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SAVE A FRIEND'S LIFE OR RISK YOUR FREEDOM: THE DILEMMA TOO MANY PEOPLE FACE WHEN WITNESSING AN OVERDOSE

JENNIE M. MILLER

INTRODUCTION

You are a Chicago, Illinois resident, walking your dog when you trip over a crack in the pavement and break your arm. You need surgery. After surgery, your doctor gives you a one-month prescription of opioids.¹ Just one little pill has the ability to make all of your pain magically disappear and allow you to function as though you had never even fallen. Near the end of your limited prescription, the pain fails to disappear as easily, and the high does not last quite as long as it once did. There are zero refills remaining.² Suddenly, you find yourself craving the drugs and, while you try to fight that craving, you cannot help yourself. You are addicted.³ You turn to the streets to purchase drugs like cocaine and heroin.⁴ You make new friendships with people who

¹ NAT'L INSTIT. ON DRUG ABUSE, *Mind Matters: The Body's Response to Opioids*, NAT'L INSTIT. HEALTH (2018), <https://teens.drugabuse.gov/teachers/mind-matters/opioids>. Medically prescribed opioids are prescribed by doctors in an effort to decrease pain. In effect, an opioid alleviates pain while also making the user feel euphoric and calm. *See id.*

² *See id.* (noting that the sudden withdrawal from an opioid can result in extreme pain and as a result makes stopping the drug extremely difficult).

³ Addiction is a chronic disease characterized by drug seeking and use that is compulsive, or difficult to control, despite harmful consequences. NAT'L INSTIT. ON DRUG ABUSE, *Understanding Drug Use and Addiction*, NAT'L INSTIT. HEALTH (June 2018), <https://www.drugabuse.gov/publications/drugfacts/understanding-drug-use-addiction>. *See also* NAT'L INSTIT. ON DRUG ABUSE, *Opioid Overdose Crisis*, NAT'L INSTIT. HEALTH (May 27, 2020), <https://www.drugabuse.gov/drugs-abuse/opioids/opioid-overdose-crisis> (noting that approximately 21%-29% of patients who are prescribed opioids misuse and further noting that approximately 8%-12% of those prescribed will ultimately end up developing an addiction).

⁴ NAT'L INSTIT. ON DRUG ABUSE, *Cocaine DrugFacts*, NAT'L INSTIT. HEALTH (July 2018), <https://www.drugabuse.gov/publications/drugfacts/cocaine>. Cocaine is an illegal and addictive stimulant drug that is sold on the streets typically as a white, powdery substance. *See*

share your addiction. Many times, they too became addicted as a result of medically prescribed opioids.⁵

One night, you purchase just enough heroin to share with your friend.⁶ You both inject a portion of the heroin. She did not pay you for her share, and you simply picked up and delivered the drugs. That night, she begins to overdose.⁷ You immediately call 911 in an effort to save her life. Despite your efforts, your friend did not survive. Local law enforcement investigates the death as a possible homicide and discovers text messages between you and your friend. The messages reveal that you were the one who brought the heroin to her that day. Now, you are charged and convicted with drug-induced homicide for the death of your friend because you obtained and gave her the drugs that killed her.⁸ In Illinois, you could be facing up to sixty years in prison.⁹ Two lives end that day: your friend's and your own.

Addiction does not discriminate.¹⁰ In the United States, drug overdose deaths are at an all-time high and affect men and women of all races, socioeconomic statuses, and ages.¹¹ From 1999 to 2014, the total number of overdose deaths nationwide nearly tripled.¹² In 2017, more than 47,000 Americans died as a result of an opioid

id. See also NAT'L INSTIT. ON DRUG ABUSE, *Heroin*, NAT'L INSTIT. OF HEALTH (2020), <https://teens.drugabuse.gov/drug-facts/heroin> (explaining that heroin is a highly addictive, illegal opioid made from morphine).

⁵ See NAT'L INSTIT. ON DRUG ABUSE, *PRESCRIPTION OPIOIDS AND HEROIN RESEARCH REPORT* (2018), <https://www.drugabuse.gov/download/19774/prescription-opioids-heroin-research-report.pdf?v=fc86d9fdda38d0f275b23cd969da1a1f> (noting that 75% of people who began using drugs in the 2000s reported that their first opioid was a prescription drug). See also Theodore J. Cicero et al., *The Changing Face of Heroin Use in the United States*, 71 J. AM. MED. ASS'N PSYCHIATRY 821, 821-822 (2014).

⁶ See *PRESCRIPTION OPIOIDS AND HEROIN RESEARCH REPORT*, *supra* note 5 (explaining that a study of young, urban injection drug users interviewed in 2008 and 2009 found that the initiation into nonmedical drug use was characterized by three main sources of opioids: family, friends, or personal prescriptions).

⁷ CTR. DISEASE CONTROL & PREVENTION, *Drug Overdose: Commonly Used Terms*, CDC INJURY CENTER (May 5, 2020), <https://www.cdc.gov/drugoverdose/opioids/terms.html> (defining "overdose" as "[i]njury to the body (poisoning) that happens when a drug is taken in excessive amounts. An overdose can be fatal or nonfatal.")

⁸ See 720 ILL. COMP. STAT. ANN. §5/9-3.3 (West 2018).

⁹ See *id.*

¹⁰ In recent years, there has been an increase in societal recognition of addiction as a mental illness. See NAT'L INST. OF DRUG ABUSE, *The Science of Drug and Addiction: The Basics*, in MEDIA GUIDE (2018), https://d14rmgtrwzf5a.cloudfront.net/sites/default/files/media_guide.pdf.

¹¹ See CTR. DISEASE CONTROL & PREVENTION, *The Drug Overdose Epidemic: Behind the Numbers*, CDC INJURY CTR. (March 19, 2020), <https://www.cdc.gov/drugoverdose/data/>.

¹² See Rose A. Rudd et al., *Increases in Drug and Opioid-Involved Overdose Deaths—United States, 2010—2015*, 65 MORBIDITY & MORTALITY WKLY. REP. 1445 (2016).

overdose, including prescription opioids, heroin, and illicitly manufactured fentanyl.¹³

But how do American drug abusers get their drugs? Many people have a misconception that drugs are purchased in dark alleyways from a drug-dealers or stolen from hospitals. However, in

2018 the United States Department of Justice Drug Enforcement Administration (“DEA”) reported that fifty-three percent of people abusing prescription opioids “were given, bought, or took” the drug from a friend or family member.¹⁴ Of this fifty-three percent, 40.4% obtained the drug from a “friend or relative for free.”¹⁵ Furthermore, in 2014, only 4.8% of drug-users admitted their source was a drug-dealer or stranger.¹⁶ The majority of Americans struggling with addiction obtain their drugs from friends and

¹³ See *Opioid Overdose Crisis*, *supra* note 3. Prescription opioids are medicines prescribed by doctors that relax the body and relieve moderate to severe pain. Heroin is an illegal, highly addictive, opioid drug that is typically ingested but may also be smoked or snorted. Fentanyl is a powerful synthetic opioid. See *id.* See also Heroin, *supra* note 4.

¹⁴ See U.S. DRUG ENFORCEMENT ADMIN., 2018 NATIONAL DRUG THREAT ASSESSMENT (2018), <https://www.dea.gov/sites/default/files/2018-11/DIR-032-18%202018%20NDTA%20final%20low%20resolution.pdf>. The DEA released its 2018 National Drug Threat Assessment (NDTA) which combines federal, state, and local law enforcement reports, as well as public health data and government intelligence to determine the drug-trafficking threats to America. See *id.*

¹⁵ *Id.* According to the 2017 report, the “combined 2013 and 2014 data from the National Survey on Drug Use and Health, [determined that] an annual average of 10.7 million people aged 12 or older misused prescription pain relievers in the past year. About one-half of those who misused prescription pain relievers in the past year said that they obtained the prescription pain relievers they had most recently misused from a friend or relative for free (50.5 percent).” See Rachel N. Lipari & Arthur Hughes, *How People Obtain the Prescription Painkillers They Misuse*, SUBSTANCE ABUSE & MENTAL HEALTH SERV. ADMIN., (Jan. 17, 2017), https://www.samhsa.gov/data/sites/default/files/report_2686/ShortReport-2686.html#:~:text=The%20most%20common%20source%20was,from%20more%20than%20one%20doctor.

¹⁶ See Lipari & Hughes, *supra* note 15. See also Leo Beletsky, *America’s Favorite Antidote: Drug-Induced Homicide in the Age of the Overdose Crisis*, 19 UTAH L. REV. 833 (2019). Beletsky looked to the data provided by the Health in Justice Action Lab regarding drug-induced homicide. Beletsky is the Faculty Director for the Health in Justice Action lab. He particularly focused on the relationship between the accused and the overdose victim, which revealed that about half of those charged with drug-induced homicide were not in fact “dealers,” but rather friends or partners of the deceased. *Id.* Health in Justice is a laboratory that conducts interdisciplinary research relevant to controversial societal issues including, but not limited to Drug-induced Homicide, cannabis reform, and involuntary commitment for substance use. See Health in Justice Action Lab, *Who We Are*, NE. SCH. L., <https://www.healthinjustice.org> (last accessed Sept. 19, 2020) [hereinafter *Who We Are*]. The lab gathers media data using web-tracking algorithms to develop accurate data, analyze the results, and raise societal awareness of effectiveness. See also Health & Justice Action Lab, *Drug-Induced Homicide*, NE. SCH. L., <https://www.healthinjustice.org/drug-induced-homicide> (last accessed Sept. 19, 2020) [hereinafter *Drug-Induced Homicide*]. The lab looked to all of the media mentions for “drug-induced homicide” to determine prosecution rates by state, as well as who was being prosecuted. *Id.*

family members, and not necessarily from drug-dealers.¹⁷ This data on where addicts get their drugs has been an important consideration in the question of how to address the explosion in overdose deaths in America. Two particular legislative responses to the overdose epidemic have been adopted by many states: (1) drug-induced homicide statutes, and (2) Overdose Good Samaritan statutes. Today, twenty states have adopted drug-induced homicide statutes, while forty states and the District of Columbia have adopted Overdose Good Samaritan statutes.¹⁸ There is even some overlap between the two responses. Of the twenty states that have adopted drug-induced homicide statutes, eighteen have also adopted an Overdose Good Samaritan statute.¹⁹

Drug-induced homicide is defined as the crime of delivering drugs that results in the death of another.²⁰ The first of these statutes was passed in the 1980s during the War on Drugs as part of an effort to crack down on drug-dealers.²¹ The hope was that harsh penalties would deter people from selling and using drugs.²² While these statutes may have been well-intentioned, their practical application falls short of their original purpose.²³

The hypothetical situation posed above is not imaginary, and instead actually happens in jurisdictions that have adopted these drug-induced homicide statutes.²⁴ In essence, two friends share

¹⁷ Lipari & Hughes, *supra* note 15.

¹⁸ See DRUG POLICY ALLIANCE, AN OVERDOSE DEATH IS NOT MURDER: WHY DRUG-INDUCED HOMICIDE LAWS ARE COUNTERPRODUCTIVE AND INHUMANE at 2 (2017), https://www.drugpolicy.org/sites/default/files/dpa_drug_induced_homicide_report_0.pdf [hereinafter DRUG POLICY ALLIANCE REP.].

¹⁹ See *Drug Overdose Immunity and Good Samaritan Laws*, NAT'L CONFERENCE OF ST. LEG. (June 5, 2017), <http://www.ncsl.org/research/civil-and-criminal-justice/drug-overdose-immunity-good-samaritan-laws.aspx>.

²⁰ See *What is "Drug-Induced Homicide?"*, DRUG POLICY ALLIANCE (Nov. 6, 2017), <https://www.drugpolicy.org/resource/DIH>. The scope of "deliver" will vary depending on the jurisdiction and could constitute actual sale for profit or simply sharing the drug with a fellow addict.

²¹ Seth McCure, *Illinois's Drug-Induced Homicide Statute: Injecting Some Sense into a Misinterpreted Law*, 4 NORTHERN ILL. L. REV. 32 (explaining that in the 1980s, America was engaged in the War on Drugs and that drug-induced homicide statutes were introduced as another tool to combat drug dealing). See also DRUG POLICY ALLIANCE REP., *supra* note 18.

²² McCure, *supra* note 21, at 49.

²³ *Id.* at 54.

²⁴ See generally Morgan Godvin, *My Friend and I Both Took Heroin. He Overdosed. Why Was I Charged With His Death?*, WASHINGTON POST, (Nov. 26, 2019, 6:00 AM), https://www.washingtonpost.com/outlook/my-friend-and-i-both-took-heroin-he-overdosed-why-was-i-charged-for-his-death/2019/11/26/33ca4826-d965-11e9-bfb1-849887369476_story.html/.

drugs.²⁵ One friend purchased and delivered the drug, while the other friend overdosed.²⁶ Now, the friend who delivered the drug is charged and convicted under the jurisdiction's drug-induced homicide statute.²⁷ This unintended prosecution of a friend or family member happens frequently under these statutes.²⁸ Specifically, research conducted by The Health in Justice Lab in 2018, indicates that the people charged under the statute are not the drug-dealers that the statute was originally intended to target.²⁹ Instead, the study showed that fifty percent of those charged with drug-induced homicide were friends, family, or partners of the victim, who do not sell drugs in any significant manner, as also seen in the above scenario.³⁰

Who exactly is being prosecuted and convicted in these twenty states also varies drastically depending on how broadly or narrowly the jurisdiction interprets and applies its statute.³¹ For example, Illinois has a very broad drug-induced homicide statute which prosecutes for the mere delivery of the drug, while Vermont's statute is narrow, prosecuting only drug-dealers for drug-induced homicide.³²

A similar variance in reach and scope also applies to Overdose Good Samaritan statutes. In 2007, these statutes began offering limited immunity to people, including those addicted to drugs, who sought medical assistance for a person experiencing an overdose.³³

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ See *Drug-Induced Homicide*, *supra* note 16. Health in Justice is a laboratory which conducts interdisciplinary research relevant to controversial societal issues including, but not limited to drug-induced homicide, cannabis reform, and involuntary commitment for substance use. The lab gathers media data using web-tracking algorithms to develop accurate data, analyze the results, and raise societal awareness of effectiveness. The Lab analyzed all media mentions for "drug-induced homicide" to determine prosecution rates by state, as well as the identities of who were being prosecuted. *Id.*

³⁰ Lipari & Hughes, *supra* note 15. Drug-dealers who sell in a "significant manner", sell large quantities of drugs and commercially gain from the sale. This definition excludes people who are addicted to drugs themselves, and who sell drugs in small quantities to support their own addiction and do not actually profit from the sale. See DRUG POLICY ALLIANCE REP., *supra* note 18.

³¹ Millie Joy Humphrey, *Dead on Arrival: Illinois' Drug-Induced Homicide Statute*, 14 T.M. COOLEY J. PRAC. & CLINICAL L. 277, 278 (2013).

³² See 720 ILL. COMP. STAT. ANN. §5/9-3.3 (West 2018); VT. STAT. ANN. tit. 18, § 4250 (West 2020).

³³ Beletsky, *supra* note 16, at 39. See also SUBSTANCE ABUSE AND MENTAL HEALTH ADMINISTRATION, *supra* note 15, at 1. Overdose Good Samaritan statutes are also known as "911 Good Samaritan" statutes. *Id.*

These statutes explicitly protect against certain drug-related offenses to minimize any fear of prosecution and instead encourage the person to call 911 to hopefully save a life.³⁴ One San Francisco study conducted from 1997 to 2000, for example, noted that only fifty-three percent of 709 drug-users who witnessed an overdose sought medical assistance.³⁵ The most common reason that people do not call 911 during a drug overdose, is fear of police involvement.³⁶ After all, the person witnessing the overdose may also be using drugs, may be on parole, or may be carrying drug paraphernalia.³⁷ The goal of Overdose Good Samaritan statutes is thus to prevent unnecessary overdose deaths, even if the use and addiction to drugs would continue. Today, forty states plus the District of Columbia have passed Overdose Good Samaritan statutes.³⁸ Such statutes address the overdose crisis as a public health problem and not as a criminal justice problem.³⁹

Still, the effectiveness of such statutes depends on whether the jurisdiction applies a more narrow or broad approach.⁴⁰ For example, Illinois has a very narrow Overdose Good Samaritan law.⁴¹ Specifically, the Good Samaritan's immunity will only protect against possession of specific substances under specific amounts, and the statute explicitly rejects protection for drug-induced

³⁴ See *id.*; see also DRUG POLICY ALLIANCE REP., *supra* note 18; see also 18 V.S.A. § 4254.

³⁵ Good Samaritan Fatal Overdose Prevention Laws, DRUG POLICY ALLIANCE, <http://www.drugpolicy.org/issues/good-samaritan-fatal-overdose-prevention-laws>

³⁶ *Id.* The DPA relied on a variety of studies to make this conclusion. For instance, "A 2002 study in Albuquerque found that only six out of 95 bystanders who witnessed an overdose called 911 as their first response; another 36 reported seeking medical assistance, but only after an average delay of just over 18 minutes. Nearly half of the witnesses cited "police" as the primary reason for not calling 911. Similarly, in a 2003-2004 study in Baltimore, two-thirds (63.4%) of the 644 study participants called 911, but more than half delayed the call by five or more minutes; one of the most common reasons for delaying the 911 call was fear of police involvement. Among those who did not call 911, 50% cited fear of police. In a 2004 Chicago evaluation of 34 people who had witnessed an overdose, all of them reported fear of police and arrest as a factor they considered when thinking about calling 911." Other research follows a similar trend. See also, Banta-Green, C. J., Beletsky, L., Schoeppe, J. A., Coffin, P. O., & Kuszler, P. C. (2013). Police officers' and paramedics' experiences with overdose and their knowledge and opinions of Washington State's drug overdose-naloxone-Good Samaritan law. *Journal of urban health: bulletin of the New York Academy of Medicine*, 90(6), 1102-11 (emphasizing that among heroin users, research indicates fear of police response as the most common barrier to not calling 911 during overdoses.)

³⁷ See Beletsky, *supra* note 16, at 7.

³⁸ See DRUG POLICY ALLIANCE REP., *supra* note 18, at 40.

³⁹ See Beletsky, *supra* note 16, at 39.

⁴⁰ See VT. STAT. ANN. tit. 18, § 4254 (West 2020); 720 ILL. COMP. STAT. ANN. §570/414 (West 2012).

⁴¹ 720 ILL. COMP. STAT. ANN. §570/414 (West 2012).

homicide.⁴² To the contrary, Vermont's statute applies more broadly and protects against most drug-related offenses.⁴³

There is an inherent tension faced by state legislatures who, on one hand, want to discourage friends and family from providing drugs to drug abusers by making drugs more difficult to access. On the other hand, states also want to encourage witnesses to call 911 once drug users exhibit signs of an imminent overdose.⁴⁴ The dilemma is that often those witnesses are the same family and friends who moments ago had provided the easy drugs to the addicts. What is the most effective and just set of laws to create these incentives to promote public health and justice?

This Note advocates that a narrow, drug-induced homicide law and a broad Overdose Good Samaritan statute is the best combination. A person who calls 911 when a friend experiences an overdose should receive Overdose Good Samaritan protection, and should not fear a drug-induced homicide prosecution for delivering the drug. This is the case in Vermont.⁴⁵ To the contrary, a friend or family member in Illinois acting to save a friend or family member's life pursuant to the state's Overdose Good Samaritan law could still be charged with drug-induced homicide. This outcome is unjust and, ironically, would only lead to more overdose deaths, not fewer.

The ultimate purpose of this Note is to ensure that states that have both drug-induced homicide statutes and Overdose Good Samaritan statutes, punish only drug-dealers, and protect the friends or family of the overdose victim who may have obtained and delivered the fatal drug but still sought medical assistance during the overdose.

Part I(A) of this Note will discuss the history and severity of the addiction epidemic that is consuming America. This section will also explain the purpose, research, and general findings of two organizations, the Drug Policy Alliance ("DPA") and the Health in Justice Action Lab, which are leading the way in research regarding this complex social issue.⁴⁶ Part I(B) of this Note will describe

⁴² 720 ILL. COMP. STAT. ANN. § 570/414(d) (West 2012).

⁴³ See generally, VT. STAT. ANN. tit. 18, § 4250 (West 2020).

⁴⁴ See discussion *supra* note 34.

⁴⁵ See VT. STAT. ANN. tit. 18, §4254 (2017).

⁴⁶ See *About Us*, DRUG POLICY ALLIANCE, <https://www.drugpolicy.org/about-us#victories>. See also *Advancing Harm Reduction Policy & Practice*, HEALTH IN JUST. ACTION

the history and purpose generally of drug-induced homicide statutes. Moreover, this section will delve into the broad application of the Illinois drug-induced homicide statute and analyze its application and its consequences. This section will also analyze the narrow application of the Vermont drug-induced homicide statute and analyze how and why the statute is more effective than the Illinois law. Part I(C) of this Note will then study the concept of Overdose Good Samaritan statutes. This section will be critical of the narrow Illinois statute and highlight the effectiveness of the broad Vermont statute.

While the drug-induced homicide statutes and Overdose Good Samaritan statutes serve different purposes, the application of each need not conflict. As a solution, Part II of this Note will propose a model drug-induced homicide statute and a model Overdose Good Samaritan statute. The former statute will expressly limit its application to drug-dealers who profit from the sale of the drug.⁴⁷ As a result, the friends and family of an overdose victim would not be prosecuted unjustly. Total repeal of drug-induced homicide laws would be improper because drug-dealers do deserve punishment for the homicide, while friends and family of the addict do not. The model Overdose Good Samaritan statute, meanwhile, largely tracks Vermont's law, with minor textual adjustments. This model statute would afford immunity for all drug-related offenses in order to decrease the number of preventable overdose deaths and immunize those at risk for prosecution of other potential drug-related offenses. These two model statutes combine to provide a fair and effective response to the overwhelming overdose crisis in America.

LAB, <https://www.healthinjustice.org/harm-reduction> (last accessed Oct. 4, 2020).

⁴⁷ "Drug-manufacturers" refers to the people who create and package the drug, while "drug-dealers" refers to people who sell the drug for profit. See *Glossary: Drug Manufacturing*, PHARMA IQ, <https://www.pharma-iq.com/glossary/drug-manufacturing> (last accessed Sept. 17, 2020). See also Elizabeth Hartney, *Drug Dealer and Their Customers*, VERY WELL MIND (Aug. 14, 2019), <https://www.verywellmind.com/what-is-a-drug-dealer-22267>.

I. THE DRUG EPIDEMIC AND THE LEGISLATIVE RESPONSE

A. *Overdose in America*

From 1999 to 2017, more than 700,000 people died from a drug overdose.⁴⁸ On average, about 130 Americans die **every day** from an opioid-related overdose.⁴⁹ In 2015, the Center for Disease Control reported that more than 52,000 people died of a drug overdose.⁵⁰ In 2016, the national total reached 63,600 overdose deaths,⁵¹ and in 2017, that number increased to 72,000.⁵² Astonishingly, this total surpasses the annual death toll for car crashes, HIV, and gun deaths.⁵³

From a causal standpoint, this increase is the result of (1) the increased use of prescription opioids,⁵⁴ (2) the illicit consumption of fentanyl,⁵⁵ and (3) the fact that these drugs are commonly mixed with drugs such as heroin⁵⁶ and cocaine.⁵⁷ The Center for Disease

⁴⁸ CTR. DISEASE CONTROL & PREVENTION, *Drug Overdose: Understanding the Epidemic*, CDC INJURY CTR. (March 19, 2020), <https://www.cdc.gov/drugoverdose/epidemic/index.html>.

⁴⁹ *Id.*

⁵⁰ Puja Seth et al., *Overdose Deaths Involving Opioids, Cocaine, and Psychostimulants—United States, 2015–2016*, 67 MORBIDITY & MORTALITY WKLY. REP. 349, 349 (2018).

⁵¹ *Id.*

⁵² Margot Sanger-Katz, *Bleak New Estimates in Drug Epidemic: A Record 72,000 Overdose Deaths in 2017*, N.Y. TIMES (Aug. 15, 2018), <https://www.nytimes.com/2018/08/15/upshot/opioids-overdose-deaths-rising-fentanyl.html>.

⁵³ *Id.*

⁵⁴ See NAT'L INSTIT. ON DRUG ABUSE, *Prescription Opioids*, NAT'L INSTIT. HEALTH (2020), <https://www.drugabuse.gov/publications/drugfacts/prescription-opioids>. See also CTR. DISEASE CONTROL & PREVENTION, *U.S. Opioid Prescribing Rate Maps*, CDC INJURY CTR. (2020), <https://www.cdc.gov/drugoverdose/maps/rxrate-maps.html> (highlighting that in 2017 alone, there were 59.0 opioid prescriptions per 100 persons).

⁵⁵ Consumption of fentanyl is not always illicit. In fact, doctors still prescribe and administer the drug post-surgery. However, illicitly manufactured fentanyl is produced in labs and is typically mixed with other drugs such as heroin. Notably, fentanyl has taken the lives of music legends such as Prince, Tom Petty, and Mac Miller in recent years. See Alex Heigl & Naja Rayne, *Fentanyl: Drug That Killed Mac Miller, Prince and Tom Petty Has Long History of Abuse*, PEOPLE (Nov. 5, 2018, 1:25 PM), <https://people.com/music/fentanyl-drug-that-killed-prince-has-long-history-of-abuse/>.

⁵⁶ CTR. DISEASE CONTROL & PREVENTION, *Heroin*, CDC INJURY CTR. (2020), <https://www.cdc.gov/drugoverdose/opioids/heroin.html>. Heroin is an illegal, highly addictive, opioid drug that is typically ingested but may also be smoked or snorted. See *id.*

⁵⁷ See Sanger-Katz, *supra* note 52. See also Karl A. Sporer & Alex H. Kral, *Prescription Naloxone: A Novel Approach to Heroin Overdose Prevention*, 49 ANNALS OF EMERGENCY MED. 172, 173 (2006). See also Dylan Love, *People Are Buying Legal Ingredients Online To Make Illegal Drugs*, BUSINESS INSIDER (Apr. 29, 2013, 9:01 PM),

Control explains that the increase in overdose deaths occurred in three waves.⁵⁸ First, doctors began overprescribing opioids in the 1990s.⁵⁹ Then, in 2010, the United States experienced a rapid increase in overdose deaths caused by heroin.⁶⁰ Unfortunately, anyone can become addicted to drugs—and eighty percent of the people who try heroin first misused prescription opioids and developed a physical dependence.⁶¹ Lastly, in 2013, illicitly manufactured fentanyl hit the market.⁶² When mixed with heroin and cocaine as a combination product, fentanyl leads to an even greater euphoric effect on the user.⁶³

As overdose fatality rates continue to rise annually, drug-induced homicide statutes have been increasingly utilized by prosecutors in an effort to hold someone responsible for the victim's death.⁶⁴ While precise data regarding the number of drug-induced homicide convictions each year is unavailable, both the Drug Policy Alliance (“DPA”) and the Health in Justice Action Lab have recently conducted research to reveal how frequently the statute is utilized by law enforcement and who exactly is prosecuted under the statute.⁶⁵

The DPA is a New York-based non-profit organization focused on drug policy reformation.⁶⁶ The alliance's goals include the termination of the War on Drugs, the legalization of marijuana for medical purposes, and the reformation of the criminal justice system to treat drug use as a public health problem and not a criminal

<https://www.businessinsider.com/make-your-own-illegal-drugs-by-buying-their-legal-ingredients-2013-4> (noting that homemade drugs are commonly created by people using and combining legal ingredients to make illegal substances in their own homes).

⁵⁸ See CTR. DISEASE CONTROL & PREVENTION, *supra* note 48.

⁵⁹ See *id.* See also CTR. DISEASE CONTROL & PREVENTION, *Prescription Opioids*, CDC INJURY CTR. (2020), <https://www.cdc.gov/drugoverdose/opioids/prescribed.html> (noting that more than 191 million opioid prescriptions were dispensed to American patients in 2017 alone).

⁶⁰ See CTR. DISEASE CONTROL & PREVENTION, *supra* note 48.

⁶¹ See *Opioid Overdose Crisis*, *supra* note 3. See also *Prescription Opioids*, *supra* note 62.

⁶² CTR. DISEASE CONTROL & PREVENTION, *supra* note 48 (explaining that fentanyl can be found in combination with heroin, counterfeit pills, and cocaine).

⁶³ CTR. DISEASE CONTROL & PREVENTION, *Fentanyl*, CDC INJURY CTR. (2020), <https://www.cdc.gov/drugoverdose/opioids/fentanyl.html> (emphasizing that Fentanyl is 50 to 100 times more powerful than morphine).

⁶⁴ See DRUG POLICY ALLIANCE REP., *supra* note 18 at 2.

⁶⁵ See *id.* See also *Drug-Induced Homicide*, *supra* note 16 (explaining how a majority of prosecutions are being brought against friends, family, and co-users of the overdose decedent).

⁶⁶ See DRUG POLICY ALLIANCE, *supra* note 46.

problem.⁶⁷ Recently, the DPA conducted media research regarding drug-induced homicide statutes.⁶⁸ Although it is unclear the precise methodology or algorithm used, the researchers looked for any media mentions referring to drug-induced homicide prosecutions and found an astronomical amount of these mentions.⁶⁹

The Health in Justice Action Lab is a laboratory that also conducts research involving complex criminal justice issues in an effort to achieve public health goals.⁷⁰ The Lab engages with academic, community, public and private partners to conduct its research.⁷¹ To evaluate drug-induced homicide statutes, the Lab gathered media mentions since the 2000s using a web-scraping algorithm, tracked past and present drug-induced homicide cases on legal databases, and tracked existing and proposed legislation nationwide.⁷² Like the DPA, the Lab found a major increase in the number of drug-induced homicide charges in recent years.⁷³

While determining the exact number of drug-induced homicide prosecutions and convictions is difficult, *both* organizations have noted an increase in recent years.⁷⁴ This is particularly noteworthy because the laws have remained on the books since the 1980s, but were used infrequently until recently.⁷⁵ Moreover, *both* organizations have concluded that drug-induced homicide statutes are mostly used to prosecute friends and family members of the overdose victim.⁷⁶

⁶⁷ See *Our Issues*, DRUG POLICY ALLIANCE, <http://www.drugpolicy.org/issues> (last visited Aug. 21, 2020).

⁶⁸ See DRUG POLICY ALLIANCE REP., *supra* note 18 at 2 (introducing their research on how media mentions of drug-induced homicide prosecutions have increased).

⁶⁹ *Id.*

⁷⁰ See *Who We Are*, *supra* note 16.

⁷¹ See *id.*

⁷² See *Drug-Induced Homicide*, *supra* note 16.

⁷³ Compare *id.* (graphing the substantial increase of drug-induced homicide charges from 1974 to 2017), with DRUG POLICY ALLIANCE REP., *supra* note 18 at 2 (explaining the substantial increase from 2011 to 2016).

⁷⁴ See *Drug-Induced Homicide*, *supra* note 16. See also DRUG POLICY ALLIANCE REP., *supra* note 18 at 2.

⁷⁵ DRUG POLICY ALLIANCE REP., *supra* note 18 at 2.

⁷⁶ *Id.* at 41 (emphasizing the difference between “seller” and “user”). See also *Drug-Induced Homicide*, *supra* note 16 (emphasizing that these friends, family, and co-user do not fit the characterization of a “dealer”).

B. Drug-Induced Homicide Statutes

Drug-induced homicide is defined as the crime of manufacturing, selling, or delivering drugs that result in the death of another.⁷⁷ In essence, these laws, though applied more broadly or narrowly depending on the jurisdiction, hold a person responsible for the death of the overdose victim if that person sold, delivered, or assisted in obtaining the fatal drug in some way.⁷⁸

The first drug-induced homicide laws were passed in the 1980s during the War on Drugs in an effort to crack down on drug-dealers.⁷⁹ Convictions of such crimes carry sentences equivalent to those for manslaughter and murder, with the penalties varying from two years to twenty years, and even to capital punishment.⁸⁰ In fact, six states carry mandatory minimum life sentences for drug-induced homicide convictions.⁸¹ The hope was that harsh penalties would deter people from selling and using drugs.⁸²

Deterrence has proven to be a fantasy in the War on Drugs. Despite the longstanding severe penalties accompanying most types of drug crimes, there are still high numbers of drug-related incarcerations.⁸³ In 1980, for example, the number of Americans in prison for drug-related offenses was 41,000.⁸⁴ By 2000, that number skyrocketed to 458,000—increasing tenfold since the escalation of the War on Drugs in the 1980s.⁸⁵ Additional telling statistics are the supply, street cost, and purity of the drugs.⁸⁶ Basic

⁷⁷ See DRUG POLICY ALLIANCE REP., *supra* note 18, at 8. See also Humphrey, *supra* note 31, at 280-81 (explaining that the scope of “deliver” varies between states and could constitute actual sale or simply sharing the drug with a friend).

⁷⁸ See DRUG POLICY ALLIANCE REP., *supra* note 18, at 8.

⁷⁹ See *id.* at 2.

⁸⁰ See *id.* at 2,8. For example, in Pennsylvania, prosecutors may charge a maximum of 40 years in prison for delivering or supplying drugs resulting in death which is Pennsylvania’s version of drug-induced homicide. See *id.* at 59.

⁸¹ See *id.* at 8.

⁸² See *id.* at 2. See also Elizabeth Brico, *I Nearly Died Drug Overdose. Would that Make My Dealer Murderer?*, POLITICO MAG.: L. & ORD. (Jan. 25, 2018), https://www.politico.com/magazine/story/2018/01/25/drug-induced-homicide-laws-former-heroin-addict-216507?utm_source=STAT+Newsletters&utm_campaign=ed9f0f2e43-MR&utm_medium=email&utm_term=0_8cab1d7961-ed9f0f2e43-150295021 (discussing prosecutors’ hope that these laws would serve as a scare tactic to deter drug dealers).

⁸³ See Anthony Lewis, *Breaking the Silence*, N.Y. TIMES (July 29, 2000), <https://archive.nytimes.com/www.nytimes.com/library/opinion/lewis/072900lewi.html>.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ See Ross C. Anderson, *We Are All Casualties of Friendly Fire in the War on Drugs*,

supply and demand principles explain that less availability of a product increases the cost to the consumer, while more availability results in decreased prices.⁸⁷ The Executive Office disclosed national statistics which revealed that between 1981 and 1998, the cost of cocaine on the street actually declined from \$190 per gram to \$44 per gram, while the purity increased.⁸⁸ The cost of heroin also declined, from \$1200 per gram to \$318 per gram, while its purity more than doubled.⁸⁹ The punitive measures set forth during the War on Drugs have not deterred people from selling drugs, but instead have resulted in the mass incarceration of many people, a continual stream of drug dealers and drugs, and even more affordable, purer drugs on the streets.⁹⁰ Harsh penalties and a broad application of the drug-induced homicide statutes are likely to duplicate the same, sad results.

Despite the failure of harsh laws to deter drug dealing and usage, twenty states are prosecuting people with the drug-induced homicide statutes today.⁹¹ In 2017 alone, thirteen states introduced bills to either create or strengthen existing drug-induced homicide laws.⁹² Even states that do not have drug-induced homicide laws “sometimes still charge people who deliver drugs that result in overdose with felony murder, depraved-heart murder (which requires prosecutors to prove only that the defendant knew the action taken was potentially lethal, but not that he intended harm), and manslaughter.”⁹³

Both the Health in Justice Lab and the DPA have recently analyzed drug-induced homicide-related media mentions and discovered a profound increase in drug-induced homicide-related prosecutions in recent years.⁹⁴ In December of 2018, the Health in

13 UTAH BAR J. 10, 11 (2000).

⁸⁷ *See id.*

⁸⁸ *Id.* *See e.g.*, OFF. OF NAT'L DRUG CONTROL POL'Y, DRUG DATA SUMMARY (1999), <https://www.ncjrs.gov/pdffiles1/drugdata.pdf>.

⁸⁹ Anderson, *supra* note 89 at 11. *See e.g.*, OFF. OF NAT'L DRUG CONTROL POL'Y, *supra* note 91.

⁹⁰ *See* Lewis, *supra* note 86. *See also* DRUG POLICY ALLIANCE REP., *supra* note 18, at 2.

⁹¹ *See id.*

⁹² Brico, *supra* note 85.

⁹³ *Id.* Although a state may not necessarily have a Drug-induced Homicide law, citizens of that jurisdiction may still be charged with a similar crime that coincides with the criminal justice system of that particular jurisdiction. *Id.*

⁹⁴ *See Drug-Induced Homicide*, *supra* note 16; DRUG POLICY ALLIANCE REP., *supra* note 18, at 2.

Justice Lab conducted a media analysis to determine the actual number of drug-induced homicide charges annually, and determined that, in 2016, the charges totaled 446; in 2017, the total reached 663, and in 2018, 423.⁹⁵ Until 2012, the annual charges for drug-induced homicide had never exceeded 100 in the United States.⁹⁶ Furthermore, the DPA has reported on the great increase in drug-induced homicide media mentions in recent years, which is also indicative of the statutes' increased application in overdose deaths.⁹⁷ Specifically, in 2011, only 363 news articles pertaining to drug-induced homicide charges and prosecutions surfaced; by 2016, that number had risen by 300% to 1,178.⁹⁸

Not only are the number of drug-induced homicide prosecutions increasing, but fifty percent of those charged with the crime were friends, family, or partners of the victim, according to the research conducted by the Heath in Justice Action Lab.⁹⁹ Forty-seven percent of the time, the person convicted is the dealer of the drug.¹⁰⁰ The DPA reported even more shocking local results. One report described that "after analyzing 100 of the most-recent drug-induced homicide cases in Southeastern Wisconsin, ninety percent of those charged were friends or relatives of the person who died."¹⁰¹ Furthermore, "out of the 32 drug-induced homicide prosecutions identified by the New Jersey Law Journal in the early 2000s," the DPA reported, "25 involved prosecution of friends of the decedent who did not sell drugs in any significant manner."¹⁰² Too frequently, prosecutors target the friends and family members who purchased and delivered the substance for the

⁹⁵ See *Drug-Induced Homicide*, *supra* note 16.

⁹⁶ *Id.*

⁹⁷ The Drug Policy Alliance is a New York-based non-profit organization which has the primary goal of reducing drug-use while also ensuring people who suffer from drug addiction are treated as humanely as possible. The Alliance also focuses on the disproportionality of incarceration of people of color who are unfairly affected by the war on drugs. See DRUG POLICY ALLIANCE, *supra* note 46.

⁹⁸ See DRUG POLICY ALLIANCE REP., *supra* note 18, at 2.

⁹⁹ See Beletsky, *supra* note 16, at 874. See generally *Drug-Induced Homicide*, *supra* note 16.

¹⁰⁰ See Beletsky, *supra* note 16, at 874 (emphasizing that half of the 47% involved a black or Hispanic "dealer" and a white overdose victim).

¹⁰¹ DRUG POLICY ALLIANCE REP., *supra* note 18, at 3.

¹⁰² *Id.* Drug-dealers who sell in a "significant manner", sell large quantities of drugs and commercially gain from the sale. This definition excludes people who are addicted to drugs themselves, and who sell drugs in small quantities to support their own addiction and do not actually profit from the sale. *Id.*

overdose victim¹⁰³ and not the actual manufacturer or supplier of the drug that earned a profit.¹⁰⁴

The prosecution of friends and family members can be problematic. For example, in 2016, Caleb Smith, an aspiring doctor in Pennsylvania who had completed a master's degree in biomedical sciences, purchased what he thought was Adderall online to help study for his medical school exams.¹⁰⁵ Smith gave his girlfriend some of the pills per her request.¹⁰⁶ In actuality, the Adderall was illicit fentanyl, and Smith's girlfriend fatally overdosed.¹⁰⁷ Smith, who had no prior criminal record, was charged with drug-induced homicide and committed suicide the day after he was released from jail.¹⁰⁸

The following section will analyze both the language and application of the Illinois and Vermont versions of drug-induced homicide. The analysis will reveal that states such as Illinois that apply their drug-induced homicide statutes in a broad manner can ultimately resulting in unfair prosecutions similar to Caleb Smith's. Vermont's statute has been narrowly applied and results in fewer but more-just prosecutions of drug-dealers and manufacturers, rather than friends and family of overdose victims.¹⁰⁹ Overall, the

¹⁰³ See Bobby Allyn, *Bystanders to Fatal Overdoses Increasingly Becoming Criminal Defendants*, NAT'L PUB. RADIO (July 2, 2018, 5:04 AM), <https://www.npr.org/2018/07/02/623327129/bystanders-to-fatal-overdoses-increasingly-becoming-criminal-defendants>.

¹⁰⁴ See DRUG POLICY ALLIANCE REP., *supra* note 18, at 3. The term "legitimate profit," refers to drug dealers who are not simply supporting their own addiction through dealing drugs. Instead, the manufacturer or dealer funds his or her lifestyle through drug dealing. *Id.*

¹⁰⁵ See Zachary A. Siegel, *Death by Prosecution: Was There A Bigger Player in Drug Case Involving Man Who Killed Himself After Federal Indictment?*, APPEAL (Jan. 22, 2018), <https://theappeal.org/murder-by-prosecution-was-there-a-bigger-player-in-drug-case-involving-man-who-killed-himself-724c2ad3e4f6/>. Adderall is a physician-prescribed medication which acts as a stimulant to allow for increased concentration. See Shaheen E. Lakhani and Annette Kirchgessner, *Prescription Stimulants in Individuals With and Without Attention Deficit Hyperactivity Disorder: Misuse, Cognitive Impact, Adverse Effects*, 2 BRAIN & BEHAVIOR 661, 661 (2012), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3489818/pdf/brb30002-0661.pdf>.

¹⁰⁶ See Siegel, *supra* 105.

¹⁰⁷ *Id.*

¹⁰⁸ See Rose Goldensohn, *They Shared Drugs. Someone Died. Does that Make Them Killers?* N.Y. TIMES (May 25, 2018), <https://www.nytimes.com/2018/05/25/us/drug-overdose-prosecution-crime.html>.

¹⁰⁹ See Robert Robidoux *faces charges of dispensing drug with death resulting*, LEGAL MONITOR WORLDWIDE (May 5, 2018), <https://plus.lexis.com/api/permalink/78cca44a-afc0-4acf-a9ca-3a72c19fe03c/?context=1530671>. For example, after conducting research of all Vermont local new papers, only one news article was found regarding a prosecution under VT. STAT. ANN. tit. 18, § 4250 (West 2020). Specifically, on May 5, 2018, 34-year old

broad versus narrow reach of each statute predictably results in starkly different numbers of prosecutions; as of 2018, Illinois applied the statute 307 times since its implementation in 1989, while Vermont has only applied the statute 17 times in total since its implementation in 2003.¹¹⁰

i. Illinois Drug-Induced Homicide Statute

The Illinois drug-induced homicide statute was first enacted in the 1980s during the War on Drugs.¹¹¹ The Illinois statute contains very broad language. Section 9-3.3(a) of the law begins:

A person commits drug-induced homicide when he or she violates Section 401 of the Illinois Controlled Substances 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.¹¹²

The Appellate Court of Illinois in *People v. Boand* held that the legislature intended to have the statute be broadly interpreted.¹¹³ In the case, four friends ingested methadone provided by Boand, who had been prescribed the drug by a doctor to treat his heroin addiction.¹¹⁴ When one of the friends died from an overdose of the drug, Boand was charged with drug-induced homicide.¹¹⁵ Boand argued that §9-3.3 failed to do three things: provide a mental state,¹¹⁶ narrowly define “who” must make the delivery, or expand on the concept of “delivery.”¹¹⁷ The Appellate Court of Illinois

drug-dealer Robert Robidoux was charged with dispensing a drug with death resulting. Robidoux had sold a bad batch of fentanyl to several people causing the death of two men, and several other nonfatal overdoses that same week. *Id.*

¹¹⁰ *Drug-Induced Homicide*, *supra* note 16.

¹¹¹ McCure, *supra* note 21, at 32.

¹¹² 720 ILL. COMP. STAT. ANN. § 5/9-3.3(a) (West 2018).

¹¹³ *People v. Boand*, 362 Ill. App. 3d 106, 139-140 (2005).

¹¹⁴ *Id.* at 111-112.

¹¹⁵ *Id.* at 113-114.

¹¹⁶ *Id.* at 141.

¹¹⁷ *Id.*

found that the legislature intended to create a law lacking such specificity and sought to prosecute anyone culpable under the broad language of the statute.¹¹⁸

Boand also tried to argue the law was unconstitutionally vague for failure to provide a mental state, but the Appellate Court held that the statute incorporated the “knowing” mental state from the Controlled Substances Act and was therefore not unconstitutionally vague.¹¹⁹ As such, the accused need only “knowingly” deliver the controlled substance that is responsible for the death.¹²⁰ In the context of the statute, “delivery” is defined as the actual, constructive, or attempted transfer of a controlled substance, with or without consideration, whether or not there is an agency relationship.¹²¹ As such, the accused need only share a portion of the substance with a friend with an awareness of that sharing, and such sharing would constitute “delivery” under the broad application of the statute.¹²² Consequently, a person knowingly delivering the drug to a friend who fatally overdoses does *not* need any mental state with respect to the resulting death, and yet may be charged with the crime of drug-induced homicide.¹²³

Finally, Boand argued that the law should be limited to prosecutions of actual drug-dealers, but the court explicitly rejected this contention.¹²⁴ To the contrary, the court explained that “[t]he drug-induced homicide statute applies to *any* person who violates section 401 of the [Illinois Controlled Substance] Act by knowingly ‘delivering’ a controlled substance.”¹²⁵

A lack of action by the legislature since *Boand* to specify the meaning of the words “who” or “deliver,” or to enumerate an actual

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 142.

¹²⁰ *Id.*

¹²¹ *Id.* at 141 (emphasizing that “if [the] legislature had 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, but instead, the statute used the term delivery, which was statutorily defined.”).

¹²² *Id.*

¹²³ *Id.* at 142. *See also* People v. Faircloth, 234 Ill. App. 3d 386, 391 (1992) (“The mental state in this statute is ‘knowingly,’ which comes from section 401 of the Controlled Substances Act of 1971, which prohibits a knowing manufacture, possession, or delivery of a controlled substance. *The defendant just needs to make a knowing delivery of a controlled substance, and if any person then dies as a result of taking that substance, the defendant is responsible for that person’s death.*”)

¹²⁴ Faircloth v. Sternes, 367 Ill. App. 3d 123, 128 (2006).

¹²⁵ *Boand*, 362 Ill. App. 3d at 141.

quantity of the drug, would appear to evidence that the court correctly identified the legislature's intent when interpreting the statute broadly. The broad *Boand* interpretation of the statute has allowed prosecutors to target family and friends of people who also suffer from addiction.¹²⁶ "The Illinois state law on drug-induced homicide is broad enough to implicate any drug provider in an overdose death of a user who may provide drugs to another user, even if they are taking the drugs together . . ."¹²⁷ As a result, any person involved in the supply chain of the drug, including the friend or family member who may have purchased or delivered the drug, may be charged and prosecuted for drug-induced homicide—neither reimbursement nor profit is necessary for conviction.¹²⁸

Most indicative of how broadly prosecutors in Illinois utilize the statute is the prosecutors' own words.¹²⁹ Specifically, Madison County State's Attorney Thomas Gibbons made clear "[a person is] part of a drug-distribution network the moment [they] give another person the drug, just like the dealer. [They are] no different or better."¹³⁰ He insisted, "[w]e intend to absolutely make an example of these people in public."¹³¹ Former U.S. Attorney for the Southern District of Illinois, Stephen Wigginton, has also made clear that simply providing or sharing the drug that caused the overdose death will make the person accountable for the death.¹³² No money needs to be involved.¹³³ The person does not need to actually profit from selling the drug.¹³⁴ *Anyone* in the chain of delivery is culpable.¹³⁵

As a Class X felony, the minimum sentence that a person will receive for violating the statute is six years.¹³⁶ The consequences could be far worse if additional sections of the Controlled Substance Act are violated.¹³⁷ Specifically, § 9-3.3(b)(1) of Illinois'

¹²⁶ DRUG POLICY ALLIANCE REP., *supra* note 18, at 3.

¹²⁷ Humphrey, *supra* note 31, at 280-81.

¹²⁸ 720 ILL. COMP. STAT. ANN. § 5/9-3.3(a) (West 2018).

¹²⁹ *See generally* DRUG POLICY ALLIANCE REP., *supra* note 18, at 26.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ 730 ILL. COMP. STAT. ANN. § 5/5-4.5-25 (West 2020).

¹³⁷ 720 ILL. COMP. STAT. ANN. § 5/9-3.3(b) (West 2018).

drug-induced homicide law provides that a person who commits drug-induced homicide by violating certain subsections of the Controlled Substance Act will be sentenced to a minimum of fifteen years and a maximum of thirty years.¹³⁸ If a further extended term is applicable, the person faces a minimum of thirty years and a maximum of sixty years.¹³⁹ These mandatory minimum sentences are extreme considering how broadly the statute applies and that fifty percent of the prosecutions under the statute are of friends and family of the overdose victim.¹⁴⁰

In one notable case, on August 10, 2014, Amy Shemberger of Illinois was charged with drug-induced homicide when her longtime boyfriend, Peter Kucinski, overdosed.¹⁴¹ The couple met in the eighth grade.¹⁴² Shemberger did not suffer from addiction until she was prescribed opioids by her doctor a few years earlier for a back injury.¹⁴³ Kucinski, on the other hand, was a long-time cocaine addict and alcoholic.¹⁴⁴ Shemberger did not deal drugs of any kind, but rather simply purchased enough heroin for herself and Kucinski.¹⁴⁵ The day of his overdose, Kucinski had only snorted a \$10 bag of heroin and chose to mix it with alcohol.¹⁴⁶ When Shemberger noticed her boyfriend had overdosed, she immediately called 911 and told them what substances he took, but nothing could revive him.¹⁴⁷ Despite her efforts, Shemberger was charged two months later with drug-induced homicide for delivering the heroin to her boyfriend.¹⁴⁸ Shemberger cooperated and received a lesser sentence of seven years—she could have received thirty years.¹⁴⁹

Despite the harsh penalties of the Illinois drug-induced homicide statute, the sad reality is that the statute has had underwhelming deterrent effects and instead, overdose rates in Illinois

¹³⁸ 720 ILL. COMP. STAT. ANN. § 5/9-3.3(b)(1) (West 2018).

¹³⁹ *Id.*

¹⁴⁰ See Beletsky, *supra* note 16, at 839.

¹⁴¹ DRUG POLICY ALLIANCE REP., *supra* note 18, at 43.

¹⁴² *Id.* at 44.

¹⁴³ *Id.* at 45.

¹⁴⁴ *Id.* at 47.

¹⁴⁵ *Id.* at 48.

¹⁴⁶ *Id.* at 43.

¹⁴⁷ *Id.* at 43.

¹⁴⁸ *Id.* at 44.

¹⁴⁹ *Id.* at 46.

have continued to increase.¹⁵⁰ Drug overdoses involving any drug as the underlying cause of death from 2013-2017 were 1,579, 1,700, 1,836, 2,410, and 2,779 respectively.¹⁵¹ Drug overdoses in which opioids had a contributory effect from 2013 to 2017 were: 1,072, 1,203, 1,382, 1,946, and 2,202, respectively.¹⁵² Drug overdoses in which heroin was a contributory factor from 2013 to 2017 were: 583, 711, 844, 1,040, and 1,187, respectively.¹⁵³

The statute is used more frequently and aggressively to prosecute today, despite blatant evidence that the Illinois drug-induced homicide law has failed to reduce the number of overdose deaths annually.¹⁵⁴ With 307 drug-induced homicide charges in Illinois, according to the Health in Justice Lab, the state ranks fourth-highest in the nation for the number of charges as of March 2018.¹⁵⁵ The fact that over 153 people charged with drug-induced homicide are friends and family of the victim is critical when considering the total number charged is 307.¹⁵⁶ Moreover, according to the DPA, from 2011 to 2016, the total number of media mentions for drug-induced homicide cases in Illinois was 420.¹⁵⁷ These media mentions increased from 2011 to 2016 by twenty percent.¹⁵⁸ Again, the media data-analysis methods used by the Health in Justice Lab and the DPA differed, but the increase in media mentions noted by both organizations is key.¹⁵⁹ Overall, the data evidences that fatal overdose rates continue to rise in Illinois despite the hope that harsh penalties and broad applications of homicide statutes would deter drug-use.¹⁶⁰ Instead, the Illinois drug-

¹⁵⁰ IDPH, Division of Data and Public Policy, *Drug Overdose Deaths by Sex, Age Group, Race/Ethnicity and County, Illinois Residents, 2013-2017*, (Oct. 9, 2018), http://www.dph.illinois.gov/sites/default/files/Publications_OPDS_Drug%20Overdose%20Deaths%20-%20October%202018.pdf

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Drug-Induced Homicide*, *supra* note 16.

¹⁵⁵ *Id.* Illinois totaled 307 and fell just behind 3rd place Wisconsin at 351. *Id.*

¹⁵⁶ *See id.* *See also* Beletsky, *supra* note 16, at 839.

¹⁵⁷ *See* DRUG POLICY ALLIANCE REP., *supra* note 18, at 26.

¹⁵⁸ *Id.*

¹⁵⁹ *Compare Id.* at 68 n.54 (explaining that the organization used a keyword search to generate a master of articles potentially related to drug-induced homicide, the list was then confirmed by analysts), *with* HEALTH IN JUSTICE ACTION LAB, *supra* note 16 (explaining that the lab used a web-scraping algorithm to analyze the web for mentions of the phrase and then confirmed with analysts).

¹⁶⁰ *See* DRUG POLICY ALLIANCE REP., *supra* note 18, at 26 (showing that fatal overdose rates have increased from 12.1 per 100,000 people in 2013 to 14.1 per 100,000 in 2015).

induced homicide statute has resulted in over-criminalization and a gross injustice by punishing the friends and family of the overdose victim who may have purchased or delivered the drug to the overdose victim.¹⁶¹

ii. Vermont's Drug-Induced Homicide Statute

In 2003, Vermont enacted a drug-induced homicide law that targeted “[s]elling or dispensing a regulated drug with death resulting.”¹⁶² The law is very brief, but clearly articulated.¹⁶³ Section 4250 begins:

If the death of a person results from the selling¹⁶⁴ or dispensing¹⁶⁵ of a regulated drug¹⁶⁶ to the person in violation of this chapter, the person convicted of the violation shall be imprisoned not less than two years nor more than 20 years.¹⁶⁷

The statute concludes by explaining that “[t]his section shall apply only if the person’s use of the regulated drug is the proximate cause of his or her death.”¹⁶⁸ The forgoing text provides the statute in its entirety, and the short and concise language is exactly what the legislature intended.¹⁶⁹

Specifically, the General Assembly of Vermont made clear that

¹⁶¹ See *Drug-Induced Homicide*, *supra* note 16. See also Beletsky, *supra* note 16, at 873-74 (emphasizing that 50% of those accused of drug-induced homicide are friends, family, and partners of the victim).

¹⁶² VT. STAT. ANN. tit. 18, § 4250 (West 2003).

¹⁶³ See *id.*

¹⁶⁴ While the word “selling” is not statutorily defined, “‘Sale’ means transfer for a consideration or barter or exchange or an offer or express or implied promise to transfer for a consideration or barter or exchange, and each such transaction made by any person, whether as principal, proprietor, agent, servant, or employee.” *Id.* § 4201(30) (1967).

¹⁶⁵ “‘Dispense’ includes distribute, leave with, give away, dispose of, or deliver.” *Id.* § 4201(7). The use of the word “dispense” in the statute, though the definition includes mere delivery, is not an issue because of the expressed legislative intent to follow in the Note.

¹⁶⁶ “Regulated drug” means: a narcotic drug; a depressant or stimulant drug, other than methamphetamine; a hallucinogenic drug; Ecstasy; marijuana; or methamphetamine. *Id.* § 4201(29).

¹⁶⁷ *Id.* § 4250(a).

¹⁶⁸ *Id.* § 4250(b).

¹⁶⁹ 2003 Vt. Acts & Resolves 54 (explaining that this bill had a narrow focus because it was part of a broader plan to address drug crimes and substance abuse).

it intended the law to be applied very narrowly.¹⁷⁰ In June of 2003, the General Assembly explained its legislative intent in enacting certain drug-related laws, including § 4250:

Many people who become addicted to illegal drugs resort to small-scale sale of drugs to support their addiction. This act is *not* directed at those people, but rather at the entrepreneurial drug dealers who traffic in large amounts of illegal drugs *for profit*. Such persons pose the greatest threat to the health and safety of Vermonters and should be subject to heightened criminal penalties for their activities.¹⁷¹

In short, the legislature enacted the statute to target only entrepreneurial drug-dealers selling large quantities of drugs for profit.¹⁷² Prosecutors may only target these drug dealers, while the friends and family members who simply purchased or delivered the drug remain free from prosecution.¹⁷³ Importantly, the statute does not target people who are addicted to drugs and sell small amounts simply to support their own addictions.¹⁷⁴ While the Vermont statute contains mandatory minimum sentencing of two years, and maximum sentencing of twenty, such harsh penalties are only being given to profiteering drug-dealers.¹⁷⁵

Media research conducted by the DPA and Health in Justice Lab both evidence the effectiveness of Vermont's narrow application.¹⁷⁶ In particular, the DPA research revealed that from 2011 to 2016, media mentions in Vermont of prosecutions totaled *only*

¹⁷⁰ *Id.* (explaining that this bill was not directed at those who deal drugs on a small scale to support their addiction, it was meant to target those who deal in large amounts of drugs for profit).

¹⁷¹ *Id.* (emphasis added). The Vermont General Assembly published its "Legislative Findings" in regards to acts related to selling or dispensing illegal drugs. The document begins by explaining the legislative intent of the General Assembly in enacting certain drug-related laws, including § 4250, as well as discussing its approach to substance abuse and drug crime. *Id.*

¹⁷² *Id.*

¹⁷³ VT. STAT. ANN. tit. 18, § 4250 (2003). *See also*, 2003 Vt. Acts & Resolves 54.

¹⁷⁴ 2003 Vt. Acts & Resolves 54.

¹⁷⁵ *Id.*

¹⁷⁶ *See* DRUG POLICY ALLIANCE REP., *supra* note 18, at 12; *see also* HEALTH IN JUSTICE ACTION LAB, *supra* note 16.

ten.¹⁷⁷ Data collected by the Health in Justice Lab reveals that the statute has been used a total of seventeen times since its enactment in 2003—this means Illinois has charged people with drug-induced homicide eighteen times more than Vermont has.¹⁷⁸ Most astonishingly, as of this writing, not a single Vermont case is available on Westlaw discussing the application of the Vermont statute, and even research of Vermont local newspapers provides only one story of a drug-dealer charged under the statute.¹⁷⁹

Overall, the legislative intent of this statute is explicitly tailored to drug-dealers who profit, and the law itself has been applied narrowly.¹⁸⁰ As such, the Vermont drug-induced homicide statute is typically used to incarcerate profiting drug-dealers, as legislatively intended, and has only been used in prosecution ten or seventeen times since its enactment, depending on the source and the data analyzed.¹⁸¹

C. Overdose Good Samaritan Statutes

Both Illinois and Vermont have also adopted Overdose Good Samaritan Statutes in an effort to tackle the increase in overdose deaths, although the effectiveness of the statutes vary by state.¹⁸² The most common reason people do not call 911 during a drug overdose is fear of police involvement and subsequent arrest.¹⁸³

¹⁷⁷ DRUG POLICY ALLIANCE REP., *supra* note 18, at 12.

¹⁷⁸ *Drug-Induced Homicide*, *supra* note 16 (Illinois' prosecutions totaled 307). *See also* DRUG POLICY ALLIANCE REP., *supra* note 18, at 2 ("Although data are unavailable on the number of people being prosecuted under these laws, media mentions of drug-induced homicide prosecutions have increased substantially").

¹⁷⁹ *See* Citing References for VT. STAT. ANN. tit. 18, § 4250 (2003), WESTLAW, <http://www.westlaw.com> (search "VT ST T. 18 § 4250"; click "Citing References"; then click "Cases") (last visited Sept. 6, 2020). As of this writing, the only case that cites the statute is from Massachusetts. *See also Robert Robidoux Faces Charges of Dispensing Drug With Death Resulting*, LEGAL MONITOR WORLDWIDE (May 5, 2018), <https://plus.lexis.com/api/permalink/78cca44a-afc0-4acf-a9ca-3a72c19fe03c?context=1530671>.

¹⁸⁰ *See* 2003 Vt. Acts & Resolves 54; DRUG POLICY ALLIANCE REP., *supra* note 18, at 9.

¹⁸¹ *Drug-Induced Homicide*, *supra* note 16.

¹⁸² *See* Leonard Paulozzi, MD, *Drug-Induced Deaths – United States, 2003-2007*, CENTER FOR DISEASE CONTROL AND PREVENTION (Jan 14, 2011), https://www.cdc.gov/mmwr/preview/mmwrhtml/su6001a12.htm?s_cid%3Dsu6001a12_x. The CDC noted that from 2003-2006 drug-induced mortality rates continued to increase.

¹⁸³ *See* DRUG POLICY ALLIANCE REP., *supra* note 18, at 40. The DPA relied on a variety of studies to make this conclusion:

Such fear is most frequently the result of drug or drug-paraphernalia possession, or probation and parole violations.¹⁸⁴ In 2007, as fatal overdose rates continued to increase,¹⁸⁵ lawmakers began enacting Overdose Good Samaritan laws to directly tackle the underlying fear of police involvement.¹⁸⁶ The primary purpose of these laws is to save lives by providing limited immunity to people who call 911 during an overdose in order to minimize concerns about any arrests and prosecutions that the Good Samaritan may otherwise experience.¹⁸⁷ In 2007, New Mexico passed the first Overdose Good Samaritan law.¹⁸⁸ Since then, forty states and the District of Columbia have passed Overdose Good Samaritan statutes.¹⁸⁹ This group includes Illinois and Vermont, who will again be the focus of the analysis.

The breadth of legal protection provided by the Overdose Good Samaritan statutes varies depending on the jurisdiction; these variances, in turn, affect the overall utilization and effectiveness of the statute in reducing overdose deaths.¹⁹⁰ For example, most

A 1997-2000 San Francisco survey of 709 young injection drug users reported that only 53% of those who witnessed an overdose sought medical help upon doing so. A 2002 study in Albuquerque found that only six out of 95 bystanders who witnessed an overdose called 911 as their first response; another 36 reported seeking medical assistance, but only after an average delay of just over 18 minutes. Nearly half of the witnesses cited "police" as the primary reason for not calling 911. Similarly, in a 2003-2004 study in Baltimore, two-thirds (63.4%) of the 644 study participants called 911, but more than half delayed the call by five or more minutes; one of the most common reasons for delaying the 911 call was fear of police involvement. Among those who did not call 911, 50% cited fear of police. In a 2004 Chicago evaluation of 34 people who had witnessed an overdose, all of them reported fear of police and arrest as a factor they considered when thinking about calling 911.

Id. See also Banta-Green et al., *supra* note 36, at 1103 (emphasizing that among heroin users, research indicates fear of police response as the most common barrier to not calling 911 during overdoses.)

¹⁸⁴ See Stephen Koester, et al., *Why Are Some People Who Have Received Overdose Education and Naloxone Reluctant to Call Emergency Medical Services in the Event of Overdose?*, 48 INT'L J. FOR DRUG POLICY 115, 118 (2017), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5825210/pdf/nihms942595.pdf>.

¹⁸⁵ See See Paulozzi, *supra* note 182. The CDC noted that from 2003-2006 drug-induced mortality rates continued to increase.

¹⁸⁶ See Corey S. Davis & Derek H. Carr, *The Law and Policy of Opioids for Pain Management, Addiction Treatment, and Overdose Reversal*, 14 IND. HEALTH L. REV. 1, 32-33 (2017).

¹⁸⁷ Lipari & Hughes, *supra* note 15, at 1.

¹⁸⁸ See Davis & Carr, *supra* note 186, at 33.

¹⁸⁹ DRUG POLICY ALLIANCE REP. *supra* note 18, at 3. This total is the number as of July 15, 2017. See DRUG POLICY ALLIANCE, *supra* note 35.

¹⁹⁰ Lipari & Hughes, *supra* note 15 at 2, 4. In particular, beyond protection from possession, sale, or delivery, some states may protect the Good Samaritan from restraining order or parole violations, while others may impose mandatory drug testing and treatment on the Good Samaritan. Most concerning, some states only provide immunity to the person who called 911. Thus, the surrounding people who did not call 911 during the overdose will

states offer immunity from a charge of or prosecuted for controlled substance *possession* crimes.¹⁹¹ Notably, in most states, immunity does not extend protection to crimes relating to or involving the sale, distribution, or trafficking of controlled substances.¹⁹² Illinois' version of the statute is a prime example of such limited immunity.¹⁹³ To the contrary, Vermont's statute provides protection from citation, arrest, and prosecution from *all* controlled substance violations—including drug-induced homicides.¹⁹⁴ Each version will be discussed in more detail in the following sections of this Note, ultimately revealing its application and overall effectiveness in combating the overdose epidemic.

i. Illinois Overdose Good Samaritan Statute

In 2012, Illinois enacted the § 414 of the Illinois Controlled Substance Act, titled “Overdose; limited immunity from prosecution,” to encourage bystanders to call 911 in the case of overdose and to offer limited liability for their Good Samaritan behavior.¹⁹⁵ Specifically, §414 (b) explains that:

A person who, in good faith, seeks or obtains emergency medical assistance for someone experiencing an overdose shall not be charged or prosecuted for Class 4 felony possession of a controlled, counterfeit, or look-alike substance or a controlled substance analog if evidence for the Class 4 felony possession charge was acquired as a result of the person seeking or obtaining emergency medical assistance and providing the

not receive the same limited immunity. *Id.*

¹⁹¹ *Id.* at 2.

¹⁹² *Id.*

¹⁹³ See 720 ILL. COMP. STAT. ANN. § 570/414(e) (West 2012).

¹⁹⁴ See VT. STAT. ANN. tit. 18 § 4254 (2013). See also Davis & Carr, *supra* note 186, at 33; DRUG POLICY ALLIANCE REP., *supra* note 18, at 40 (noting that Vermont and Delaware are the only states that provide immunity for drug-induced homicide if a person seeks medical assistance).

¹⁹⁵ See 720 ILL. COMP. STAT. ANN. § 570/414 (West 2012).

amount of substance recovered is within the amount identified in subsection (d) of this Section.¹⁹⁶

This limited immunity will only apply to people who *possess* specific substances, under specific amounts.¹⁹⁷ For example, a Good Samaritan who possesses three or more grams of heroin or cocaine would not be afforded limited immunity under the statute.¹⁹⁸

Even more importantly, the Illinois Overdose Good Samaritan statute is limited to possession crimes and does not afford protection for any other drug-related crimes, such as sale or distribution.¹⁹⁹ In fact, the statute explicitly denies protection from a drug-induced homicide charge.²⁰⁰ The statute dictates, “Nothing in this Section is intended to interfere with or prevent the investigation, arrest, or prosecution of any person for . . . drug-induced homicide . . .”²⁰¹ As a result, a person in Illinois who knowingly “delivers” a controlled substance to an overdose victim, but calls 911 in an effort to save the person’s life, will likely be immune from prosecution for possession; but they may still be charged with drug-induced homicide, which carries a serious mandatory minimum of six years in prison.²⁰² In addition, Illinois does consider the fact

¹⁹⁶ *Id.* § 414(b); Note that, §414(a) of the Illinois Controlled Substance Act begins by defining “overdose” as “a controlled substance-induced physiological event that results in a life-threatening emergency to the individual who ingested, inhaled, injected or otherwise bodily absorbed a controlled, counterfeit, or look-alike substance or a controlled substance analog.” *Id.* § 414(a). Moreover, allegedly this same limited immunity is statutorily applied to the person experiencing the overdose pursuant to §414(c). However, in the case of *People v. Teper*, 74 N.E.3d 1011 (2016), the court refused to apply §414(c) when the overdose victim was found in her car, unresponsive from an overdose. There, police received reports of an unresponsive woman in a car on the highway. *Id.* at 1013. After police arrived on the scene, they observed the condition of the defendant and saw drugs and drug paraphernalia. *Id.* at 1015. As a result, the officers determined that she was overdosing and administered Narcan, causing the defendant to gain consciousness. *Id.* The court held that § 414(c) did not apply because the officers provided emergency medical assistance to the defendant as a result of viewing evidence of drug use and possession, rather than the reverse. *Id.* at 1020. The court further held that even if § 414(c) were to apply, under § 414(e), the officers had probable cause to arrest the defendant independent of her obtaining medical assistance because they observed drugs and drug paraphernalia in the defendant’s car. *Id.* at 1021. Evidently, limited immunity is not guaranteed and will turn on the facts of the case to determine if probable cause exists.

¹⁹⁷ See 720 ILL. COMP. STAT. ANN. § 570/414(d) (West 2012).

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* § 414(e) (“Nothing in this Section is intended to interfere with or prevent the investigation, arrest, or prosecution of any person for the delivery or distribution of cannabis, methamphetamine or other controlled substances . . . or any other crime.”).

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² See 720 ILL. COMP. STAT. ANN. § 5/9-3.3(b) (West 2018) (“Drug-induced homicide is

that a defendant sought or obtained medical assistance during an overdose as a potential mitigating factor for sentencing for other drug-related offenses; however, judges are limited in using their discretion in sentencing by the mandatory minimum required under the drug-induced homicide law.²⁰³

From a policy perspective, the Illinois law fails to fulfill its purpose of saving lives during an overdose.²⁰⁴ As stated in the Illinois drug-induced homicide statute analysis, drug overdoses involving any drug as the underlying cause of death in Illinois increased substantially from 2013 to 2017: totaling 1,579, 1,700, 1,836, 2,410, and 2,779, respectfully.²⁰⁵ These numbers reveal that today, many individuals are still witnessing an overdose and delaying or refraining from calling 911 due to fear of police and prosecution.²⁰⁶ Moreover, while the implementation of these statutes was an effort by the legislature to encourage people to call 911 during an overdose, the numbers do not lie.²⁰⁷ The limited immunity is too limited, and overdose deaths continue to rise in Illinois.²⁰⁸

a Class X felony . . ."); 730 ILL. COMP. STAT. ANN. § 5/5-4.5-25 (2020) ("For a Class X felony . . . [t]he sentence of imprisonment shall be a determinate sentence . . . of not less than 6 years . . ."); 21 ILL. LAW AND PRAC. HOMICIDE § 110 (2020).

²⁰³ 720 ILL. COMP. STAT. ANN. § 5/5-5-3.1 (West 2020) ("The following grounds shall be accorded weight in favor of withholding or minimizing a sentence of imprisonment: . . . [t]he defendant sought or obtained emergency medical assistance for an overdose . . ."); see also 720 ILL. COMP. STAT. ANN. § 5/9-3.3 (West 2020) (classifying drug-induced homicide as a Class X felony); 730 ILL. COMP. STAT. ANN. § 5/5-4.5-25 (West 2020) (imposing a 6-year minimum and 30-year maximum sentence for Class X felonies).

²⁰⁴ See DRUG POLICY ALLIANCE REP., *supra* note 18, at 26.

²⁰⁵ IDPH, Division of Data and Public Policy, *supra* note 150.

²⁰⁶ See Amanda D. Latimore & Rachel S. Bergstein, "Caught with a body" yet protected by law? Calling 911 for opioid overdose in the context of the Good Samaritan Law, 50 INT'L J. FOR DRUG POLICY 82, 82-89 (2017). The primary purpose of the 2017 study was (1) to characterize the factors which impacted a person's decision to call 911 while at the scene of an overdose and (2) to explore the Overdose Good Samaritan law as a possible factor in a person's decision to seek medical assistance. *Id.* at 82. The researchers conducted 22 in-depth interviews with people who experienced or witnessed a drug overdose in Baltimore, Maryland. *Id.* at 85. The researchers found that 21-68% of people who saw an overdose sought medical assistance for the victim. *Id.* at 82.

²⁰⁷ See IDPH, Division of Data and Public Policy, *supra* note 150.

²⁰⁸ *Id.*

ii. Vermont's Overdose Good Samaritan Statute

Unlike Illinois, Vermont's Overdose Good Samaritan Law provides paramount protection to the Good Samaritan.²⁰⁹ In 2013, Vermont enacted § 4254, which states that:

A person who, in good faith and in a timely manner, seeks medical assistance for someone who is experiencing a drug overdose shall not be cited, arrested, or prosecuted for a violation of this chapter . . .²¹⁰

Thus, the Vermont statute explicitly provides protection for all drug-related offenses enumerated under Chapter 84, including but not limited to possession, drug-dispensing, sale, and even drug-induced homicide.²¹¹ As a result, a Good Samaritan cannot be prosecuted for drug-induced homicide because §4254(b) prohibits such prosecution.²¹² The statute goes on to explain that a person who seeks medical assistance in good faith will not be penalized for violating a protection order, probation, pretrial release, or for parole.²¹³ Furthermore, the fact that the person sought medical assistance will be considered a mitigating factor at sentencing for a violation of any offense not protected by the statute.²¹⁴

In light of the expansive protection to Good Samaritans, Vermont has seen a decline in fatal overdoses.²¹⁵ Specifically, Vermont saw a six percent decrease in drug-related deaths from 2016

²⁰⁹ Compare 720 ILL. COMP. STAT. ANN. § 570/414 (West 2012), with VT. STAT. ANN. tit. 18, § 4254 (2013).

²¹⁰ VT. STAT. ANN. tit. 18, § 4254(b) (2013).

²¹¹ *Id.*

²¹² *Id.*

²¹³ *Id.* § 4254(d)-(e).

²¹⁴ *Id.* § 4250(f).

²¹⁵ *Drug-Related Fatalities Among Vermonters*, VT. DEP'T HEALTH (Jan. 2019), http://www.healthvermont.gov/sites/default/files/documents/pdf/ADAP_Data_Brief_Drug_Related_Fatalities.pdf The substances involved in these drug-related overdose deaths varied. Specifically, over half (54%) of the drug-related overdose deaths involved fentanyl in 2017, up from about one-third (37%) in 2016. Still, slightly fewer fatalities involved heroin in 2017 (31%) than in 2016 (33%), while prescription opioid involvement did not change (31%).

to 2017; the overall number has decreased from 129 in 2016 to 123 in 2017.²¹⁶

Further evidence of how many people actually call 911 during an overdose is found in Vermont's Statewide Incident Reporting Network ("SIREN") which explains how many times EMS agencies administer naloxone each year.²¹⁷ In 2017, SIREN reported that Vermont EMS administered 848 doses of naloxone.²¹⁸ The administration of naloxone was successful ninety-five percent of the time.²¹⁹ Moreover, in Vermont, only 123 people fatally overdosed in 2017.²²⁰ Of the 109 Vermonters who died of a drug overdose, ninety-one were identified within the SIREN database.²²¹ Overall, Vermont's statute is more effective than Illinois', as evidenced by the number of people who seek medical assistance during an overdose and the overall decline in overdose deaths throughout the state.²²²

²¹⁶ *Id.*

²¹⁷ *Naloxone Distribution and Administration*, VT. DEP'T HEALTH (Aug. 2020), http://www.healthvermont.gov/sites/default/files/documents/pdf/ADAP_Naloxone_Data_Brief_1.pdf. Naloxone is an opioid antagonist that, when administered as a nasal spray during an overdose, blocks the effect of the opioid and regulates breathing. *Naloxone*, NAT'L INSTIT. ON DRUG ABUSE (Sept 2019), <https://www.drugabuse.gov/publications/drugfacts/naloxone>. "Vermont Statewide Incident Reporting Network (SIREN) is a comprehensive electronic prehospital patient care data collection, analysis, and reporting system that has been in use since 2010. EMS reporting serves several important functions, including legal documentation, quality improvement initiatives, billing, and evaluation of individual and agency performance measures." *SIREN- Statewide Incident Reporting Network*, VT. DEP'T HEALTH (July 1, 2020), <https://www.healthvermont.gov/emergency/ems/siren-statewide-incident-reporting-network>.

²¹⁸ Jordan Cuddemi, *New Hampshire, Vermont officials work to halt opioid deaths*, VALLEY NEWS (Apr. 20, 2019, 10:04 PM), <https://www.vnews.com/A-Look-at-Twin-State-s-Opioid-Related-Fatalities-Per-Capita-24760514>.

²¹⁹ VT. DEP'T HEALTH, VT. SOCIAL AUTOPSY REPORT: 2017 DATA ANALYSIS, (Aug. 2020), <https://www.healthvermont.gov/sites/default/files/documents/pdf/ADAPSocialAutopsyReportAug2020.pdf>.

²²⁰ *See id.*

²²¹ *Id.*

²²² *See id.*

II. SOLUTION

While criminal law should be used to combat the opioid crisis, reform of current drug-induced homicide statutes and Overdose Good Samaritan statutes is necessary. First, this Note calls for each state to implement the proposed model drug-induced homicide statute below. In short, the model statute expressly limits prosecution to drug-manufacturers and dealers. Total repeal of drug-induced homicide statutes would be improper because drug manufacturers and dealers who profit should be punished for their actions. However, friends and family of overdose victims should *not* be the target of prosecution. Second, Vermont's Overdose Good Samaritan statute should be adopted by each state with some minor textual improvements that clearly articulate immunity from arrest, charge, and prosecution for "all drug-related offenses," absent independent evidence that would warrant an independent arrest or prosecution.

A. Proposed Model Drug-Induced Homicide Statute

First and foremost, the model drug-induced homicide statute needs to be limited in prosecutorial application. Specifically, the text of the statute must clearly target only drug-manufacturers and drug-dealers who *profit* from the sale of the drug. This should be expressly enumerated in subsection A of the statute and will begin:

A person commits drug-induced homicide if the death of another results from the manufacturing or selling, of a regulated controlled substance *for profit*, by the person.

The terms "regulated controlled substance," "sale," "manufacture," and "for profit" must be statutorily defined for the statute to be effective. The model statute will adopt Vermont's definitions for both "regulated drug" and "sale." For example, the former means a narcotic drug, a depressant or stimulant drug, a hallucinogenic

drug, ecstasy, marijuana, or methamphetamine.²²³ This definition is intended to encompass a wide range of drugs for which the manufacturing or sale of is punishable under this law.²²⁴ For the purposes of the model statute, “sale” means transfer for a consideration or barter or exchange, and each such transaction made by any person, whether as principal, proprietor, agent, servant, or employee.²²⁵ Therefore, a drug-dealer is a person involved with the sale of any of the above regulated controlled substances. “Drug-manufacture” is defined as the illicit drug production process. Thus, a drug-manufacturer is any individual involved in the drug production process. This is particularly important because the person actually selling the drug is not the only person that should be punished for the overdose victim’s death. In fact, the drug-manufacturer is the reason many of the regulated controlled substances exist and are available for sale to begin with.

As such, both drug-dealers and drug-manufacturers are culpable under this model statute. “For profit” is defined as “commercial gain.” This will ensure that people actually profiting from drug-manufacturing and dealing are prosecuted under the model drug-induced homicide law, and that the friends and family members who simply purchased or delivered the substance to the overdose victim are not.

Most importantly, mere “delivery” should not be an act punishable by the statute because people, like the friends and family of the overdose victim, do not profit from the delivery. Even if the overdose victim reimbursed the friend or family member for purchasing the drug, reimbursement for the purchase does not qualify as “profit.”²²⁶ Therefore, a person who purchases drugs for both himself and a drug-user did not “sell” drugs for profit upon reimbursement. Ultimately, this simple textual change will limit the

²²³ VT. STAT. ANN. tit. 18, § 4201(29).

²²⁴ *Controlled Substances Law and Legal Definition*, U.S. LEGAL, <https://definitions.uslegal.com/c/controlled-substances/> (last visited Sep. 6, 2020). According to U.S. Legal Definitions, Controlled substances are drugs that are regulated by state and federal laws that aim to control the danger of addiction, abuse, physical and mental harm, the trafficking by illegal means, and the dangers from actions of those who have used the substances. *Id.* Such substances are typically separated into Schedule I, drugs that have no accepted medical use such as heroin, Schedule II, which are highly addictive but have some medical use such as oxycodone, fentanyl, and morphine, and so on. *Id.*

²²⁵ VT. STAT. ANN. tit. 18, § 4201(30).

²²⁶ Reimbursement does not qualify as profit when an overdose victim pays the person who purchased and delivered the drugs the price of their own share.

prosecutorial power to charge people with drug-induced homicide to drug-manufacturers and dealers. Next, subsection B of the statute will read:

This section shall only apply if the person's death is caused by the injection, inhalation, absorption, or ingestion of an amount of the controlled substance which is the proximate cause of death.

Reasonably, no human being should be charged with homicide if the drug they provided did not actually cause the victim's death.²²⁷ Finally, because the statute will narrowly define that drug-manufacturers and dealers are the intended targets of the statute, mandatory minimums and maximums are appropriate. Each state should use its own discretion to determine the mandatory minimum and maximum sentence it seeks to impose. Subsection C of the statute will explain:

A person who commits drug-induced homicide pursuant to Subsection A and B of this statute, shall be sentenced to a term of not less than [insert minimum sentence], and not more than [insert maximum sentence].

With the mandatory minimum and maximum sentences, it shall be the discretion of the jury and judiciary to determine what sentence a person deserves, given not only the circumstances set forth in the particular case before them, but also the prior criminal history of the defendant on trial. Overall, these changes will limit prosecution under the statute and ensure that only drug-manufacturers and dealers with the utmost culpability receive the punitive repercussions they deserve—not the friends and family of the overdose victim who simply delivered the drugs. After all, the act of prosecuting the friends and family of the overdose victim is tragic.

²²⁷ See DRUG POLICY ALLIANCE REP., *supra* note 18, at 43-46. A person should not be charged with drug-induced homicide when the overdose victim not only ingested a drug, but also voluntarily combined the drug with alcohol or other substances. *Id.*

That person just lost a loved one, and now may also lose his or her freedom if prosecuted under more broadly applied drug-induced homicide laws like Illinois'. Only the drug-manufacturers and dealers should be prosecuted under the model drug-induced homicide statute.

B. Proposed Model Overdose Good Samaritan Law

This model statute seeks to ensure that, in the event of a 911 call for an apparent overdose, the scene is treated as a medical emergency and *not* a crime scene.²²⁸ Moreover, a broadly defined Overdose Good Samaritan law will prevent the greatest number of overdose deaths. In Vermont, the significant decrease in overdose fatalities, as well as the high number of times EMS has administered naloxone in recent years, substantiates the success of a broad provision of immunity.²²⁹

A statute is most effective when its plain language clearly informs the Good Samaritan of the actual protection afforded. The model Overdose Good Samaritan statute below includes key phrases from the Vermont Good Samaritan law while making several textual improvements to enhance clarity. Subsection A of the statute begins:

A person who, in good faith and in a timely manner, seeks medical assistance for someone who is experiencing a drug overdose shall not be cited, arrested, or prosecuted for *any* drug-related offense.

²²⁸ See NAT'L INST. OF DRUG ABUSE, *supra* note 10, at 3.

²²⁹ See VT. DEP'T HEALTH, *supra* note 219.

Subsection B of the statute will continue:

A person who seeks medical assistance for a drug overdose or is the subject of a good faith request for medical assistance . . . shall not be subject to any of the penalties for violation of a protection order.

Additionally, Subsection C, D, E, and F respectively will dictate that:

- (c) A person shall not be subject to any sanction for a violation of a condition of pretrial release, probation, furlough, or parole for any drug-related offense.
- (d) The act of seeking medical assistance shall be considered a mitigating factor at sentencing for violation of an independent offense.
- (e) The immunity provisions of this section apply only to the use and derivative use of evidence gained as a proximate result of the person's seeking medical assistance for a drug overdose. . . and do not preclude prosecution of the person on the basis of evidence obtained from an independent source.
- (f) Immunity shall not be contingent on cooperation with law enforcement or require the person to seek treatment themselves.

Subsection E is particularly important because it is critical that law enforcement may still prosecute crimes when evidence independent of the overdose exists. Moreover, pursuant to subsection F, a person cannot be forced to cooperate or seek treatment for the addiction because that could deter the 911 call, and saving the overdose victim's life is of the utmost priority.

Lastly, and most importantly, protection from drug-induced homicide will not need to be enumerated in the statute. Because the model drug-induced homicide statute specifically targets drug-manufacturers and dealers, immunity is not necessary. Ultimately, because the drug-induced homicide statute will be limited

to drug-manufacturers and dealers, the Overdose Good Samaritan statute does not need to enumerate protection from such prosecution. Each statute can now act independent of the other and accomplish the goals originally set forth at the time of their enactment— to deter selling and encourage people to call for medical assistance to save a life during an overdose.²³⁰ The drug-induced homicide statute will target drug-dealers and manufacturers, while the Overdose Good Samaritan law will broaden immunity protection and ensure that people call for medical assistance in the case of a drug overdose and do not face criminal charges as a result.

CONCLUSION

In conclusion, adoption of the model drug-induced homicide statute will ensure drug-manufacturers and dealers worthy of prosecution are actually the ones prosecuted, while adoption of the Overdose Good Samaritan will ensure people witnessing an overdose will seek medical assistance without fear of police involvement. It is critical that the adopted drug-induced homicide statute explicitly target drug-manufacturers and dealers, and in effect, protect the friends and family of the overdose victim who may have purchased or delivered the drug from the grave consequences under the law. Moreover, it is critical that friends and family are aware of and understand the protections afforded to them under the model Overdose Good Samaritan statute. Therefore, clearly enumerated protection must be laid out within the model statute as presented above. By immunizing the Good Samaritan from any drug-related offense, people will be more willing to save a life and seek medical assistance because the fear of police involvement will decrease. Such immunity will instill trust and confidence in the criminal justice system from those calling 911 and more lives will be saved in the wake of the drug epidemic that is plaguing the nation.

²³⁰ Lipari & Hughes, *supra* note 15, at 3.