup>140</sup>

#### 4. *Is Sharing Considered Delivery?*

For the most part, these drug-induced homicide statutes refer to the illegal action as some version of "unlawfully delivering."<sup>141</sup> The primary issue in *People v. Coots* surrounded the meaning of "delivery" in Illinois's statute.<sup>142</sup> The narrow question posed was: can a person who separately procures the drug in the absence of a co-user and then physically transfers possession to the co-user (without intent to convey to a third party) be guilty of delivery?<sup>143</sup> The court answered in the affirmative.<sup>144</sup>

The case involved two friends, the defendant, Amanda Coots, and Rustin Cawthon.<sup>145</sup> During the afternoon of June 5, 2009, Cawthon called Coots and asked if she wanted to get a hotel room and "party."<sup>146</sup> The two spent a series of days checking in and out of rooms at a Super 8 Motel in McHenry, Illinois.<sup>147</sup> On the second day, Cawthon suggested that they get some heroin, and he took \$1,000 out of his bank account.<sup>148</sup> At Cawthon's request, Coots made some calls, and after no luck for a while, she was able to score about six bags of heroin for the two of them.<sup>149</sup> Cawthon paid for the heroin.<sup>150</sup> He insisted that he "go first," so Cawthon ingested his first bag of heroin while Coots used the only needle she had to use two bags simultaneously.<sup>151</sup> Then, Cawthon complained that he wasn't

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137. *Burrage*, 571 U.S. at 208.

138. *Id.* at 212–17.

139. *Id.* at 218–19.

140. *Id.* at 216–18; see 21 U.S.C. § 841(b)(1)(C) (2012).

141. 720 ILL. COMP. STAT. 570/401 (2012).

142. 968 N.E.2d 1151, 1156 (Ill. App. Ct. 2012).

143. *Id.* at 1153.

144. *Id.* at 1164–65.

145. *Id.* at 1153–54.

146. *Id.* at 1154.

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.* at 1155.

151. *Id.*



high and asked for another bag, but Coots told him, “You need to just wait.”<sup>152</sup> Cawthon kept begging and begging for more.<sup>153</sup> Coots told detectives, “I had the bags in my pocket, so I wasn’t going to give it to him.”<sup>154</sup> Eventually, she gave into the begging, handed him another bag, left the hotel room, and later explained to detectives that “it was his money, he paid for it.”<sup>155</sup>

The next morning, Cawthon was found dead in the motel room by an employee, and his autopsy revealed that he had died from the adverse effects of heroin.<sup>156</sup> As a result, Coots was charged and convicted of drug-induced homicide and sentenced to ten years in prison.<sup>157</sup> She appealed on the ground that she was not proven to be guilty beyond a reasonable doubt considering that the evidence showed that she, at most, only jointly possessed the fatal heroin and did not “deliver” it to Cawthon.<sup>158</sup>

In its long, detailed, and case-law-heavy opinion, the Illinois Appellate Court ultimately concluded that “a rational jury could find defendant guilty of delivering the fatal heroin and not merely possessing it jointly with Cawthon.”<sup>159</sup> To come to its conclusion, the court relied on a few different cases, including *United States v. Swiderski*,<sup>160</sup> which said that Congress intended to penalize drug offenses of a commercial nature more severely than illicit personal use because “commercial trafficking . . . tends to have the dangerous, unwanted effect of drawing additional participants into the web of drug use.”<sup>161</sup> The court concluded with helpful rule language drawing a clear line between joint possession and distribution:

[W]here two individuals simultaneously and jointly acquire possession of a drug for their own use, intending only to share it together, their only crime is simple joint possession, without any intent to distribute the drug further. Since both acquire possession from the outset and neither intends to distribute the drug to a third person, neither serves as a link in the chain of distribution. For purposes of the [federal statute,] they must therefore be treated as possessors for personal use rather than for further distribution.<sup>162</sup>

It is important to note that the unlawful delivery as it pertains to the statute does not include “the exchange of physical possession between two persons who jointly acquired and hold the drug for their own use.”<sup>163</sup> Rather, there must be something more than a “co-purchase by truly equal partners.”<sup>164</sup> Undoubtedly, the exact moment when co-purchasers turn into a seller and a buyer, however, is

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152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.* at 1153–54.

157. *Id.* at 1153.

158. *Id.*

159. *Id.* at 1162.

160. *Id.* at 1156.

161. 548 F.2d 445, 450 (2d Cir. 1977).

162. *Id.*

163. *Id.*

164. *People v. Coots*, 968 N.E.2d 1151, 1160 (Ill. App. Ct. 2012).

hard to ascertain. The Ninth Circuit attempted to further explain this gray area by noting that when one person acquires the drug himself and then physically transfers possession to another, he has “operated as the link between the person with whom he intended to share the [drug] and the drug itself.”<sup>165</sup> In that situation, the co-users are not “truly equal partners,” because one has taken “a more active role in . . . carrying-out the drug transaction.”<sup>166</sup>

Applying this standard that the *Coots* court discusses to the facts of the actual case demonstrates how arbitrary the distinction is between what the court refers to as “truly equal partners” and deliverer and user.<sup>167</sup> In *Coots*, the defendant and the victim were friends.<sup>168</sup> They seemed to be two low-level users due to the fact that Coots had a tough time getting in contact with someone who had the drugs.<sup>169</sup> It was initially Cawthon’s idea to “party” and use drugs, and he was the one that purchased them.<sup>170</sup> Coots was responsible for contacting the dealer and keeping the drugs in her pocket, but she only gave Cawthon more heroin after he repeatedly begged her for more.<sup>171</sup> Without knowing how the court ruled, it is likely that most people would not consider Coots to have “unlawfully delivered” drugs to Cawthon. Due to the nature of their relationship and events that took place, it could be concluded that the two participated equally in the entire drug transaction and drug use. The fact that the court considered the relationship in *Coots* to be that of a deliverer and user has its flaws.

##### 5. *Severity of the Punishment*

In addition to the disagreement regarding the mens rea, causation, and “unlawful delivery” portions of the analysis, there is also debate as to whether the punishment that attaches to these types of homicides is proportionate to the act committed.<sup>172</sup> As many state constitutions do, the Illinois Constitution requires that all penalties be determined according to the level of seriousness of the offense and with the purpose of attempting to restore the defendant back to useful citizenship.<sup>173</sup> In the State of Illinois, if a defendant is convicted of drug-induced homicide, they will face fifteen to thirty years in prison or thirty to sixty years if there are aggravating factors present, which cause an extended term to be added to the sentence.<sup>174</sup>

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165. *United States v. Wright*, 593 F.2d 105, 108 (9th Cir. 1979).

166. *People v. Edwards*, 702 P.2d 555, 559 n.5 (Cal. 1985).

167. *See Coots*, 968 N.E.2d at 1153.

168. *Id.* at 1153–54.

169. *Id.* at 1154.

170. *Id.*

171. *Id.* at 1155.

172. *See, e.g., Faircloth v. Starnes*, 853 N.E.2d 878, 878 (Ill. App. Ct. 2006).

173. ILL. CONST. art. I, § 11 (“All penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship. No conviction shall work corruption of blood or forfeiture of estate. No person shall be transported out of the State for an offense committed within the State.”).

174. 750 ILL. COMP. STAT. 5/9-3.3 (2018)

For comparison purposes, it is necessary to briefly discuss the other forms of homicide under Illinois law and the sentences they carry. Beginning with the most serious form of homicide, Illinois's first-degree murder statute says that a person commits first degree murder when they intentionally kill another person without legal justification or when someone is killed during the commission of a forcible felony.<sup>175</sup> First-degree murder carries a sentence of twenty to sixty years in prison, unless there are aggravating factors, in which case a life sentence may be handed down.<sup>176</sup> Second-degree murder is committed when a person acts under a sudden and intense passion from a serious provocation causing the death of another.<sup>177</sup> If convicted, the offender faces four to twenty years in prison or the alternative, which is probation for up to four years.<sup>178</sup> Lastly, in Illinois, a person commits involuntary manslaughter when they act recklessly and unintentionally kill someone without lawful justification if their acts were likely to cause death or great bodily harm to an individual.<sup>179</sup> Involuntary manslaughter does not mandate jail time and typically results in probation as an alternative to incarceration due to the lack of the defendant's specific intent to kill.<sup>180</sup>

In looking at Illinois's different types of homicides with respect to the severity of their punishment on a sliding scale, drug-induced homicide would fall in between first and second-degree murder.<sup>181</sup> Assuming that the punishment attached to the drug-induced homicide statute is proportionate to the acts committed, it seems as if, when enacting the statute, the Illinois Legislature viewed the acts of the drug supplier as fairly comparable to the acts of a first-degree murderer.<sup>182</sup> At the very least, they must have viewed them as *more* comparable to the acts of a first-degree murderer than they view the acts of a second-degree murderer to those of a first-degree murderer. Considering the different levels of mens rea that are required for each crime, there is a disconnect between first-degree, intentional murder, and drug-induced homicide and the punishments that attach to each of them.

This disconnect was the basis of one of the defendant's arguments in the *Faircloth* case.<sup>183</sup> Faircloth, the defendant, argued that the drug-induced homicide statute is unconstitutional, not only because it is vague, but also because of the Illinois Constitution's Proportionality of Punishment Clause.<sup>184</sup> Specifically, he asserted that the punishment he was facing was wholly disproportionate to the wrong the statute seeks to prevent, the delivery of a small amount of narcotics.<sup>185</sup>

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175. 720 ILL. COMP. STAT. 5/9-1 (2018). See generally *Murder/Manslaughter/Homicide*, JOHN D. IOAKIMIDIS, ATTORNEY AT LAW, <http://www.legaldefenderspc.com/murder-manslaughter-homicide.html> (last visited Aug. 13, 2019) [hereinafter *Murder/Manslaughter/Homicide*].

176. 720 ILL. COMP. STAT. 5/9-1; *Murder/Manslaughter/Homicide*, *supra* note 175.

177. See generally *Murder/Manslaughter/Homicide*, *supra* note 175.

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.*

182. See 720 ILL. COMP. STAT. 5/9-1 (2018).

183. *Faircloth v. Sternes*, 853 N.E.2d 878, 880–81 (Ill. App. Ct. 2006).

184. *Id.* at 881.

185. *Id.*

The court, however, rejected this argument, displeased with the defendant's "attempt to minimize the severity of his crime."<sup>186</sup> The court concluded that Faircloth's proportionate-penalties challenge was without merit, reasoning that "the possible sentencing range that the legislature has prescribed for drug-induced homicide is [not] so unconscionable as to shock the moral sense of the community."<sup>187</sup>

### III. ANALYSIS

Part III discusses both sides of the debate with respect to these drug-induced homicide laws. It explains the purpose that these laws were meant to serve by analyzing the legislative history as well as sharing some of the positive effects they have had. Conversely, this Part will also discuss the imperfect aspects of these laws, including the harm and unintended consequences they are causing.

#### A. *What Do Proponents Say?*

While these laws have their fair share of critics, there are also people who defend them, especially within the law enforcement community. Their argument is essentially centered on deterrence, claiming that these statutes will deter or prevent drug dealers from selling drugs. In fact, when asked his view, a retired Chicago Police Department ("CPD") captain answered that he believes dealers will be deterred if they know of the severe penalties associated with the charge and its widespread use.<sup>188</sup> When meeting recently with prosecutors and other CPD officials about using the charge more and more, the retired captain said, "I think it can be used to really send a chill down the back of the drug distributors . . . [it] could go all the way up the chain, all the way back up to the Mexican cartel."<sup>189</sup> The retired CPD captain is not alone. When asked about Louisiana's law holding dealers responsible for second-degree murder, a West Baton Rouge Assistant District Attorney said, "[i]t's a good law, if you ask me . . . [f]olks got to be prepared for the consequences when they deal dope."<sup>190</sup> Thus, there is a retributivist-type punishment argument lingering in the background of these laws, which is supported by the District Attorney's comment.

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186. *Id.* at 884.

187. *Id.*

188. Zak Koeske, *Experts Divided on Prosecuting Heroin Providers*, CHI. TRIB. (July 1, 2016, 5:33 PM), <http://www.chicagotribune.com/suburbs/daily-southtown/news/ct-sta-drug-induced-homicide-st-0703-20160630-story.html>.

189. *Id.*

190. *Man Faces Murder Charges after Girlfriend Dies of Overdose*, *supra* note 1.

B. *What Do Opponents Say?*

Although there are many proponents of these drug-induced homicide laws, there are also many who oppose them for a variety of reasons.<sup>191</sup> First, these drug-induced homicide laws are actually punishing the people they are intended to protect.<sup>192</sup> They serve as a disincentive for calling 911 and saving lives of overdose victims due to fear of police involvement.<sup>193</sup> Similarly, Good Samaritan Laws seem to be counteracted by these statutes.<sup>194</sup> Additionally, and potentially most importantly, these laws do not even achieve their goal of deterring the sale of drugs and reducing the number of overdoses that occur in the future.<sup>195</sup>

1. *Punish the Victims*

It is widely understood among experts in this field and people who have done extensive research on drug use and addiction that it is typically extremely hard to distinguish between the users and the sellers.<sup>196</sup> The majority of sellers, especially the street-level dealers, are also users and addicts who are selling to finance their own drug habits.<sup>197</sup>

Moreover, most of these drug-induced homicide statutes are often drafted poorly as to encompass drug delivery or aiding and abetting drug use, even if it is just between friends, family members, and/or acquaintances who use drugs together.<sup>198</sup> This was the case in *United States v. Boand*, where Boand and the victim were casual friends who had smoked marijuana and ingested methadone together before a night out.<sup>199</sup> The defendant asserted that Illinois's drug-induced homicide statute was unconstitutionally overbroad because it allows for anyone in the delivery chain to be on the hook for murder, despite the fact that the statute was originally intended to punish only "professional drug dealers."<sup>200</sup> The court rejected the defendant's argument noting that the statute applies to *any* person who knowingly delivers a controlled substance in violation of Section 401 of the

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191. *An Overdose Death Is Not Murder: Why Drug-Induced Homicide Laws Are Counterproductive and Inhumane*, DRUGPOLICY.ORG (Nov. 6, 2017), <http://www.drugpolicy.org/resource/DIH> [hereinafter *Drug Induced Homicide Laws*].

192. DRUG POLICY ALLIANCE, AN OVERDOSE DEATH IS NOT MURDER: WHY DRUG-INDUCED HOMICIDE LAWS ARE COUNTERPRODUCTIVE AND INHUMANE 41 (2017), [http://www.drugpolicy.org/sites/default/files/dpa\\_drug\\_induced\\_homicide\\_report\\_0.pdf](http://www.drugpolicy.org/sites/default/files/dpa_drug_induced_homicide_report_0.pdf) ("It is widely understood among experts who have studied drug markets that many sellers are people who are addicted and selling to support their own drug use. Moreover, the drug induced homicide laws are often drafted so broadly that they, in many cases, encompass drug delivery or aiding and abetting drug use." And this even includes friends or people who are using drugs together.).

193. *Drug Induced Homicide Laws*, *supra* note 191.

194. *Id.*

195. *Id.*

196. DRUG POLICY ALLIANCE, *supra* note 192, at 41.

197. *Drug Induced Homicide Laws*, *supra* note 191.

198. DRUG POLICY ALLIANCE, *supra* note 192, at 17.

199. *People v. Boand*, 838 N.E.2d 367, 375–77 (Ill. App. Ct. 2005).

200. *Id.* at 398.

statute.<sup>201</sup> The court went on to conclude that the statute was in fact constitutional, regardless of whether or not it precisely defines the class of people it applies to, reasoning that had the legislature “intended to limit the statute to apply only to ‘dealers’ or wholesale distributors of controlled substances, it would have used those terms and defined them.”<sup>202</sup>

Illinois’s drug-induced homicide statute, however, is not the only one that is leading to punishment of unintended targets.<sup>203</sup> New Jersey’s law, for example, has been used to “prosecute minors with no record or evidence of prior drug dealing, family members who engaged in drug use ‘recreationally,’ and ‘small time users,’ whom the legislature stated should be rehabilitated, not incapacitated,” despite the legislature’s intent for the law to affect upper-level dealers or “kingpins” in the organized drug trade.<sup>204</sup>

In October of 2016, a New York Representative, Tom Reed, introduced a bill that would allow federal prosecutors to charge dealers with life in prison and even the death penalty when they can be connected to an overdose caused by fentanyl-laced heroin.<sup>205</sup> Reed, like many other proponents of these types of homicide statutes, said that his law was not designed to go after simple users, but rather the “worst of the worst” by scaring dealers with murder charges.<sup>206</sup> Opponents, however, do not believe his scare tactics are going to work.<sup>207</sup> They say such legislation is ineffective at deterring the flow of drugs and most often just harms the people it is designed to protect.<sup>208</sup> Deterrence measures like these mandatory-minimum sentences for drug dealers have been around for decades and have yet to make a dent in drug supply, according to opioid-use researcher and professor, Ted Cicero.<sup>209</sup> Additionally, John Barry, the executive director of a New York-based public-health organization referred to the bill a “draconian response to a complicated issue . . . [that] will serve only to make our current crisis worse.”<sup>210</sup>

Unsurprisingly, twenty-five out of the thirty-two drug-induced homicide prosecutions identified in the early 2000s involved prosecutions of a friend of the overdose victim who didn’t participate in any significant drug dealing.<sup>211</sup> This statistic alone, along with many others, goes to show that, as a result of the way these laws are typically written, the very people that they are intended to

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201. *Id.* at 400.

202. *Id.*

203. *Drug Induced Homicide Laws*, *supra* note 191.

204. DRUG POLICY ALLIANCE, *supra* note 192, at 42.

205. Harrison Jacobs, *The Overdose Crisis is Bringing Back One of the Worst Policies of the ‘War on Drugs’*, BUS. INSIDER (Oct. 25, 2006, 9:50 AM), <http://www.businessinsider.com/drug-induced-homicide-policies-overdose-heroin-2016-10>.

206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.*

211. DRUG POLICY ALLIANCE, *supra* note 192, at 3.

protect—people who are on the brink of death as a result of their substance abuse—are the ones being punished.<sup>212</sup>

## 2. *Fentanyl-Laced Heroin*

As discussed previously in this Note,<sup>213</sup> it has been reported that fentanyl, a synthetic opiate that is generally manufactured and mixed with heroin in Mexico to increase its potency, is contributing to the increase in heroin overdoses.<sup>214</sup> Accordingly, many defendants who have recently been charged with drug-induced homicide have sold heroin containing some form of fentanyl, which has led to the death of another.<sup>215</sup> The problem with this lies in the fact that the vast majority of these street-level sellers supplying this extra potent heroin are likely unaware that it is laced with fentanyl.<sup>216</sup> Rather, they are likely users themselves who, like other street-level sellers, support their own addiction through selling opioids and are in desperate need of assistance and treatment.<sup>217</sup>

## 3. *Disincentive to Take Precaution*

The most commonly cited reason for not calling 911 in an emergency situation is “fear of police involvement.”<sup>218</sup> In response, at least thirty-five states have passed some form of “Good Samaritan” law, which provides “limited criminal immunity to those who seek medical assistance in the event of an overdose.”<sup>219</sup> It is widely recognized that reducing barriers to calling 911 has the potential to save victims of overdose from severe injury and death considering “the chance of surviving an overdose, like that of surviving a heart attack, depends greatly on how quickly one receives medical assistance.”<sup>220</sup>

The difference, though, between overdose emergencies and heart attacks is that “[w]itnesses to heart attacks rarely think twice about calling 911, but witnesses to an overdose often hesitate to call for help or, in many cases, simply

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212. Jacobs, *supra* note 205.

213. See *supra* Section II.A.

214. DRUG POLICY ALLIANCE, *supra* note 192, at 5.

215. *Id.* at 16–17.

216. *Id.* at 17.

217. *Id.*

218. *Id.* at 3.

219. *Id.*

220. *Good Samaritan Fatal Overdose Prevention Law*, DRUGPOLICY.ORG, <http://www.drugpolicy.org/911-good-samaritan-fatal-overdose-prevention-law> (last visited Aug. 13, 2019) [hereinafter *Good Samaritan*]; see *Drug Induced Homicide Laws*, *supra* note 191 (“Twenty states and the District of Columbia have enacted policies to provide limited immunity from arrest or prosecution for minor drug law violations for people who summon help at the scene of an overdose. New Mexico was the first state to pass such a policy and has been joined in recent years by Alaska, California, Colorado, Connecticut, Delaware, Florida, Georgia, Illinois, Louisiana, Maryland, Massachusetts, Minnesota, New Jersey, New York, North Carolina, Rhode Island, Vermont, Washington, and Wisconsin. Good Samaritan laws do not protect people from arrest for other offenses, such as selling or trafficking drugs, or driving while drugged. These policies protect only the caller and overdose victim from arrest and/or prosecution for simple drug possession, possession of paraphernalia, and/or being under the influence.”).

don't make the call."<sup>221</sup> First of all, it is likely that the witness is unaware of the existence of these Good Samaritan laws, let alone whether or not their particular state's law will protect them from prosecution if they do decide to lend a hand.<sup>222</sup> Another reason they don't call is because "Good Samaritan laws do not protect people from arrest for other offenses, such as selling or trafficking drugs, or driving while drugged. These policies protect only the caller and overdose victim from arrest and/or prosecution for simple drug possession, possession of paraphernalia, and/or being under the influence."<sup>223</sup>

Not surprisingly, drug-induced homicide is among the list of offenses of which people are not protected from arrest by "Good Samaritan" laws.<sup>224</sup> Accordingly, these laws "discourage people from seeking help for fear of prosecution for manslaughter or murder."<sup>225</sup> The majority of drug-induced homicide cases in Illinois involve a chance to save the life of an overdose victim, however, the defendants typically choose not to do anything because of their fear of prosecution.<sup>226</sup> This is alarming considering the fact that one of the very purposes of these laws is to reduce the number of heroin overdoses that occur in this country.<sup>227</sup> Rather, as most states do not provide immunity from these laws, it seems as if these drug-induced homicide laws are only causing additional overdose deaths.<sup>228</sup> Put differently, these laws may be preventing lives from being saved if it were not for these statutes and peoples' fear of police involvement.<sup>229</sup>

#### 4. *Lack of any Deterrent Effect*

As already discussed in this Note that one of the main purposes of drug-induced homicide statutes is to decrease the amount of people that overdose on illicit drugs and die, especially while in the midst of this nationwide heroin epidemic.<sup>230</sup> By deterring people from supplying drugs that could lead to these overdose deaths, the purpose of these statutes would be fulfilled. Yet, this is not what is happening. While these statutes may seem like deterrence mechanisms on their face, they are simply not deterring drug sales.<sup>231</sup>

Among both the general public and the academic and scientific communities, it is well established that "neither increased arrests nor increased severity of

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221. Press Release, Drug Policy All., 911 "Bad" Samaritan Law Sent to Ohio Governor Kasich (May 24, 2016), <http://www.drugpolicy.org/news/2016/05/911-bad-samaritan-law-sent-ohio-governor-kasich>.

222. See Shauna Miller, *The Sorry State of 'Good Samaritan' Laws*, CITYLAB (Jan. 27, 2015), <https://www.citylab.com/equity/2015/01/the-sorry-state-of-good-samaritan-laws/384793/> ("A person calling 911 to report an overdose is protected from prosecution for related crimes in just 21 states, and . . . it can be hard to know what your rights are in an O.D. emergency.").

223. *Alcohol, Drug and Mental Health News*, HCDRUGFREE (Mar. 20, 2017), <http://www.hcdrugfree.org/drug-alcohol-news/2017/3/20/good-samaritan-public-service-announcement>.

224. *Drug Induced Homicide Laws*, *supra* note 191.

225. *Id.*

226. *Id.*

227. *Id.*

228. *Id.*

229. *Id.*

230. See *supra* Section II.B.

231. *Drug Induced Homicide Laws*, *supra* note 191.



criminal punishment for drug-related offenses have resulted in less use (demand) or fewer sales (supply).”<sup>232</sup> In other words, these drug-induced homicide statutes and the lengthy sentences that attach to them have no deterrent effect.<sup>233</sup> Considering that Economics 101 tells us that supply follows demand, “[t]he supply chain for illegal substances is not eliminated because a single seller is incarcerated, whether for drug-induced homicide or otherwise.”<sup>234</sup> It is fairly likely that drug addicts, who are always chasing their next high, will continue to look for drugs regardless of which dealers are incarcerated. In fact, a handful of different studies “have found that the incarceration of people who sell drugs results in a ‘replacement effect,’ in which the market responds to the demand for drugs by replacing drug sellers sent to prison with either new recruits or by increased drug selling by actors already in the market.”<sup>235</sup> For example, one study concluded that the outcome of imprisoning drug sellers is the market opening up for another seller to take the incarcerated seller’s place.<sup>236</sup> Restated differently, in an open market, when there is demand, there will be supply. Thus, it can be said that our laws’ focus should be on decreasing the demand for heroin, which will, in turn, lead to a decrease in the supply, rather than attempting to first decrease the supply itself.

Although they may serve the purpose of punishing people who have done wrong, these drug-induced homicide laws have far too many faults. First, the punishment is disproportionate to the crime.<sup>237</sup> Furthermore, these statutes do not reduce the demand for drugs, nor do they, according to the data-driven “replacement effect” theory, reduce the amount of drug dealers in our society.<sup>238</sup>

##### 5. *Proof Issues*

When it comes to proving murder under drug-induced homicide statutes and showing that the dealer-defendant actually *caused* the resulting death, some prosecutors will argue that it is harder to show foreseeability than it is to show cause-in-fact. Given the dangerous nature of heroin, it is difficult to understand how this can be true. It is foreseeable that injecting, ingesting or snorting heroin, especially if laced with fentanyl, will lead to death, or at the very least, some sort of harm. What is less clear is that the deliverer of the drug is the *actual* cause of the user’s death.

The Supreme Court in *Burrage*<sup>239</sup> reversed the lower courts which held that Burrage may be found guilty if the drugs he distributed were a contributing cause to the victim’s death.<sup>240</sup> *Burrage* held that unless the distributed heroin is the but-

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232. *Id.*

233. *Id.*

234. *Id.*

235. *Id.*

236. *Id.*

237. *See supra* Section II.B.5.

238. *See supra* Section III.B.4.

239. 571 U.S. 204 (2014).

240. *Id.* at 207–08.

for cause of the victim's death, the distributor cannot be subjected to the heightened punishment under the drug-induced homicide portion of the Controlled Substances Act.<sup>241</sup> The Act uses "death results from" language, which is different from the Illinois statute, which says "death is caused by;" however, because both phrases essentially have the same meaning, the Court in *Burrage* equates the two in the indictment.<sup>242</sup> Thus, the holding in *Burrage* should apply to states' drug-induced homicide statutes as well.<sup>243</sup>

Regardless of this holding, which, on its face, simplifies the causation piece of the analysis, the but-for causation requirement of these statutes should be nearly impossible to prove. According to the Model Penal Code, conduct is the cause of the result when it is an antecedent but for which the result in question would not have occurred.<sup>244</sup> This means that, in order for one to be convicted of drug-induced homicide, the prosecutor must prove that, but for the defendant delivering heroin to the victim, the death would not have occurred.

In most, if not all instances, there are a number of reasons why the heroin will not be the true but-for cause of the victim. First of all, victims are likely drug addicts who are constantly chasing their next high.<sup>245</sup> Thus, even if victims do not obtain heroin or another illicit substance from the defendant in a drug-induced homicide case, addicts probably could have obtained drugs from someone else, which could also have led to their death. Additionally, but for the victims' personal decision to use the drug that led to their death, they would also not have died. This fact cannot be ignored. In many cases, most victims of homicide, whether it be first or second-degree murder or manslaughter, rarely consent to their own death; they likely do not give permission to someone to end their lives. In contrast, in looking at drug-induced homicide, some culpability can be attributed to the drug-using victim, assuming he or she made the conscious choice to use the drug. Essentially, there are multiple causes of a death that result from overdose, and not one of the causes, including the delivery of the drugs, is sufficient on its own.<sup>246</sup>

This idea has also been furthered by scholars in the field. In his book titled *Criminal Liability for Non-aggressive Death*, criminal law professor William Wilson argues that drug-induced homicide statutes should drop out of the manslaughter category altogether, unless there is an independent basis for liability, such as the lack of consent from the user.<sup>247</sup> He writes that the "argument is not simply that death is not a reasonably foreseeable consequence of drug supply. It may be. It depends."<sup>248</sup> Rather, as he discusses, using drugs is a risk, and a drug

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241. *Id.*; see also 21 U.S.C. § 841(b)(1)(C) (2018).

242. 21 U.S.C. § 841(b)(1)(C); *Burrage*, 571 U.S. at 218–19.

243. *Burrage*, 571 U.S. at 218–19.

244. MODEL PENAL CODE § 2.03.

245. See *supra* Section III.B.1.

246. William Wilson, *Dealing with Drug-Induced Homicide*, in CRIMINAL LIABILITY FOR NON-AGGRESSIVE DEATH 177, 189 (C.M.V. Clarkson & Sally Cunningham ed., Routledge 2016) (2008).

247. *Id.* at 185.

248. *Id.* at 189.

dealer who deals drugs to someone who overdoses is simply unlucky.<sup>249</sup> To be clear, Professor Wilson is not unsympathetically victim-blaming while placing absolutely no culpability on the dealer. Rather, he is asserting that drug users who overdose are victims to the disease of addiction, but not of murder or manslaughter.<sup>250</sup>

#### IV. RECOMMENDATION

Drug-induced homicide statutes hardly have any upside. Whether our goal is to punish dealers or to save lives, these laws are counterproductive for all of the reasons discussed above.<sup>251</sup> Thus, this Note recommends that these federal and state drug-induced homicide statutes be repealed altogether while necessarily still leaving drug manufacturing and delivery statutes in place. They “won’t bring our children back . . . [they] won’t make other children safer,” said Denise Cullen, a drug-policy activist and mother whose son died of an overdose in 2007.<sup>252</sup>

As previously mentioned, and perhaps surprisingly, President Trump does claim to stand by some of Obama’s initiatives for drug reform, including the Comprehensive Addiction and Recovery Act, signed into law in July of 2016.<sup>253</sup> He has also indicated that he plans to “expand access to treatment slots and end Medicaid policies that obstruct inpatient treatment, expand incentives to use drug courts and mandated treatment, and distribute widely naloxone/Narcan (opioid antidote to treat OD) to first responders and caregivers.”<sup>254</sup> This Note also argues that these are the types of programs and initiatives that should be pushed forward and implemented in order to combat this heroin epidemic, rather than the punishment-driven, decades-old drug-induced homicide statutes, which are only making the problem worse.

There are many alternatives to these statutes that could, unlike the statutes themselves, contribute to a decrease in demand and thus, a decrease in drug use overdose deaths. Some include an increase in the availability of drug courts and other forms of rehabilitation for addicts, such as treatment centers with intense, in-patient addiction therapy, fact-based education programs, and support groups.<sup>255</sup> Through these programs, which are typically offered as an alternative to probation or short-term incarceration, drug users would have the opportunity to receive the medical help that they need to treat their addiction in exchange for possible reduced sentences or dismissed charges.<sup>256</sup> Drug court as a form of punishment, for both drug users and dealers, is a much more utilitarian and equitable

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249. *Id.* at 185.

250. *Id.* at 192–93.

251. *See supra* Part III.

252. Jacobs, *supra* note 205.

253. Ehley, *supra* note 66.

254. McCarton Ackerman, *Donald Trump Releases Strategy to Address Opiate Epidemic*, FIX (Nov. 1, 2016), <https://www.thefix.com/donald-trump-releases-strategy-address-opiate-epidemic>.

255. *See Drug Induced Homicide Laws*, *supra* note 191.

256. *Id.*

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approach to punishment, unlike a murder charge, conviction, and long-term incarceration.

If, however, these heroin statutes are going to remain, they desperately need to be amended. First and foremost, they need to be altered in a way such that the high-level dealers or “kingpins,” those who were the original targets, are the only ones being charged, as opposed to low-level sellers and users who are desperate for treatment. This could be done by adding a *mens rea* requirement to the statute. Despite the comparisons made to felony-murder statutes, the crime of drug-induced homicide does not need to be and should not be one of strict liability with no *mens rea* requirement whatsoever for the resulting death. Felony-murder statutes involve no culpability on the part of the victim, but rather all of the culpability falls on the shoulders of the defendant committing the felony which leads to someone’s death.

Conversely, unlike felony-murder statutes, which also have downfalls of their own, the victims in the drug-induced homicide cases typically have *some* culpability with respect to their own death.<sup>257</sup> After all, by making the conscious choice to use a lethal drug (assuming they do), victims are putting themselves at risk. No illicit drugs, especially heroin and cocaine, are safe to inject, snort, or ingest. Arguably, an individual is choosing to risk their life by using any of these substances. Although it is extremely unfortunate that these users lose their lives to drugs, they have contributed to their own death by making the personal choice to use the fatal drug. It is more of an outcome of addiction rather than an intentional act on the part of the “dealer” or “deliverer,” who is many times a friend, family member, or a co-user. Therefore, regardless of the amount they are given or what the drug is “laced with,” victims of drug-induced homicide are distinguishable from victims of armed robbery or some other felony that results in death and implicates a felony-murder statute. If these statutes are to remain, it is vital that some *mens rea* requirement—knowingly, intentionally, or recklessly—be added. By adding a *mens rea* requirement, these drug-induced death cases would inherently be much harder to prove, limiting convictions to people whom the statute originally intended to punish.

## V. CONCLUSION

As this Note has explained, in order to “push back” on this addiction problem our country is facing, numerous states have been pursuing charges against the drug dealers in situations where someone has overdosed on the drugs they received.<sup>258</sup> Not only, however, are these statutes looking to press drug charges against these dealers, but surprisingly to most people, these prosecutors are looking to hold them responsible for murder.<sup>259</sup> Whether they are advancing new state legislation or reviving existing state statutes, prosecutors in at least twelve

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257. *See supra* Section III.B.5.

258. *Death by Dealer, supra* note 9.

259. *Id.*

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states are pursuing these types of charges as well as the federal government under the Controlled Substances Act.<sup>260</sup>

This Note detailed the wide array of reasons why these homicide statutes are inappropriately holding drug dealers strictly liable for homicide due to the lack of a mens rea requirement in the statute.<sup>261</sup> They are turning drug dealers, who are many times interchangeable with users, into murderers, which is not a deterrent for the dealers or the users. When one dealer becomes incarcerated, another one takes his place to keep up with the demand. As a result, the number of overdoses is not decreasing, and these statutes are not doing what the legislatures intended for them to do. Rather, they are strictly punitive in nature for everyone involved.<sup>262</sup> These statutes should be either repealed or completely revamped.<sup>263</sup>

Returning to where this Note began, everyone loses when an individual overdoses on heroin. Dana Farinick lost her life because of her own addiction. Marc and Kim Farinick lost their daughter to a terrible drug after doing everything in their power to protect and save her. Brandon also lost. He went from sitting on the couch getting high with his girlfriend to being charged with her murder. Who knew that sharing drugs with someone and intentionally killing someone were essentially the same thing?

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260. *Id.*

261. Walker, *supra* note 13.

262. See *Death by Dealer*, *supra* note 9; Walker, *supra* note 13.

263. See Walker, *supra* note 13.

