

TESTIMONY ON HB 1398

Criminal Law - Distribution of Heroin or Fentanyl Causing Serious Bodily Injury or Death

House Judiciary Committee

February 18, 2025

TESTIMONY IN OPPOSITION

Submitted by: **Amy Fettig, Co-Executive Director, Fair and Just Prosecution**

Honorable Chair & Members of the House Judiciary Committee:

I write on behalf of Fair and Just Prosecution (FJP) to express our opposition to HB 1398 - Criminal Law - Distribution of Heroin or Fentanyl Causing Serious Bodily Injury or Death. This bill would hold individuals suffering from addiction liable for overdose deaths they did not intend to cause and are not aware have even occurred, and it will do nothing to improve public safety.

FJP, a project of the Tides Center, is a national organization that brings together elected prosecutors as part of a nonpartisan network of leaders committed to a justice system grounded in fairness, compassion, and fiscal responsibility. The leaders we work with hail from over 60 jurisdictions — urban, suburban, and rural alike — and they collectively represent nearly 20% of our nation's population. We support measures that provide healthcare and services to those suffering from addiction, instead of those that seek longer and longer periods of incarceration for victims of a public health crisis.

The research is clear that laws criminalizing drug-induced homicide (DIH), like HB 1398, fail to deter drug use or distribution, prevent overdose victims from accessing medical help, and intensify distrust of law enforcement within drug-impacted communities. This bill is glaringly misaligned with decades of public health research and has the potential to exacerbate the devastating effects of the opioid epidemic on Maryland communities.

Although we are aware that proponents of this bill have stated that it is intended to target high-level drug distributors, it is written so broadly as to allow prosecutors to secure decades-long prison sentences against individuals who bear no meaningful culpability for an overdose death. The law's broad definition of distribution, without any requirement that the prosecution demonstrate mens rea or even knowledge on the part of the distributor, would all but ensure that it will be used to secure devastating prison sentences against vulnerable individuals who have played no part in driving, and have seen no profit from, the opioid crisis. For example, if two friends agree to split an order of fentanyl, and one of them reimburses the other for her half of the transaction before going on to overdose, the survivor could be prosecuted under this law. A

low-level courier who delivers a package containing a drug that leads to an overdose could face decades in prison, even if he had no way of knowing what was inside the package. Someone who picks up and pays for a package containing drugs as a favor for a friend or family member, and then accepts reimbursement for the expense, could face prosecution under this law if anyone goes on to experience an overdose as a result of using those drugs, whether or not they knew what was in.

Unfortunately, decades of research has made clear that such scenarios are not remotely far-fetched: although DIH laws are almost always framed around the intent to prosecute entrepreneurial drug sellers or “kingpins,” they are in practice almost exclusively used to prosecute and imprison low-level dealers or friends and family of the deceased.¹ Already, the amendments offered to this bill highlight the propensity of law enforcement perspective to prosecute and punish anyone who possesses, delivers or shares drugs that ultimately cause a death, despite their lack of knowledge of what they possess, deliver or share, and despite any life-saving measures they take to try to reverse overdoses. When legislatures fail to narrowly tailor DIH laws to apply only to high-level distributors, the most vulnerable inevitably bear the brunt of the law’s impact, regardless of legislative intent.

Moreover, this bill seeks to solve a non-existent problem; Maryland’s existing criminal statutes already provide ample mechanisms for prosecutors to hold accountable those who truly prey on and profit from individuals with opioid use disorder. For example, Maryland’s drug trafficking laws allow prosecutors to seek long prison sentences for large-scale drug distributors, and many jurisdictions in Maryland already seek manslaughter charges for traffickers whose drug sales result in deaths. Moreover, in Maryland, distributing fentanyl already carries a penalty of up to 30 years in prison. The General Assembly should focus on investments in prevention and treatment rather than doubling down on the colossal failures of drug criminalization.

The “war on drugs” has actually been a war on families, communities, and resources. As laid out in our [issue brief](#), laws criminalizing drug-induced homicide do not advance public safety or improve outcomes for those suffering from substance use disorder. As an organization committed to evidence-based solutions to this public health crisis, after listening to our network of prosecutors, we have found that research supports the following:

- DIH laws do not stop overdoses. Analyses of drug-induced homicide practices in jurisdictions in New Jersey, Tennessee, North Carolina, Illinois, Louisiana, and New York, found that despite dramatic growth in drug-induced homicide prosecutions, all of the jurisdictions experienced significant increases in overdose deaths, ranging from 7.6% to 20.1% in a single year.²

¹ See, e.g., Beletsky, L. (2019), *America's Favorite Antidote: Drug-Induced Homicide, Fatal Overdose, and the Public's Health*, Utah Law Review, 2019(4), 833, <https://dc.law.utah.edu/ulr/vol2019/iss4/4/>; Edwards, J. (2002), *Making Friends into Felons*, New Jersey Law Journal, 1, <https://www.law.com/njlawjournal/almID/900005371745/Making-Friends-Into-Felons/>; Davis, S. and Polcyn, B. (2017), *High-Level Drug Dealers Rarely Charged with Drug-Related Homicides as Wisconsin Death Toll Reaches 10k*, Fox 6 Now Milwaukee, <https://www.fox6now.com/news/high-level-drug-dealers-rarely-charged-with-drug-related-homicides-as-wisconsin-death-toll-reaches-10k>.

² Drug Policy Alliance (2017), *An Overdose Death Is Not Murder: Why Drug-Induced Homicide Laws Are Counterproductive and Inhumane*, 10, https://drugpolicy.org/sites/default/files/dpa_drug_induced_homicide_report_0.pdf.

- DIH laws discourage people who use drugs from reporting potentially reversible overdoses for fear of harsh criminal penalties. The most common reason people cite for not seeking medical attention is fear of law enforcement involvement.³
- So-called “good samaritan” exceptions to DIH laws do not encourage reporting of overdoses, and they are difficult and burdensome for defendants to prove.
- In practice, DIH laws have almost exclusively been used to prosecute and imprison low-level dealers or friends and family of the deceased, many of whom struggle with drug use themselves.⁴
- DIH laws obstruct actual efforts to disrupt large-scale distribution networks. Prosecutors and law enforcement need witness cooperation in order to prosecute trafficking offenses, and these laws push those witnesses further into hiding.
- Racial disparities are already particularly pronounced in the application and enforcement of drug laws, and DIH prosecutions perpetuate those disparities.⁵
- DIH prosecutions can further drain already overburdened and underfunded district attorney and coroner offices, while providing no public safety benefit.⁶

Thousands of Marylanders have lost their lives to this public health crisis, and the tragedy of the overdose epidemic throughout our nation cannot be overstated. The individuals for whom this bill is named deserved an opportunity at treatment, rehabilitation and recovery. Unfortunately, this bill will do nothing to prevent others from succumbing to opioid overdose and death.⁷ Under this bill, if any one of the named individuals had traded their drugs to another person, or shared them in exchange for something as small as a soda or cigarette, and the person with whom they shared or traded their drugs then died, they would not have received the treatment they needed to get healthy; they would have been prosecuted and potentially sentenced to up to twenty years in prison. The loss of each of these individuals is tragic beyond measure, but this bill holds only the potential to create more and more tragedies.

When sheriff or police departments recommend charges against individuals who lack any intent to cause harm and had minimal involvement in the trafficking of drugs, local prosecutors are put in an extremely difficult position of having to decline to file charges, an action that can have severe political consequences. If this bill is passed, the legislature will have no ability to curb the prosecutions that result from this law; those prosecutions will undoubtedly be overwhelmingly unjust, drive mass incarceration, and fail to prevent drug-related harms.

³ Tracy, M. et al. (2005), *Circumstances of Witnessed Drug Overdose in New York City: Implications for Intervention, Drug and Alcohol Dependence*, 79(2), 181-190, <https://www.sciencedirect.com/science/article/abs/pii/S0376871605000505?via%3Dihub>.

⁴ Beletsky, L. (2019), *America’s Favorite Antidote: Drug-Induced Homicide in the Age of the Overdose Crisis*, Utah Law Review, 2019(4), 833-890, <https://dc.law.utah.edu/cgi/viewcontent.cgi?article=1219&context=ulr>.

⁵ For example, in an Illinois county with a Black population of under 2%, 35% of their drug-induced homicide defendants are Black, and in a Minnesota county with a Black population of 13%, at least eight of 11 cases (72%) prosecuted were against Black defendants. See Drug Policy Alliance, *supra* note 2 at 47.

⁶ For example, Hamilton County, Ohio, reported spending at least \$750,000 per year to investigate drug-induced homicide cases, even as overdose rates in the county nearly doubled between 2012 and 2016. See *Id.* at 24.

⁷ There is no empirical evidence that harsher punishment reduces the supply of, or demand for, drugs. See Pew Charitable Trusts (2017), *Letter to The President’s Commission on Combating Drug Addiction and the Opioid Crisis RE: The Lack of a Relationship between Drug Imprisonment and Drug Problems*, <https://www.pewtrusts.org/-/media/assets/2017/06/the-lack-of-a-relationship-between-drug-imprisonment-and-drug-problems.pdf>.

Fair and Just Prosecution urges the House Judiciary Committee to oppose HB1398. I appreciate your time and consideration of this testimony. Thank you.

Sincerely,

Amy Fetting
Co-Executive Director
Fair and Just Prosecution



FAIR AND JUST PROSECUTION

Promoting justice through leadership and innovation

ISSUES AT A GLANCE

Drug-Induced Homicide Prosecutions

*Fair and Just Prosecution (FJP) brings together elected district attorneys¹ as part of a network of like-minded leaders committed to change and innovation. FJP hopes to enable a new generation of prosecutive leaders to learn from best practices, respected experts, and innovative approaches aimed at promoting a justice system grounded in fairness, equity, compassion, and fiscal responsibility. In furtherance of those efforts, FJP's "Issues at a Glance" briefs provide district attorneys with information and insights about a variety of critical and timely topics. These papers give an overview of the issue, key background information, ideas on where and how this issue arises, and specific recommendations to consider. They are intended to be succinct and to provide district attorneys with enough information to evaluate whether they want to pursue further action within their office. For each topic, Fair and Just Prosecution has additional supporting materials, including model policies and guidelines, key academic papers, and other research. If your office wants to learn more about this topic, we encourage you to contact us.**

SUMMARY

This is one of a series of FJP's "Issues at a Glance" briefs addressing strategies for improving responses to overdose deaths and incorporating harm reduction approaches into prosecutors' work. As prosecutors face the tragedy of rising overdose deaths in their communities, this series of briefs urges them to embrace interventions grounded in the philosophy of harm reduction.²

This brief focuses on drug-induced homicide prosecutions. It describes why they are inherently problematic, while offering more effective, humane, and fiscally responsible alternatives. It is intended as a guide for prosecutors who are grappling with how to

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¹ The terms "district attorney," "DA," or "elected prosecutor" are used generally to refer to any chief local prosecutor, including State's Attorneys, Prosecuting Attorneys, and Attorneys General with local jurisdiction.

² See Fair and Just Prosecution (2019), *Harm Reduction Responses to Drug Use*, https://www.fairandjustprosecution.org/staging/wp-content/uploads/2019/08/FJP_Brief_HarmReduction.pdf.

"Rather than relying on medical science, our leaders have been influenced by the same misguided approaches that undergirded the 'war on drugs' in the 1980s – fear, stigma, and racism."

— KING COUNTY (SEATTLE, WA) PROSECUTING ATTORNEY DAN SATTERBERG

respond effectively to an increased number of overdose deaths in their communities and seeking to do so with evidence-based and compassionate approaches.

“Drug-induced homicide” (DIH) prosecutions – the practice of charging individuals who supply drugs that result in a fatal overdose with homicide, even in the absence of specific intent to cause death – have dramatically increased in the wake of the overdose crisis. While an estimated 28 individuals faced DIH prosecutions in 2007, close to 700 DIH cases were filed in 2018 based on media reports.³ This brief outlines the evidence regarding DIH prosecutions, including their inefficacy in reducing overdoses, the proportionality and racial injustice concerns they raise, and their role in ultimately exacerbating the harms of the overdose crisis. The brief recommends that prosecutors cease to seek DIH charges absent evidence of specific intent to kill, and delineates more effective approaches that have the potential to save lives.

BACKGROUND

Fatal drug overdoses in the United States increased by 539% between 1999 and 2021.⁴ The Covid-19 pandemic has only intensified that trend: more than 107,000 people died of a drug overdose in 2021 – the highest number of American overdose deaths ever recorded in a 12-month period.⁵ The overdose death toll is greater than the combined deaths from car crashes⁶ and gun shots.⁷

Despite growing public recognition that the overdose crisis requires public health solutions, not carceral and punitive responses,⁸ some local and federal prosecutors have responded to this rise in overdose deaths by dramatically increasing the rate at which they pursue drug-induced homicide charges (also known as “drug delivery resulting in death” in some jurisdictions). Since their introduction in the 1980s, drug-induced homicide laws have spread to 23 states, the District of Columbia, and the federal system.⁹ DIH prosecutions remained rare until the onset of the current overdose crisis, and the rate of such charges varies widely across the United States. An analysis of media mentions of DIH prosecutions between 2011 and 2016 showed an increase of over 300% (from 363 to 1,178), and found that since 2011 midwestern states (such as Ohio, Wisconsin, Illinois, and Minnesota) have been the “most aggressive” in pursuing these cases.¹⁰

³ Health in Justice Action Lab (2021), *Drug-Induced Homicide*, Northeastern University School of Law, <https://www.healthinjustice.org/drug-induced-homicide>.

⁴ CDC WONDER, National Center for Health Statistics (2021), *Multiple Cause of Death 1999-2020*, <https://wonder.cdc.gov/mcd.html>; CDC, National Center for Health Statistics (2022), *U.S. Overdose Deaths in 2021 Increased Half as Much as in 2020 – But Are Still Up 15%*, https://www.cdc.gov/nchs/pressroom/nchs_press_releases/2022/202205.htm.

⁵ Ahmad, F.B., Rossen, L.M., and Sutton, P. (2021), *Provisional drug overdose death counts*, National Center for Health Statistics, <https://www.cdc.gov/nchs/nvss/vsrr/drug-overdose-data.htm>.

⁶ National Highway Traffic Safety Administration (2022), *Newly Released Estimates Show Traffic Fatalities Reached a 16-Year High in 2021*, <https://www.nhtsa.gov/press-releases/early-estimate-2021-traffic-fatalities>.

⁷ Gun Violence Archive (2021), *Past Summary Ledgers*, <https://www.gunviolencearchive.org/past-tolls>.

⁸ Pew Research Center (2014), *America’s New Drug Policy Landscape*, <https://www.pewresearch.org/politics/2014/04/02/americas-new-drug-policy-landscape/>.

⁹ Prescription Drug Abuse Policy System (2019), *Drug Induced Homicide Laws*, <http://pdaps.org/datasets/drug-induced-homicide-1529945480-1549313265-1559075032>.

¹⁰ Drug Policy Alliance (2017), *An Overdose Death Is Not Murder: Why Drug-Induced Homicide Laws Are Counterproductive and Inhumane*, 11, https://drugpolicy.org/sites/default/files/dpa_drug_induced_homicide_report_0.pdf.

The stated intent of many DIH laws is to prevent overdoses by removing predatory drug sellers from the streets, holding manufacturers and “kingpins” accountable, and deterring future sales.¹¹ In practice, however, they often serve to criminalize the family and friends of the decedent¹² – people who may struggle with substance use themselves – and there is no evidence that drug-induced homicide prosecutions reduce overdose deaths.¹³ In contrast, there is evidence that such prosecutions often have significant negative unintended consequences, such as eroding the efficacy of critical Good Samaritan laws and deterring people from calling 911 when witnessing an overdose.¹⁴ Approaches to the overdose crisis that are grounded in public health, rather than criminal enforcement, have been met with greater success and provide a more humane response to these tragic cases.

CONCERNS REGARDING DRUG-INDUCED HOMICIDE PROSECUTIONS

As noted, drug-induced homicide prosecutions raise a number of serious concerns, including that they do not alleviate the risk of fatal overdoses; are ineffective as a deterrent to drug use, drug sales, and overdose deaths; can be legally problematic and consume significant resources; often target friends and family members; and worsen racial disparities in the system. This section discusses these concerns in greater detail.

A. DIH Prosecutions Can Exacerbate the Risk of Fatal Overdoses

There is no empirical evidence that DIH prosecutions save lives. Analyses of drug-induced homicide practices in jurisdictions in New Jersey, Tennessee, North Carolina, Illinois, Louisiana, and New York, found that despite dramatic growth in drug-induced homicide prosecutions, all of the jurisdictions experienced significant increases in overdose deaths, ranging from 7.6% to 20.1% in a single year.¹⁵

It is not surprising that DIH prosecutions are associated with an increase in the risk of fatal overdoses. Urgent medical attention, often including the administration of naloxone, is essential for reversing overdoses.¹⁶ And often the greatest barrier to urgent medical attention is fear of arrest and prosecution. The most common reason people cite for not seeking medical attention

¹¹ Phillips, K. (2020), *From Overdose to Crime Scene: The Incompatibility of Drug-Induced Homicide Statutes with Due Process*, Duke Law Journal, 70, 659-704, <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=4049&context=dlj>.

¹² Walker, J. (2017), *Prosecutors Treat Opioid Overdoses as Homicides, Snagging Friends, Relatives*, The Wall Street Journal, <https://www.wsj.com/articles/prosecutors-treat-opioid-overdoses-as-homicides-snagging-friends-relatives-1513538404>.

¹³ Drug Policy Alliance, *supra* note 10 at 40.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Chimbar, L. and Moleta, Y. (2018), *Naloxone Effectiveness: A Systematic Review*, Journal of Addictions Nursing, <https://pubmed.ncbi.nlm.nih.gov/30180002/>.

“I need the friends and roommates and cousins and dorm mates, I need them calling 911 immediately and I need that message to be clear. I need them to be reassured that I’m not going to throw a homicide charge against them for doing so.”

during an overdose is fear of police involvement.¹⁷ Indeed, in one study, participants stated – unprompted – that fear of an arrest stemming from the sale of drugs that result in an overdose death would deter them from calling 911.¹⁸

Good Samaritan laws (or 911 Immunity laws), which grant immunity from prosecution to those individuals who call for medical assistance in an overdose emergency, are designed to address that barrier. Studies demonstrate that Good Samaritan laws can decrease opioid-related overdose deaths in states that adopt them.¹⁹ Forty-seven states and the District of Columbia have passed Good Samaritan laws, but the vast majority only provide protection for low-level drug offenses.²⁰ Only three states – Vermont, Delaware, and Rhode Island – provide immunity from charges resulting from an accidental overdose death if a person seeks medical assistance.²¹ In the other 44 states, the threat of DIH prosecution undercuts the efficacy of Good Samaritan laws, and potentially deters individuals from seeking life-saving assistance.²²

Furthermore, criminalization itself can fuel fatal overdoses. Many of the people who face DIH charges are people who use drugs.²³ Medication-assisted treatment (MAT)²⁴ remains difficult to access. For those who are incarcerated, MAT is even more limited, and upon release from incarceration, individuals face a risk of overdose 130 times higher than the average adult.²⁵ The criminalization of people who use drugs can also create barriers to employment, housing, and treatment,²⁶ all of which can lead to further destabilization and, in turn, increase both drug use and overdoses.²⁷ Likewise, criminalization increases the stigma associated with drug use, and research indicates that the negative and frequent experience of being stigmatized is a major factor in why individuals decline to seek and complete substance use treatment or utilize harm reduction services, such as sterile syringe programs.²⁸

¹⁷ Tracy, M. et al. (2005), *Circumstances of Witnessed Drug Overdose in New York City: Implications for Intervention, Drug and Alcohol Dependence*, 79(2), 181-190, <https://www.sciencedirect.com/science/article/abs/pii/S0376871605000505?via%3Dihub>.

¹⁸ Latimore, A. and Bergstein, R. (2017), “Caught with a Body” Yet Protected by Law? Calling 911 For Opioid Overdose in the Context of the Good Samaritan Law, *International Journal of Drug Policy*, 50, 82-89, <https://pubmed.ncbi.nlm.nih.gov/29040841/>.

¹⁹ Government Accountability Office (2021), *Most States Have Good Samaritan Laws and Research Indicates They May Have Positive Effects*, <https://www.gao.gov/assets/gao-21-248.pdf>.

²⁰ *Id.*

²¹ Drug Policy Alliance, *supra* note 10 at 40; Office of the Rhode Island Attorney General (2018), Press Release Regarding H7715, <https://www.ri.gov/press/view/33459>.

²² *Id.*

²³ See Beletsky, L. (2019), *America’s Favorite Antidote: Drug-Induced Homicide in the Age of the Overdose Crisis*, *Utah Law Review*, 2019(4), 833-890, <https://dc.law.utah.edu/cgi/viewcontent.cgi?article=1219&context=ulr>.

²⁴ Sometimes also referred to as “medications for addiction treatment.”

²⁵ See generally, Beletsky, L. et al. (2015), *Fatal Re-Entry: Legal and Programmatic Opportunities to Curb Opioid Overdose Among Individuals Newly Released from Incarceration*, *Northeastern University Law Journal*, 7(1), 155-215, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2628297.

²⁶ *Id.*

²⁷ Borden, T. (2016), *Every 25 Seconds: The Human Toll of Criminalizing Drug Use in the United States*, Human Rights Watch, <https://www.hrw.org/report/2016/10/12/every-25-seconds/human-toll-criminalizing-drug-use-united-states>.

²⁸ *Id.* See also Bergstein, R. et al. (2021), *Refusal to accept emergency medical transport following opioid overdose, and conditions that may promote connections to care*, *International Journal of Drug Policy*, 97, <https://pubmed.ncbi.nlm.nih.gov/34062289/>; McGinty, E. and Barry, C. (2020), *Stigma Reduction to Combat the Addiction Crisis – Developing an Evidence Base*, *The New England Journal of Medicine*, 382, 1291-1292, <https://www.nejm.org/doi/full/10.1056/NEJMp2000227>.

For all of these reasons, utilizing prosecutorial power to pursue these charges is misguided and may lead to further harm among individuals and communities hit hardest by the overdose epidemic.

B. DIH Prosecutions Do Not Reduce Drug Sales and Use

Four decades after the start of the “War on Drugs” and the ensuing escalation of criminal penalties for drug use and sales, there is no empirical evidence that harsher punishment reduces the supply of, or demand for, drugs.²⁹ In fact, a recent 50-state survey found that higher rates of incarceration for drug crimes did not translate into lower rates of drug use, arrests, or overdose deaths.³⁰ Additionally, the Office for National Drug Control Policy (ONDCP) determined that despite increased consequences, the rate of use of illegal drugs has continued to rise, from 6.7% of Americans age 12 and older in 1990 to 9.2% in 2012.³¹ Indeed, it is well established that the harms caused by the drug war and mass incarceration³² ultimately fuel the underlying drivers of substance use – including social isolation, lack of economic opportunities, trauma, mental health issues, high-stress environments, and family instability. And while DIH laws increase the potential penalties and prison sentences that drug sellers face, the research clearly shows that piling on incarceration does not improve public safety.³³

C. DIH Laws Are Rarely Employed Against High-Level “Kinpins” and Large-Scale Sellers

DIH laws are premised on the theory that they will reduce supply by incarcerating and eliminating entrepreneurial drug sellers or “kingpins.”³⁴ In Vermont, for example, legislators explicitly stated in legislation authorizing drug-induced homicide prosecutions that the provision was not intended to be directed at small-scale sellers and users.³⁵ In practice, however, DIH laws have almost exclusively been used to prosecute and imprison low-level dealers or friends and family of

²⁹ Pew Charitable Trusts (2017), *Letter to The President’s Commission on Combating Drug Addiction and the Opioid Crisis RE: The Lack of a Relationship between Drug Imprisonment and Drug Problems*, <https://www.pewtrusts.org/-/media/assets/2017/06/the-lack-of-a-relationship-between-drug-imprisonment-and-drug-problems.pdf>.

³⁰ *Id.*

³¹ Drug Policy Alliance, *supra* note 10 at 39.

³² Nosrati, E. et al. (2019), *Economic decline, incarceration, and mortality from drug use disorders in the USA between 1983 and 2014: an observational analysis*, *Lancet Public Health*, 4, 326-333, <https://www.thelancet.com/action/showPdf?pii=S2468-2667%2819%2930104-5>.

³³ Stemen, D. (2017), *The Prison Paradox: More Incarceration Will Not Make Us Safer*, Vera Institute of Justice, https://www.vera.org/downloads/publications/for-the-record-prison-paradox_02.pdf.

³⁴ Knight, J.H. (2004), *The First Hit’s Free...Or Is It? Criminal Liability for Drug-Induced Death in New Jersey*, *Seton Hall Law Review*, 34, 1327-1352, <https://scholarship.shu.edu/cgi/viewcontent.cgi?article=1263&context=shlr>.

³⁵ Drug Policy Alliance, *supra* note 10, at 9.

“It is this individual look at the facts and circumstances of each case and individual accused of a crime that, we believe, creates the best opportunity for justice for victims, the public, and the defendant, and enhances the credibility of the criminal legal system’s response to the more nuanced approach to drugs demanded in this day and age.”

the deceased.³⁶ This is likely in part due to the challenge of proving charges against drug sellers two or three levels removed from the actual death, as compared to pursuing charges against someone who was present at the scene of the overdose.³⁷

In the early 2000s in New Jersey, 25 out of 32 drug-induced homicide prosecutions were of friends of the decedents who did not regularly sell drugs.³⁸ In southeastern Wisconsin, an analysis of 100 drug-induced homicide prosecutions similarly found that close to 90% of the defendants were either friends or relatives of the decedent or low-level dealers selling to support their own drug use.³⁹ And in Illinois, a review of drug-induced homicide prosecutions indicated that the person charged was typically the last person who was with the decedent before their death and was often a friend, rather than a drug supplier.⁴⁰ Nationally, a study of media reports of drug-induced homicide prosecutions between 2000 and 2016 revealed that half of those charged were social contacts of the deceased, not traditional “dealers,” and those who were deemed “dealers” were at the very bottom of the trafficking chain.⁴¹

As these analyses make clear, DIH laws consistently fail to live up to their legislative intent, and instead simply deepen cycles of harm and trauma by ensnaring the loved ones of the deceased in the criminal legal system.

D. Some DIH Prosecutions Can Implicate Constitutional and Evidentiary Concerns

Drug-induced homicide laws come in various forms, but they typically expand the circle of liability for a death beyond those who possess the specific intent to kill or seriously injure to all individuals who intentionally supplied a drug to the decedent and understood that the substance was illicit. “Supplying,” “transferring,” or “delivering” the drug is often construed broadly to include giving the drug to the decedent without remuneration, using or sharing a supply with the decedent, or even helping the decedent use their own supply.⁴² Such statutes generally do not require a specific knowledge of the nature of the illicit substance, meaning that defendants can be held liable, for example, for unknowingly sharing fentanyl-adulterated heroin with the decedent, which

³⁶ This misalignment between the legislative intent of DIH or “drug delivery resulting in death” statutes and their real-world implementation drew notice in Virginia, causing then-Virginia Gov. Ralph Northam to veto an expansion of the state’s felony murder statute in 2019, stating: “While I share the goal of addressing the opioid crisis and ensuring drug dealers are punished for supplying dangerous drugs, this bill goes beyond drug dealers and would punish individuals who are themselves struggling with addiction. The way to help individuals struggling with addiction is to ensure they receive proper treatment.” Northam, R. (2019), *Press Release: Governor Northam Vetoes Legislation with Potential Inadvertent Consequences for Individuals Struggling with Addiction*, <https://www.governor.virginia.gov/newsroom/all-releases/2019/may/headline-840389-en.html>.

³⁷ Shuler, J. (2018), *Overdose and Punishment*, The New Republic, <https://newrepublic.com/article/150465/prosecutors-reviving-reagan-era-drug-induced-homicide-laws>.

³⁸ Edwards, J. (2002), *Making Friends into Felons*, New Jersey Law Journal, 1, <https://www.law.com/njljournal/almID/900005371745/Making-Friends-Into-Felons/>.

³⁹ Polcyn, B. (2017), *High-Level Drug Dealers Rarely Charged with Drug-Related Homicides as Wisconsin Death Toll Reaches 10k*, Fox 6 Now Milwaukee, <https://www.fox6now.com/news/high-level-drug-dealers-rarely-charged-with-drug-related-homicides-as-wisconsin-death-toll-reaches-10k>.

⁴⁰ Gutowski, C. (2014), *State Drug Policy Reflects Opposing Sides*, Chicago Tribune, <https://www.chicagotribune.com/news/ct-xpm-2014-02-03-ct-drug-homicides-met-20140203-story.html>.

⁴¹ Beletsky, L., *supra* note 23.

⁴² Phillips, K. (2020), *From Overdose to Crime Scene: The Incompatibility of Drug-Induced Homicide Statutes with Due Process*, Duke Law Journal, 70, 659-704, <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=4049&context=dlj>.

is much more likely to lead to a fatal overdose than heroin alone. Indeed, there may be legitimate constitutional concerns that the causal chain in many drug-induced homicide prosecutions is overly tenuous or that such statutes are void for vagueness.

Furthermore, actual causation may be challenging to prove beyond a reasonable doubt in many DIH cases given the prevalence of more than one illicit substance in many overdose deaths. However, these legal questions are rarely litigated given the extraordinarily high potential sentences at stake in DIH prosecutions, which often prompt defendants to accept plea deals. Simply threatening harsh DIH penalties can prompt a guilty plea and lead to a waiver of rights.

E. DIH Prosecutions Consume Scarce Criminal Justice Resources

DIH prosecutions can further drain already overburdened and underfunded district attorney and coroner offices, while providing no public safety benefit. Beyond the costs of incarceration itself (now estimated nationally at more than \$182 billion per year⁴³), taxpayers can be liable for significant investigatory expenses throughout the prosecution. For example, Hamilton County, Ohio, reported spending at least \$750,000 per year to investigate drug-induced homicide cases, even as overdose rates in the county nearly doubled between 2012 and 2016.⁴⁴ Likewise, the coroner in Westmoreland County, Pennsylvania, lamented the aggressive position of the elected prosecutor in regard to these cases, explaining that investigations of drug-induced homicide cases cost \$3,000 each for an already cash-strapped office.⁴⁵

Such resources could be better spent pursuing serious violent crime and advancing office priorities that will have a positive impact on promoting safer and healthier communities. Support for prevention and treatment is also critical, and DAs can and should use their position to advocate for more funding and public support for harm reduction strategies that are proven to not only reduce overdoses, but also often provide cost savings over time.

F. DIH Laws Perpetuate Racial Disparities

Racial disparities are already particularly pronounced in the application and enforcement of drug laws, and DIH prosecutions perpetuate those disparities. While the rates of drug use by Black and white people are similar, Black people are incarcerated for drug offenses at a rate ten times higher than that of whites.⁴⁶ Black people represent 5% of illicit drug users, but 29% of those arrested and 33% of those incarcerated for drug offenses, according to the NAACP.⁴⁷ While very limited data is available, those disparities appear prevalent within DIH prosecutions as well: in an Illinois county with a Black population of under 2%, 35% of their drug-induced homicide defendants are Black,⁴⁸ and in a Minnesota county with a Black population of 13%, at least eight of 11 cases (72%) prosecuted were against Black defendants.⁴⁹ The sentences of drug-

⁴³ Wagner, P. and Rabuy, B. (2017), *Following the Money of Mass Incarceration*, Prison Policy Initiative, <https://www.prisonpolicy.org/reports/money.html>.

⁴⁴ Drug Policy Alliance, *supra* note 10 at 24.

⁴⁵ *Id.*

⁴⁶ ACLU (2014), *Racial Disparities in Sentencing: Hearing on Reports of Racism in the Justice System of the United States*, https://www.aclu.org/sites/default/files/assets/141027_jachr_racial_disparities_aclu_submission_0.pdf.

⁴⁷ NAACP, Criminal Justice Fact Sheet, <https://naacp.org/resources/criminal-justice-fact-sheet>.

⁴⁸ Drug Policy Alliance, *supra* note 10 at 47.

⁴⁹ *Id.*

induced homicide prosecutions also raise concerns regarding racial disparities: from 2008 to 2018, the median drug-induced homicide sentence across the country for Black defendants was ten years, compared to less than seven years for white defendants.⁵⁰

For all of these reasons, drug-induced homicide prosecutions fail to fulfill the promise of reducing overdoses, and instead have myriad negative impacts. Research-based public health responses that adopt a harm reduction approach to drug use are an effective alternative, and prosecutors have an important role to play in advocating for such measures and embedding them in the criminal legal system.⁵¹

THE BENEFITS OF PUBLIC HEALTH AND HARM REDUCTION APPROACHES

Harm reduction is a public health philosophy and set of practical strategies that emphasizes mitigating the harms associated with drug use, rather than focusing on eliminating such conduct altogether. While this may seem counterintuitive, harm reduction interventions offer evidence-based alternatives to DIH prosecutions and other carceral responses to the overdose crisis. Importantly, harm reduction embraces as a starting point that people who use drugs may not be willing or able to stop or may not have access to the services and support they need, often due to stigma and discrimination. Harm reduction organizations are often staffed by individuals who have lived experience with addiction, an invaluable asset in building trust and forging connections to treatment options. Accordingly, harm reduction strategies and services have low barriers to entry and aim to meet people “where they’re at,” rather than promote abstinence-based recovery, which doesn’t work for everyone, isn’t evidence-based, and doesn’t allow individuals to have agency in choosing the treatment they want.⁵²

Many harm reduction interventions have been shown to decrease overdose deaths and use resources more efficiently than the alternative of simply relying on arrests and prosecution. For example, a study of a needle and syringe exchange program in New York City demonstrated that the program saved lives and lowered overall costs for the city through reduced HIV treatment outlays.⁵³ Likewise, methadone, buprenorphine, and naltrexone all produced cost savings when combined with contingency management, overdose education, and naloxone distribution, with lifetime per-person savings ranging from \$25,000 to \$105,000.⁵⁴ These programs, along with

⁵⁰ Health in Justice Action Lab, *supra* note 3.

⁵¹ See Fair and Just Prosecution (2019), *Harm Reduction Responses to Drug Use*, https://www.fairandjustprosecution.org/staging/wp-content/uploads/2019/08/FJP_Brief_HarmReduction.pdf.

⁵² *Id.*

⁵³ Belani, H.K. and Muennig, P.A. (2008), *Cost-Effectiveness of Needle and Syringe Exchange for the Prevention of HIV in New York City*, *Journal of HIV/AIDS & Social Services*, 7(3), 229-240, <https://www.tandfonline.com/doi/full/10.1080/15381500802307492?scroll=top&needAccess=true>.

⁵⁴ Fairley, M. et al. (2021), *Cost-effectiveness of Treatments for Opioid Use Disorder*, *JAMA Psychiatry*, 78(7), 767-777, <https://jamanetwork.com/journals/jamapsychiatry/article-abstract/2778020>.

“Harm reduction has nothing to do with condoning behavior. It has to do with reducing harm. And frankly, from my perspective, that’s what public safety is.... [E]very single person in this community that uses drugs... deserves respect and dignity. We want to make sure that people stay alive. They can’t recover if they’re dead.”

other harm reduction models, are not only more effective at reducing overdoses than punitive measures, but also provide cost savings that can be reinvested to compound benefits.

Specific harm reduction strategies that have been successfully adopted in the community and by many criminal justice stakeholders include: medication-assisted treatment, the distribution of the opioid overdose antidote naloxone, sterile syringe access, drug checking services, peer recovery coaches, and overdose prevention sites. Prosecutors – who exercise tremendous discretion in charging and disposition decisions and also have a powerful voice in their community’s public safety conversations – can play a critical role in ensuring that communities adopt harm reduction strategies that have proven more effective than overly punitive approaches such as drug-induced homicide charges. For more information on harm reduction principles and related interventions, including diversion and deflection programs, see FJP’s Issues at a Glance Briefs on [Harm Reduction Responses to Drug Use](#) and [Reconciling Drug Courts, Decarceration, and Harm Reduction](#).

RECOMMENDATIONS

Prosecutors should avoid drug-induced homicide prosecutions absent evidence of specific intent, and instead focus limited public resources on proven public health approaches to addressing problematic substance use and overdose. The following recommendations are rooted in this public health harm reduction approach.

A. Avoid prosecution of drug-induced homicide and other drug-related offenses and mitigate the harmful impacts of past prosecutions.

1. **Do not prosecute unintentional drug overdoses as homicides – either directly or via felony-murder statutes – or use the threat of such a prosecution to obtain a guilty plea.** Given the absence of proven benefits, as well as the increased health risk associated with DIH prosecutions, individuals who supply drugs that lead to an accidental fatal overdose should not be charged with homicide. Greater caution should be exercised before any other criminal prosecution is initiated as well.
2. **Decline prosecution in cases involving possession or distribution of life-saving medications such as naloxone, methadone, or buprenorphine.** Several district attorneys have implemented policies declining to prosecute possession of these medications, including Chittenden County, Vermont, State’s Attorney Sarah George⁵⁵ and Washtenaw County, Michigan, Prosecuting Attorney Eli Savit.⁵⁶

⁵⁵ Riggs, M. (2018), *This Vermont Prosecutor Is Pushing Back Against the DOJ’s Drug Warriors*, Reason, <https://reason.com/2018/06/15/this-vermont-county-prosecutor-is-pushin/>.

⁵⁶ Savit, E. (2021), *Policy 2021-07: Policy Regarding Buprenorphine*, <https://www.washtenaw.org/3299/Buprenorphine-Policy>; Savit, E. (2021), *Policy 2021-15: Policy Regarding Methadone*, <https://www.washtenaw.org/3455/Methadone-Policy>.

“When we charge buprenorphine-related cases, we make it more likely that people in recovery will end up using drugs like heroin or fentanyl. The data from other communities clearly bears this out. Declining to prosecute buprenorphine is associated with a significant reduction in overdose deaths. That’s the outcome we all should want.”

3. **Decline to prosecute low-level simple drug possession, and, for more serious cases, pursue treatment-based case resolutions for individuals with substance use disorders.** Whenever possible, deflect or divert individuals out of the criminal legal system.
4. **Review previous drug-induced homicide convictions and sentences** obtained by the office and consider sentencing review or expungement measures to address injustices in those past cases. For more information, see FJP's Issues at a Glance Briefs on [Conviction Integrity Units](#) and [Sentencing Review and Second Chances](#).

B. Prioritize harm reduction approaches in response to substance use.

1. **Adopt a public health approach to substance use and overdose.** Educate your office on the nature of substance use, defer to clinical experts, and, whenever possible, encourage your public health partner agencies to take the lead in developing responses to substance use issues.
2. **Advocate for broad Good Samaritan laws and adopt a strong Good Samaritan policy in your jurisdiction** to minimize potential criminal liability for any individual who calls for emergency medical assistance in response to an overdose, including protection from prosecution for other felony drug-related charges.
3. **Invest in partnerships that prioritize harm reduction in the community.** Work with people who use drugs, community organizations, law enforcement, public health professionals, and first responders to create programming that informs people who use drugs about community resources that are available to them, including naloxone distribution, Good Samaritan laws, and options for treatment.
4. **Advocate for harm reduction public education, syringe access programs, and free drug testing.** Syringe access programs are proven to reduce the transmission of blood-borne illnesses⁵⁷ and can also be an important point of connection to other services, such as education on safer injection practices or free drug testing to monitor the presence of fentanyl.

C. Engage in ongoing advocacy and public education on harm reduction approaches.

1. **Communicate the office's drug-induced overdose prosecution policy to ADAs and the community clearly and repeatedly.** The overarching goal of such messaging should be to

⁵⁷ CDC (2019), *Syringe Services Programs (SSPs) Fact Sheet*, <https://www.cdc.gov/ssp/syringe-services-programs-factsheet.html#:~:text=For%20people%20who%20do%20not,in%20HIV%20and%20HCV%20incidence>.

"This is a public health crisis, and it [has] wound up at the doorstep of the criminal justice system, and we're not going to prosecute our way out of this problem.... We can use our discretion to ensure that the criminal justice system doesn't punish people who need help. We can convene policy and health leaders to work together promoting health- and treatment-based models and we can push for solutions that are grounded in compassion and evidence."

prevent public confusion about DIH policies, support and promote Good Samaritan laws, and alleviate fear about reporting overdoses.

2. **Advocate for improved access to medication-assisted treatment in community, court, and correctional settings.** Rapid connection to MAT, especially upon reentry from incarceration, is critical to prevent overdoses. Encourage local providers to be certified to prescribe MAT; improve screening, assessment, and connection to MAT in court settings; ensure any local drug court permits MAT; and call for access to MAT in jails and prisons.
3. **Advocate for improved access to naloxone.** Encourage your local first responders to be equipped with naloxone, support free naloxone training and distribution for the public, and train people who use drugs – whether in community or court-based or correctional settings – on how to administer naloxone to others.
4. **Support efforts and legislation that create, as well as remove barriers to opening, overdose prevention sites.** Research has shown overdose prevention sites are effective at preventing fatal overdoses.⁵⁸ As credible voices on matters of public safety, prosecutors can play an important role in building public buy-in for such measures.
5. **Advance and promote harm reduction-based supply-side solutions and harm reduction interventions in your community.** Supply-side solutions involving regulation rather than prohibition have shown benefit. For example, prescription heroin has been implemented internationally and has been shown to reduce overdoses, crime, and demand for illicit heroin, while also allowing individuals to have certainty that they are not using fentanyl-contaminated heroin.⁵⁹

CONCLUSION

A prosecutor's duty is to seek justice, advance public safety, and promote a fairer and more equitable criminal legal system. In the face of the growing overdose crisis, elected prosecutors should honor this obligation by shifting the focus away from problematic and harmful drug-induced homicide prosecutions and toward proven public health approaches. These prosecutions undermine Good Samaritan laws, potentially increase the risk of overdose deaths, exacerbate racial disparities, and consume limited law enforcement and criminal justice resources. Prosecutors can take the lead in their communities by embracing a harm reduction approach and centering public health, thereby supporting community well-being and saving lives.

RESOURCES

- Leo Beletsky (2019), [America's Favorite Antidote: Drug-Induced Homicide in the Age of the Overdose Crisis](#), Utah Law Review.
- Morgan Godvin (2021), [When Accidental Overdose is Treated as Murder: Seeking Relief for Defendants](#), Health in Justice Action Lab.

⁵⁸ Singer, J.A. (2018), *Harm Reduction: Shifting from a War on Drugs to a War on Drug-Related Deaths*, Cato Institute, <https://www.cato.org/policy-analysis/harm-reduction-shifting-war-drugs-war-drug-related-deaths>; Arbour, L., Gallop, G., and Krinsky, M.A. (2019), *It's time for drug policy reform – in America and across the globe*, Salon, <https://www.salon.com/2019/10/19/its-time-for-drug-policy-reform-in-america-and-across-the-globe/>.

⁵⁹ *Id.*

- Jeffrey A. Singer (2018), [Harm Reduction: Shifting from a War on Drugs to a War on Drug-Related Deaths](#), Cato Institute.
- Drug Policy Alliance (2017), [An Overdose Death Is Not Murder: Why Drug-Induced Homicide Laws Are Counterproductive and Inhumane](#).

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