

# DRUG-INDUCED HOMICIDE: A COMPREHENSIVE STATUTORY PROPOSAL

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*The staggering increase in US opioid overdose deaths in the last decade has prompted federal and state governments to aggressively pursue drug-induced homicide prosecutions, underscoring the propensity for punitive rather than policy responses to drug use. State and federal drug-induced homicide laws are too often overly broad and consequently incriminate individuals who lack the requisite mens rea for homicide prosecution. This paper addresses the issues with the current status of drug-induced homicide legislation and offers a legal framework to resolve certain deficiencies. In Part I, this paper explains the problematic approaches federal and state governments currently employ to combat today's opioid epidemic while Part II explores the legal conundrum resulting from overly broad statutory language. The paper then offers, in Part III, a comprehensive statutory proposal that includes key elements paramount to the fair and just administration of our laws. Finally, the paper explains, in Part IV, why this statutory scheme is best designed to target culpable parties without incriminating blameless individuals.*

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## INTRODUCTION

According to evidence presented at his trial, now-thirty-two-year-old Aaron Broussard ordered one-hundred grams of 4-FA, an analogue drug resembling that of amphetamine and MDMA, from his suppliers in China.<sup>1</sup> Mr. Broussard's suppliers actually shipped him one-hundred grams of ninety-nine percent pure fentanyl.<sup>2</sup> Over the course of one month, Mr. Broussard sent packages containing fentanyl to over twelve customers throughout the US who ordered and expected to receive a controlled substance analogue similar to Adderall.<sup>3</sup>

Mr. Broussard claimed that he did not know he was distributing fentanyl, but at trial the prosecution noted that he continued to sell the drugs after learning some people had become seriously ill and nearly died.<sup>4</sup> In fact, Mr. Broussard contacted his suppliers in China to request a discount on his next drug delivery because of this issue.<sup>5</sup> Moreover, a similar mix-up occurred in August 2015, after which Mr. Broussard was "repeatedly told to test his drugs," though he never did.<sup>6</sup>

Eleven people died as a result of ingesting the fentanyl Mr. Broussard sold to them as an Adderall analogue. A federal jury consequently convicted Mr. Broussard on seventeen counts, including distribution of fentanyl resulting in death.

Mr. Broussard's case illustrates the need for drug-induced homicide (DIH) laws. But these laws can – and often do – implicate individuals who seem to lack any culpability.

In August 2015, Amy Shemberger pled guilty to drug-induced homicide, a Class X felony under Illinois law, and received a seven-year prison

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<sup>1</sup> Press Release, Department of Justice, U.S. Attorney's Office, District of Minnesota, Federal Jury Convicts Hopkins Man for Distributing Fentanyl that Caused Eleven Overdose Deaths (Mar. 31, 2022), <https://www.justice.gov/usao-mn/pr/federal-jury-convicts-hopkins-man-distributing-fentanyl-caused-eleven-overdose-deaths>. See generally Clayton L. Smith, *The Controlled Substance Analogue Enforcement Act of 1986: The Compromising of Criminalization*, 16 AM. J. CRIM. L. 107, 108 (1988) (providing an outline of the evolution of the analogue drug problem) ("The term 'designer drug' [also known as analogue drug] is used to define a class of chemical substances specifically created to mimic the pharmacological effects of substances listed in the Controlled Substances Act.").

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Minnesota Man Sentenced to Life in Prison for Selling Fentanyl in 11 Fatal Overdoses: "Your disregard for Human Life Is Terrifying"*, CBS NEWS, (Sept. 13, 2022), <https://www.cbsnews.com/news/aaron-broussard-life-prison-selling-fentanyl-11-fatal-overdoses/> (Sep. 13, 2022).

<sup>5</sup> *Id.*

<sup>6</sup> Department of Justice, *supra* note 1.

sentence.<sup>7</sup> The offense carries a sentence of up to thirty years, but she received a shorter sentence for testifying against her co-defendant.<sup>8</sup>

Ms. Shemberger “murdered” her long-term boyfriend, Peter Kucinski – her high school sweetheart and the father of her child.<sup>9</sup> She and Peter struggled with substance abuse and used heroin regularly.<sup>10</sup> Ms. Shemberger began using heroin after developing an addiction to prescription painkillers following a back injury.<sup>11</sup> Mr. Kucinski used heroin for years prior to Ms. Shemberger’s injury and helped her transition to heroin once she began experiencing symptoms of withdrawal between prescription refills.<sup>12</sup>

Ms. Shemberger and Mr. Kucinski alternated driving into Chicago to buy drugs, and on the day of Peter’s death, Ms. Shemberger caught a ride with a friend who purchased the heroin and drove her home.<sup>13</sup> On the way home, Ms. Shemberger snorted a ten-dollar bag of heroin and then gave Mr. Kucinski his own ten-dollar bag.<sup>14</sup> Mr. Kucinski snorted the bag of heroin in the bathroom of their home and then went to sleep.<sup>15</sup>

Ms. Shemberger and a friend later noticed that Mr. Kucinski was no longer breathing.<sup>16</sup> They called 911 and paramedics rushed Mr. Kucinski to the hospital, but he died before arriving.<sup>17</sup> Two months later, the State of Illinois charged Ms. Shemberger with drug-induced homicide and a judge set her bail at one million dollars.<sup>18</sup>

The case of Aaron Broussard illustrates the need for a legal mechanism to hold accountable those who knowingly and recklessly facilitate overdose deaths and contribute to the US opioid epidemic. But state and federal DIH laws are too often overly broad and encompass individuals like Amy Shemberger who lack the requisite *mens rea* for homicide prosecution. This

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<sup>7</sup> *An Overdose Death Is Not Murder: Why Drug-Induced Homicide Laws Are Counterproductive and Inhumane*, DRUG POLICY ALLIANCE (Nov. 2017), [https://drugpolicy.org/wp-content/uploads/2023/05/Overdose\\_Death\\_Is\\_Not\\_Murder\\_Report.pdf](https://drugpolicy.org/wp-content/uploads/2023/05/Overdose_Death_Is_Not_Murder_Report.pdf).

<sup>8</sup> 720 ILL. COMP. STAT. 5/9-3.3 (2018).

<sup>9</sup> DRUG POLICY ALLIANCE, *supra* note 7.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* (“Benjamin [Camunias] bought the heroin and then drove Amy back to Lockport, Illinois where she and Peter lived with their five-year-old son, Noah.”). Camunias was also charged with the same offenses.

<sup>14</sup> *Id.* (noting that Peter snorted the same amount of heroin that Ms. Shemberger snorted on the car ride home).

<sup>15</sup> *Id.* (“‘Peter would pass out and not wake up for three or four hours sometimes,’ Amy explained. ‘I wouldn’t really think anything of it, because that was what he would do over and over throughout all the years I knew him.’”).

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 43.

<sup>18</sup> *Id.* at 44.

article addresses the issues with the current status of drug-induced homicide legislation and offers a legal framework to resolve certain deficiencies. In Part I, the article explains the problematic approach currently employed to combat today’s opioid epidemic while Part II explores the legal conundrum resulting from this approach and the use of overly broad statutory language. The article then offers, in Part III, a comprehensive statutory proposal that includes key elements paramount to the fair and just administration of our laws. Finally, the article explains, in Part IV, why this statutory scheme is best designed to target culpable parties without incriminating blameless individuals.

## I. THE PROBLEMATIC APPROACH TO TODAY’S OPIOID EPIDEMIC

### A. *Today’s Opioid Epidemic*

Between 1999 and 2021, U.S. drug overdose deaths increased by 539%.<sup>19</sup> In 2021, 107,600 people died from overdoses – an all-time high and marked fifteen percent increase from 2020.<sup>20</sup> The most recent increases in opioid overdose deaths are attributed to illicitly manufactured fentanyl, which “is often added to heroin to cut costs while increasing potency.”<sup>21</sup> The Drug Enforcement Administration (DEA), likely in response to these staggering numbers, “issued a nationwide alert” about the dangers of fentanyl and fentanyl analogues in 2015.<sup>22</sup>

According to the Centers for Disease Control and Prevention (CDC), fentanyl “is often mixed with heroin and/or cocaine as a combination product—with *or without the user’s knowledge*—to increase its euphoric effects.”<sup>23</sup> As “the most potent opioid available for use in medical treatment[,]” fentanyl is fifty to one hundred times “more potent than morphine” and thirty to fifty times “more potent than heroin.”<sup>24</sup> As little as

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<sup>19</sup> *Drug-Induced Homicide Prosecutions*, FAIR AND JUST PROSECUTION, <https://fairandjustprosecution.org/wp-content/uploads/2022/07/FJP-Drug-Induced-Homicide-Brief.pdf> (last visited Sep. 3, 2022).

<sup>20</sup> See Shawn Hayes, *The Fatal “Blues”*, FBI LEB (June 6, 2023), <https://leb.fbi.gov/articles/featured-articles/the-fatal-blues#:~:text=In%202021%2C%20more%20than%20107%2C600,synthetic%20opioids%2C%20such%20as%20fentanyl.&text=By%20comparison%2C%20during%20the%20same,49%2C000%20were%20killed%20by%20firearms>.

<sup>21</sup> DRUG POLICY ALLIANCE, *supra* note 7 (footnote omitted).

<sup>22</sup> Press Release, Drug Enf’t Admin., DEA Issues Nationwide Alert on Fentanyl As Threat to Health and Public Safety (Mar. 18, 2015), <https://www.dea.gov/es/node/5270>.

<sup>23</sup> *Fentanyl*, CTRS. FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/opioids/basics/fentanyl.html> (last updated Aug. 8, 2023) (emphasis added).

<sup>24</sup> Drug Enforcement Administration, *supra* note 22.

one-fourth of a milligram can be fatal if ingested.<sup>25</sup> The DEA says, “[m]any users believe that they are purchasing heroin and actually don’t know that they are purchasing fentanyl – which often results in overdose deaths.”<sup>26</sup>

In October 2017, President Trump officially declared the opioid crisis a public health emergency.<sup>27</sup> He provided details “of his administration[’s] plans to combat the growing crisis –including promoting a massive anti-drug ad campaign.”<sup>28</sup> He also directed the Health and Human Services (HHS) secretary “to declare the epidemic a public health emergency.”<sup>29</sup> Disregarding policy solutions, however, some state and federal legislators have encouraged punitive approaches to address the crisis instead.<sup>30</sup> Former Attorney General Sessions even suggested capital punishment as an appropriate course of action in some DIH cases in a 2018 memo issued to U.S. Attorneys urging federal prosecutors to consider “every lawful tool at their disposal. . . . include[ing] the pursuit of capital punishment in appropriate cases.”<sup>31</sup>

### B. *The Legal Conundrum*

As the number of fatal overdoses in the US has continued to increase, so

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<sup>25</sup> *Id.*

<sup>26</sup> *Fentanyl*, U.S. DRUG ENF’T ADMIN., <https://www.dea.gov/factsheets/fentanyl> (last visited Nov. 1, 2022).

<sup>27</sup> Dan Merica, *Trump Declares Opioid Epidemic a National Public Health Emergency*, CNN (Oct. 26, 2017), <https://www.cnn.com/2017/10/26/politics/donald-trump-opioid-epidemic>.

<sup>28</sup> *Ongoing emergencies & disasters*, CTRS. FOR MEDICARE & MEDICAID SRVS. (last modified Sept. 6, 2023), <https://www.cms.gov/about-cms/what-we-do/emergency-response/current-emergencies/ongoing-emergencies>.

<sup>29</sup> *Id.*

<sup>30</sup> *See, e.g.*, Press Release, Florida Senate, Senate Passes Bill to Crack Down on “Frankenstein” Drug Dealers (May 2, 2023), <https://flsenate.gov/Media/PressRelease/Show/4455>, (quoting Florida Senator Jason Brodeur saying “This legislation provides a key to a holistic strategy when it comes to reducing overdoses and fentanyl poisonings, and that is holding drug dealers accountable. The outcome of this law gives those in the criminal justice profession an additional tool that is needed to combat this deadly epidemic”); Matthew Medsger, *Murder charges for deadly drug dealers proposal will reemerge in Senate*, BOSTON HERALD, <https://www.bostonherald.com/2023/01/18/murder-charges-for-deadly-drug-dealers-proposal-will-reemerge-in-senate/> (Jan. 18, 2023, 6:30 PM) (discussing a drug-induced homicide bill introduced in Massachusetts by State Senator Patrick O’Connor) (“[Senator O’Connor] told the Herald . . . ‘where we are we need to continue to have an emphasis on enforcement and there has to be an element of justice for these devastated families.’”).

<sup>31</sup> Press Release, Department of Justice, Office of Pub. Affairs, Attorney General Sessions Issues Memo to U.S. Attorneys on the Use of Capital Punishment in Drug-Related Prosecutions (Mar. 21, 2018), <https://www.justice.gov/opa/pr/attorney-general-sessions-issues-memo-us-attorneys-use-capital-punishment-drug-related>.

too has the frequency of charges and prosecutions under DIH statutes.<sup>32</sup> National DIH charges totaled 446 in 2016, 663 in 2017, and 423 in 2018.<sup>33</sup>

Though most DIH laws are intended to target large-scale drug operations and distributors, friends and family of the deceased may find themselves facing charges.<sup>34</sup> According to a study by the Health in Justice Action Lab, fifty percent of those charged under the statutes are friends, family, or partners of the deceased, while the actual “dealer[s] of the drug” represent only forty-seven percent of DIH prosecutions.<sup>35</sup> Even more problematic, most DIH laws require no intent toward the resulting death.<sup>36</sup> Because of this, state DIH laws do not always conform with traditional notions of justice – that is, the punishment often does not fit the crime or culpability – and may properly be characterized as strict liability offenses.<sup>37</sup>

The *mens rea* requirement attached to traditional homicide law is deeply rooted in American legal jurisprudence, but DIH laws appear to abandon this principle, “impos[ing] punishments far in excess of the culpability they require.”<sup>38</sup> Moreover, the statutes are written and interpreted broadly to

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<sup>32</sup> Jennie M. Miller, *Save a Friend’s Life or Risk Your Freedom: The Dilemma Too Many People Face When Witnessing An Overdose*, 34 J. CIV. RTS. & ECON. DEV. 351, 362-64 (2021) (“[T]he [Drug Policy Alliance] 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.”).

<sup>33</sup>*Id.* at 363-64 (noting a three-hundred percent increase in news article about DIH charges from 2011 to 2016) (“In 2017 alone, thirteen states introduced bills to either create or strengthen existing drug-induced homicide laws.”)

<sup>34</sup> See, e.g., Kaitlin S. Phillips, Note, *From Overdose to Crime Scene: The Incompatibility of Drug-Induced Homicide Statutes with Due Process*, 70 DUKE L.J. 659, 667 (2020). DIH laws also create a disincentive for individuals to seek help in an emergency. Miller, *supra* note 32, at 364.

<sup>35</sup> Miller, *supra* note 32, at 364. See Part IV.A. for a discussion on the importance of adequately distinguishing traditional “drug dealers” from individuals who merely share or provide friends and/or family with drugs.

<sup>36</sup> See, e.g., FLA. STAT. § 782.04(1)(a) (2023); 720 ILL. COMP. STAT. § 5/9-3.3(a) (2018); MICH. COMP. LAWS § 750.317a (2006); OKLA. STAT. 21 § 701.7(b) (2012); WASH. REV. CODE § 69.50.415(1) (2023); VT. STAT. ANN. tit 18 § 4250(a)-(b) (2003).

<sup>37</sup> Strict liability is liability without culpability. See, e.g., *People v. Dancy*, 102 Cal. App. 4th 21, 35 (2002) (“[A] strict liability offense is one which dispenses with a mens rea, scienter, or wrongful intent element. Strict liability offenses eliminate the requirement of mens rea; that is, the requirement of a guilty mind with respect to an element of a crime.”); *State v. Lucero*, 98 N.M. 204, 206 (N.M. 1982) (“A strict liability statute is one which imposes criminal sanction for an unlawful act without requiring a showing of criminal intent.’ Thus, the sole question for the jury in a strict liability offense is whether the jury believes the defendant committed the act prescribed by the statute.”) (citation omitted) (quoting *State v. Lucero*, 87 N.M. 242, 244 (1975)).

<sup>38</sup> See, e.g., Phillips, *supra* note 34.

encompass anyone who “physically delivers” a proscribed drug.<sup>39</sup>

Although the purpose of the harsh penalties attached to DIH statutes was, and still is, to deter people from selling and using drugs, scholars have criticized the statutes as overly punitive and argue that they actually exacerbate the opioid epidemic by undermining local efforts to mitigate the crisis through public policy initiatives.<sup>40</sup> The National Overdose Prevention Network – a project at the Public Health Institute – argues that “the ‘tough-on-crime’ rhetoric of the decades-long drug war and the stigma associated with drug use have blocked the widespread adoption of life-saving overdose prevention and treatment policies.”<sup>41</sup>

Moreover, DIH laws disproportionately target people of color,<sup>42</sup> and this is unsurprising in the broader context of the war on drugs which has been “strikingly unequal across racial groups.”<sup>43</sup> Approximately seventy-four percent of all people imprisoned for drug possession crimes are Black,<sup>44</sup> and people of color receive sentences 2.1 years longer, on average, than white defendants accused of DIH or similar crimes.<sup>45</sup>

Despite criticisms surrounding the efficacy of drug-induced homicide legislation as a means for curtailing the overdose crisis, loved ones of those lost to drug use search for justice and find solace in accountability. The Drug-Induced Homicide Foundation is a nonprofit organization working to

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<sup>39</sup> *State v. McCasland*, 218 So. 3d 1119, 1127 (1st Cir. 2017) (affirming the conviction of second degree murder under Louisiana’s drug delivery resulting in death statute). *E.g.*, Millie Joy Humphrey, *Dead on Arrival: Illinois’ Drug-Induced Homicide Statute*, 14 T.M. COOLEY J. PRAC. & CLINICAL L. 227, 280-81 (2012).

<sup>40</sup> *See, e.g.*, Alyssa Mallgrave, *Purely Local Tragedies: How Prosecuting Drug-Induced Homicide in Federal Court Exacerbates the Overdose Crisis*, 13 DREXEL L. REV. 233, 233 (2020); Miller, *supra* note 32, at 371 (criticizing aggressive prosecutions under the Illinois DIH statute “despite blatant evidence that the . . . law has failed to reduce the number of overdose deaths annually”); Humphrey, *supra* note 39, at 288-98 (“While it is commendable for the legislature to draft a statute recognizing the grave effects of the drug trade and attempt to respond to the overdose deaths in a severe manner, it effectually enables more deaths than it prevents.”).

<sup>41</sup> *Drug Facts*, NAT’L OVERDOSE PREVENTION NETWORK, <https://nopn.org/resources/drug-facts> (last visited Oct. 9, 2023).

<sup>42</sup> *See, e.g.*, Valena E. Beety et al., *Drug-Induced Homicide: Challenges and Strategies in Criminal Defense*, 70 S.C. L. REV. 707, 709-10 (2019). *See also* FAIR AND JUST PROSECUTION, *supra* note 19, at 7 (arguing that legal questions such as causality are rarely argued because the “extraordinarily high potential sentences at stake . . . often prompt defendants to accept plea deals”).

<sup>43</sup> Zachary E. Shapiro et al., *Cycles of Failure: The War on Family, the War on Drugs, and the War on Schools Through HBO’s The Wire*, 25 WASH. & LEE J. C.R. & SOC. JUST. 183, 203 (2018) (“The War on Drugs has produced significant collateral damage. Its greatest casualty is the urban black community.”).

<sup>44</sup> *Id.*

<sup>45</sup> Beety, *supra* note 42 (citing *Drug Induced Homicide*, HEALTH IN JUSTICE ACTION LAB, <https://www.healthinjustice.org/drug-induced-homicide> (last visited Jan. 20, 2019)).

introduce DIH legislation to states that have not yet adopted these laws.<sup>46</sup> The organization provides support for families of victims who were “unlawfully delivered a controlled substance resulting in their death.”<sup>47</sup> Contrary to what many scholars argue, the foundation advocates that criminal investigation and prosecution are effective means to reduce drug-related deaths.<sup>48</sup>

## II. DRUG-INDUCED HOMICIDE APPROACHES

Legislatures introduced DIH laws in the 1980s to target people selling drugs during the war on drugs.<sup>49</sup> Currently twenty-three states and D.C. have enacted some form of these laws, while the federal system pursues similar charges under the Controlled Substances Act (CSA).<sup>50</sup>

### A. *The Controlled Substances Act*

Congress established the federal U.S. drug policy in 1970 with its passage of the CSA,<sup>51</sup> which places all substances already regulated under existing federal law into one of five schedules based on the substance’s “medical use, potential for abuse, and safety or dependence liability.”<sup>52</sup> Section 841 of the CSA – the “death results” sentencing enhancement – allows federal prosecutors to charge individuals who deliver a Schedule I or II drug if the use of that substance results in death or serious bodily injury.<sup>53</sup> The charge

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<sup>46</sup> *Why Are Drug Dealers Getting Away with Murder?*, DRUGINDUCEDHOMICIDE.ORG, <https://druginducedhomicide.org> (last visited Oct. 9, 2023).

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> Miller, *supra* note 32, at 362 (discussing the history and purpose of drug-induced homicide statutes).

<sup>50</sup> *See, e.g.*, FAIR AND JUST PROSECUTION, *supra* note 19.

<sup>51</sup> Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. §§ 801, 804.

<sup>52</sup> *The Controlled Substances Act*, U.S. DRUG ENF’T ADMIN., <https://www.dea.gov/drug-information/csa> (last visited Oct. 9, 2023). Schedule I drugs are drugs with “no currently accepted medical use and a high potential for abuse” and include heroin, marijuana, and ecstasy. *Drug Scheduling*, U.S. DRUG ENF’T ADMIN., Drug Information, <https://www.dea.gov/drug-information/drug-scheduling> (last visited Oct. 9, 2023). Schedule II drugs are drugs with a “high potential for abuse, with use potentially leading to severe psychological or physical dependence,” including, cocaine, methamphetamine, and fentanyl. *Id.* Schedule III drugs are drugs with a “moderate to low potential for physical and psychological dependence,” including codeine, ketamine, and steroids. *Id.* Schedule IV drugs are drugs with a “low potential for abuse and low risk of dependence,” including Xanax, Valium, and Ambien. *Id.* Schedule V drugs are drugs with “lower potential for abuse than Schedule IV and consist of preparations containing limited quantities of certain narcotics.” *Id.*

<sup>53</sup> 21 U.S.C. § 841(b)(1)(C).



carries a mandatory minimum sentence of twenty years in prison.<sup>54</sup>

On its face, the provision has two unambiguous requirements: that the defendant manufacture or distribute drugs and that a third party dies.<sup>55</sup> Intent toward the resulting death, causation, and any other element are either absent or subject to the courts' interpretation.<sup>56</sup>

Section 841 does not explain under what circumstances the "death results" sentencing enhancement is appropriate, but in 2014 the Supreme Court held that it applies when the use of the controlled substance is a "but-for" cause of the death and not merely a "contributing cause."<sup>57</sup> Nonetheless, scholars argue that even after this opinion, courts continue to employ a broader causation standard.<sup>58</sup> According to Valena E. Beety, most circuits concluded that the CSA does not require proof of proximate cause to charge an individual for drug delivery resulting in death.<sup>59</sup>

### B. State Approaches

State DIH laws vary, but they generally "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."<sup>60</sup> Twenty-three states and D.C. currently have some form of DIH legislation,<sup>61</sup> while states without DIH statutes may charge the offense of drug delivery resulting in death under various felony-murder, depraved heart, or involuntary or voluntary manslaughter laws.<sup>62</sup>

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<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> Alyssa D. Weinstein, *When Cause-in-Fact is, in Fact, Not the Solution: How Burrage Failed to Narrow the Scope of the Controlled Substances Act's "Death Results" Sentencing Enhancement*, 4.1 HRLR ONLINE 1 *passim* (2019).

<sup>57</sup> *Burrage v. United States*, 571 U.S. 204, 218-19 (2014) ("We hold that, at least where use of the drug distributed by the defendant is not an independently sufficient cause of the victim's death or serious bodily injury, a defendant cannot be liable under the penalty enhancement provision of 21 U.S.C. § 841(b)(1)(C) unless such use is a but-for cause of the death or injury."). *Accord* Weinstein, *supra* note 56, at 4.

<sup>58</sup> Weinstein, *supra* note 56, at 4.

<sup>59</sup> Beety, *supra* note 42, at 725-26 (urging litigants to request a proximate causation instruction to preserve the issue for the Supreme Court).

<sup>60</sup> FAIR AND JUST PROSECUTION, *supra* note 19.

<sup>61</sup> *Id.*

<sup>62</sup> DRUG POLICY ALLIANCE, *supra* note 7. *See, e.g.*, *Fairecloth v. Sternes*, 853 N.E.2d 878, 878 (Ill. App. Ct. 2006) (affirming defendant's drug-induced homicide conviction for delivering cocaine to victim who died "[f]ollowing a three-day cocaine binge"); *People v. Lagesse*, 2022 IL App (3d) 200452-U, \*2 (Ill. App. Ct. 2022) (affirming defendant's drug-induced homicide conviction after he delivered heroin and fentanyl to the victim); *Veach v.*

Convictions under these statutes carry sentences “equivalent to those for manslaughter and murder” and penalties vary from two to twenty years, with some including capital punishment.<sup>63</sup> Six states carry mandatory minimum life sentences.<sup>64</sup>

The Florida DIH statute provides that the unlawful killing of a person resulting from the unlawful distribution of a controlled substance is murder in the first degree and constitutes a capital felony.<sup>65</sup> This statute is particularly problematic as it lacks a *mens rea* requirement towards both the resulting death and the act of delivery yet allows prosecutors to seek the death penalty or life imprisonment.<sup>66</sup>

In Illinois, a person commits drug-induced homicide when he or she violates the Illinois Controlled Substances Act by “unlawfully delivering a controlled substance to another” if “any person’s death is caused by the injection, inhalation, absorption, or ingestion of *any amount* of that controlled substance.”<sup>67</sup> This offense is a Class X felony and carries a minimum six-year sentence.<sup>68</sup>

Scholars have criticized the Illinois statute as being overly broad because the requisite mental state for homicide is not present in most prosecutions.<sup>69</sup> Moreover, the statute applies to any person who “delivers” a drug, whether or not they fit within the traditional understanding of a drug dealer.<sup>70</sup> Finally, the statute does not specify a requisite quantity of the drug delivered or purchased.<sup>71</sup>

In Michigan, a person is guilty of a felony punishable by life imprisonment or any term of years if they deliver a schedule one or two controlled substance, other than marijuana, that causes the death of the recipient or any other person.<sup>72</sup> Michigan narrows the application of the statute by specifying a schedule one or two controlled substance other than

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State, 204 N.E.3d 331, 333 (Ind. Ct. App. 2023) (affirming defendant’s drug-induced homicide conviction and noting that a jury could have inferred that the fentanyl residue delivered to the victim was the cause of his death).

<sup>63</sup> DRUG POLICY ALLIANCE, *supra* note 7.

<sup>64</sup> Miller, *supra* note 32, at 362.

<sup>65</sup> FLA. STAT. § 782.04(1)(a) (2023).

<sup>66</sup> *See id.* § 782.04(1)(b).

<sup>67</sup> 720 ILL. COMP. STAT. § 5/9-3.3(a) (2018) (emphasis added).

<sup>68</sup> *Id.* § 5/9-3.3(b)

<sup>69</sup> *See* Humphrey, *supra* note 39, at 280 (“The protest expressed by mere users convicted of the offense is that the legislative intent is to punish drug dealers, not users. Yet, the statute prescribes the same punishment to both *groupings*; to be clear, the statute does not distinguish the two at all; therefore, the courts are not buying this argument either.”) (footnote omitted). *Cf.* Miller, *supra* note 32, *passim*.

<sup>70</sup> *See* Humphrey, *supra* note 39, at 280. *See also* Miller, *supra* note 32, *passim*.

<sup>71</sup> *See* 720 ILL. COMP. STAT. § 5/9-3.3 (2018).

<sup>72</sup> MICH. COMP. LAWS § 750.317a.

marijuana, but the loose causality standard and lack of a requisite mental state toward the resulting death affords prosecutors broad discretion in deciding when to bring charges and against whom.<sup>73</sup>

Under the Oklahoma DIH statute, a person commits murder in the first degree, regardless of malice, if death results from the unlawful distribution of a controlled dangerous substance.<sup>74</sup> Not only does this statute lack a mental state requirement toward the resulting death, but the language explicitly states that liability will be imposed *regardless of malice*.<sup>75</sup>

In Washington, a person who unlawfully delivers a controlled substance, which is subsequently used by the person to whom it was delivered and results in the death of the user, is guilty of “controlled substances homicide.”<sup>76</sup> While the statute lacks a *mens rea* element, it does require a clear chain of custody: the decedent must be the person to whom the drug was delivered.<sup>77</sup>

Vermont law provides that if death results from the selling or dispensing of a regulated drug in violation of state law, then the person convicted of the violation shall be imprisoned for no less than two years and no more than twenty years.<sup>78</sup> This DIH approach yields a lighter sentence than many others and establishes proximate cause as a required element but includes no *mens rea* requirement toward the resulting death and does not address the chain of custody.<sup>79</sup>

The General Assembly of Vermont explained its intent that the law be applied very narrowly to target entrepreneurial drug dealers “who traffic large amounts of illegal drugs *for profit*, rather than people addicted to drugs or their friends and family.”<sup>80</sup> Unlike Vermont, not every state legislature has explained its intent behind their own DIH statute.

Each of these statutes present issues with causality, mental state and culpability, drug classification, and/or chain of custody. An adequate DIH statute must consider each of these factors when seeking to apply homicide law to drug distribution crimes.

### III. STATUTORY PROPOSAL

An adequate DIH statute must, at a minimum, reference a causation

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<sup>73</sup> *See id.*

<sup>74</sup> OKLA. STAT. tit. 21 § 701.7(b) (2019).

<sup>75</sup> *See id.*

<sup>76</sup> WASH. REV. CODE § 69.50.415(1) (2023). This offense is a class B felony. *Id.* § 69.50.415(2) (2023).

<sup>77</sup> *See* WASH. REV. CODE § 69.50.415(1) (2023).

<sup>78</sup> 18 VT. STAT. ANN. tit 18. § 4250(a) (2023).

<sup>79</sup> *Id.* § 4250(b).

<sup>80</sup> Miller, *supra* note 32, at 372.

element and the offender’s mental state toward the resulting death.<sup>81</sup> Further, providing some means to narrow the scope of whom the statute targets will help ensure that blameless individuals – particularly friends and family of the decedent – are not unjustly incriminated.

To inform the *mens rea* and causation elements, the statute should consider the lethality of the drug. The following proposal includes a tiered system under which the lethality of the drug dictates the *mens rea* and, consequently, the seriousness of the offense.

#### A. Necessary Components

Legislatures enacted DIH statutes for righteous reasons: to deter sales of dangerous drugs and penalize those who facilitate overdose deaths. To further this objective without incriminating friends and family, DIH statutes must utilize some framework that defines “distribute” or specifies the nature of a distributor.<sup>82</sup> Doing so will narrow the scope and reach of the statute to better ensure the appropriate individuals are held accountable without incriminating blameless parties. Therefore, profit motive can and should be used to identify individuals the statute seeks to target.<sup>83</sup>

Moreover, most state DIH statutes as well as the CSA overlook the importance of intent in these offenses. Rather than imposing strict liability, a statute that considers the knowledge and intent of the drug distributor will better ensure that blameworthy individuals like Aaron Broussard are brought to justice while those who lack the requisite culpability are not used as a

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<sup>81</sup> Mental state, also called *mens rea*, meaning “guilty mind,” is an essential element in criminal law because it “supports the legitimacy of the criminal law by punishing those actions believed to be immoral.” Jeremy M. Mill, *Mens Rea Quagmire: The Conscience or Consciousness of the Criminal Law?*, 29 W. ST. U. L. REV. 21, 22 (2001). Causation is an equally important element as forms the basis for assigning blame. See Sanford H. Kadish, *Complicity, Cause and Blame: A Study in the Interpretation of Doctrine*, 73 CAL. L. REV. 323, 332 (1985) (“[W]hether we may be blamed for something that results from our actions turns on whether we may be said to have been the cause of that result, or to be blamable for it on some related ground.”).

<sup>82</sup> See Humphrey, *supra* note 39, at 286-87 for a discussion on the impact of DIH statutes on the actions of those in a position to summon medical help.

<sup>83</sup> Various areas of the law employ a similar approach, using profit motive to define relevant actors, including antitrust laws, consumer protection laws, and tax laws. See, e.g., 15 U.S.C. § 2 (“Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony”); 15 U.S.C. § 52(b) (empowering the Federal Trade Commission to take action against unfair methods of competition “affecting commerce” without explicitly mentioning profit motive); 26 U.S.C. § 183 (outlining criteria used by the Internal Revenue Service to determine whether an activity is engaged in for profit, which can affect the taxpayer’s ability to deduct losses associated with that activity from their taxable income).

scapegoat in the overdose crisis like Amy Shemberger.<sup>84</sup> When determining a distributor’s level of intent, several factors should be considered, including the lethality of the drug and the chain of custody.

Common sense supports the need for a statute that considers the lethality of the drug and the consequent likelihood of its use resulting in death. This is arguably one of the most important considerations when seeking to impose liability for delivery of a drug resulting in death, as this knowledge informs the *mens rea* element. Lethality is also useful for assessing the foreseeability of death resulting from use; thus, DIH statutes should use this factor to guide the analysis of *mens rea* and causation to determine an offender’s level of culpability.

## B. Offenses

DIH charges should be classified into two separate categories – misdemeanor and felony offenses – based on the necessary components discussed above. The offender’s mental state toward the resulting death should correspond to the seriousness of the offense. Consequently, no liability should be imposed when the offender acts with no criminal intent toward the underlying death.

The proposed statute uses marijuana, heroin, and fentanyl as standards to establish a tiered system based on potency, but each state should determine the lethality of a given drug – and the culpability it engenders – based on expert guidance.<sup>85</sup>

Each state should also determine the appropriate maximum and minimum sentences for misdemeanor and felony offenses.<sup>86</sup>

The following sections include a DIH statute proposal divided into two categories: misdemeanor and felony offenses.

### 1. Misdemeanor Offense

If a person intending to make a profit, recklessly or with criminal negligence, delivers a drug that results in the death of the person to whom it was delivered, then that person is liable for misdemeanor manslaughter. Based on the lethality of the drug, an individual who knowingly delivers:

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<sup>84</sup> See generally *supra* notes 1-18 and accompanying text.

<sup>85</sup> The CSA scheduling is not the most suitable guidepost. See *infra* Section IV.B.

<sup>86</sup> This author advocates for abolishment of capital punishment and urges against its use under DIH laws. See generally Arnold H. Loewy, *Why Capital Punishment Should be Abolished*, 51 TEX. TECH L. REV. 31, 42 (2018) (“[G]iven the marginal utility of capital punishment weighed against its great disutility, it is clear to me that capital punishment should be abolished, and the sooner the better.”).

1. Heroin acted recklessly or with criminal negligence toward the resulting death and is liable for voluntary manslaughter.
2. Any drug less potent than heroin acted negligently toward the resulting death and is liable for involuntary manslaughter.

In any case, the delivery of the drug must be an independently sufficient cause of death to charge the manufacturer or deliverer with misdemeanor drug-induced homicide.

## *2. Felony Offense*

If a person intending to make a profit manufactures or delivers a drug that he or she knew or should have known was likely to result in death and does result in the death of the person to whom it was delivered, then that person is liable for felony manslaughter. Based on the lethality of the drug, an individual who knowingly delivers fentanyl or a drug of similar potency acted knowingly toward the resulting death.

If a person manufactures or delivers a drug with the intent to cause the death of any person, then that person is liable for murder in the first degree.

In any case, the delivery of the drug must be an independently sufficient cause of death to charge the manufacturer or deliverer with felony drug-induced homicide.

## IV. STRENGTHS OF THIS STATUTORY SCHEME

Adoption of this statutory scheme will ensure that prosecutors target culpable parties rather than blameless individuals for drug-induced homicide. The imposition of a requisite mental state toward the resulting death, in conjunction with the inclusion of a profit motive distinction for distributors, better ensures that prosecutors target the right people. Further, the classification of offenses based on the lethality of the drug and corollary gradient of seriousness guarantees charges proportional to the offense committed. Finally, both misdemeanor and felony DIH offenses require independently sufficient causation to ensure fair and just prosecutions.

### *A. Targeting the Right People*

The profit motive requirement will limit confusion with the applicability of the statute by clarifying the nature of the relationship between the decedent and a potential defendant.

Importantly, the proposed statute embraces the “joint-user doctrine,” which provides that when “two individuals simultaneously and jointly acquire possession of a drug for their own use, intending only to share it

together, their only crime is personal drug abuse.”<sup>87</sup> Some statutes allow for DIH prosecutions even when both the offender *and* the decedent were present at the time of purchase and jointly had actual or constructive possession of the drugs.<sup>88</sup> The profit motive requirement aligns the proposed statute with the principles underpinning the joint-user doctrine. The “intending to make a profit” phrase also eliminates confusion with the meaning of the term “deliver” – that is, whether the term limits prosecution to those who sell or broadly encompasses anyone who hands a drug to another.

### B. Calibrating for Culpability

Few state statutes impose a *mens rea* requirement towards the resulting death. Like the CSA, the unlawful act in most state DIH statutes derives from a violation of state laws prohibiting the selling or delivering of a regulated substance.<sup>89</sup> These laws typically require a knowing or intentional mental state regarding the distribution of the illicit drug, though not toward the resulting death.<sup>90</sup> The Oklahoma statute goes so far as to explicitly state that an offender is liable for murder in the first degree, *regardless of malice*, if death results from the distribution of a controlled substance.<sup>91</sup>

This approach runs counter to traditionally accepted homicide law, which requires *mens rea* as a due process safeguard.<sup>92</sup> The current lack of a requisite mental state toward the result is unprecedented in homicide jurisprudence and leads to charges far in excess of the culpability they require.

Traditional homicide law incorporates an offense gradient in which mental state corresponds to the seriousness of the offense,<sup>93</sup> and DIH laws should affirm this approach. With this in mind, legislatures should look to the lethality of the drug to inform *mens rea*.

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<sup>87</sup> United States v. Swiderski, 548 F.2d 445, 450 (2d Cir. 1977) (reversing defendants’ convictions under Section 841(a) of the Controlled Substances Act) (“[S]imple joint possession does not pose any of the evils which Congress sought to deter and punish through the more severe penalties provided for those engaged in a ‘continuing criminal enterprise’ or in drug distribution.”). *Accord* Beety, *supra* note 42, at 713.

<sup>88</sup> See *People v. Coats*, 968 N.E.2d 1151, 1161 (Ill. App. Ct. 2012) (finding that “the existence *or* the nonexistence of joint possession at a pertinent time could have been found by a reasonable jury”).

<sup>89</sup> See *supra* Part II.B.

<sup>90</sup> See *supra* Part II.B.

<sup>91</sup> OKLA. STAT. tit. 21, § 701.7(b) (2012).

<sup>92</sup> Benjamin Levin describes *mens rea* as “a key component of the substantive criminal law and a staple of the first-year law school curriculum . . . the requirement that criminal conduct be accompanied by a ‘bad mind’ or guilty mental state.” Benjamin Levin, *Criminal Law: Mens Rea Reform and Its Discontents*, 109 J. CRIM. L. & CRIMINOLOGY 491, 493 (2019).

<sup>93</sup> See generally MODEL PENAL CODE § 2.02(1)-(2).

Moreover, the mental state requirements in the proposed statute help avoid the “culpability gap,” described by Professor Stephen Smith as the discrepancy resulting “when a prohibited act, though blameworthy, is insufficiently blameworthy to deserve the penalties authorized by the statute under which the offender is prosecuted.”<sup>94</sup>

Not only does the proposed scheme close the culpability gap, but it also accounts for the complexities of drug-related deaths, including the role of other parties, such as the decedent, and factors that impact the foreseeability of a resultant death.

### C. *Classifying Offense Based on Gradient of Seriousness*

The use of tiers based on the drug’s lethality allows legislatures to classify the offenses into categories based on the gradient of seriousness. Though a valid design, the CSA’s scheduling system is structurally flawed, as evidenced by the inclusion of marijuana as a Schedule I drug with “no currently accepted medical use and a high potential for abuse,”<sup>95</sup> despite its lawful medical use in thirty-seven states, four territories, and D.C.<sup>96</sup>

Despite federal and state attempts to classify controlled substances into categories,<sup>97</sup> the systems do not consider the character most relevant to homicide charges: lethality. Although the CSA and most parallel laws classify marijuana as a Schedule I drug,<sup>98</sup> it is one of the safest drugs commonly used recreationally.<sup>99</sup>

The classification of marijuana and heroin as a Schedule I drug and fentanyl as a Schedule II drug exemplifies the current system’s flaws – fentanyl is incredibly lethal, marijuana is functionally nonlethal, and heroin falls somewhere in the middle of this spectrum.<sup>100</sup> The CDC reported approximately 9,173 overdose deaths involving heroin in 2021, while

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<sup>94</sup> Stephen F. Smith, *Proportional Mens Rea*, 46 AM. CRIM. L. REV. 127, 136 (2009).

<sup>95</sup> *Drug Scheduling*, UNITED STATES DRUG ENF’T ADMIN., <https://www.dea.gov/drug-information/drug-scheduling> (last visited Nov. 27, 2022).

<sup>96</sup> *State Medical Cannabis Laws*, NAT’L CONFERENCE OF STATE LEGISLATURES, <https://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx> (June 22, 2023).

<sup>97</sup> *See, e.g.*, 21 U.S.C. § 812; MICH. COMP. LAWS § 750.317a (2006); MISS. CODE ANN. §§ 41-29-113–121 (2013).

<sup>98</sup> *See, e.g.*, 21 C.F.R. § 1308.11(d)(23); MISS. CODE ANN. § 41-29-113(d)(23)(A) (2013); ALA. CODE. § 20-2-23(b)(3)(J) (2021).

<sup>99</sup> *See* Drik W. Lachenmeier & Jürgen Rehm, *Comparative Risk Assessment of Alcohol, Tobacco, Cannabis and Other Illicit Drugs Using the Margin of Exposure Approach*, SCI. REPS., Jan. 30, 2015, at 1, 5-6.

<sup>100</sup> *See, e.g.*, *What Is a Lethal Dose of Marijuana*, ADDICTIONRESOURCE.NET, <https://www.addictionresource.net/lethal-doses/marijuana/> (last visited Aug. 16, 2023 July 13, 2021) (noting that the lethal dose of marijuana is extremely high and an overdose death from marijuana use is “extremely unlikely.”).



roughly one million people over the age of twelve reported using heroin in the past 12 months.<sup>101</sup> Thus, heroin use is not uncommon and, while dangerous, the drug is not as lethal as other controlled substances. This can be aptly contrasted with fentanyl, which is fifty times more potent than heroin and fatal even if ingested in extremely small quantities.<sup>102</sup>

Because lethality of a drug informs not only the *mens rea* but also causation, DIH laws should abandon the use of federal and state drug scheduling and instead consider the drug’s potency and likelihood of causing death.

A classification system like that in the proposed statute maximizes fairness in charges and sentencing: less culpability corresponds to a lesser offense. Further, the statutory scheme not only delineates between felony and misdemeanor offenses but also includes different classes of misdemeanor offenses based on culpability, considering the offender’s mental state toward, and the foreseeability of, the resultant death. This tailored approach avoids an “all or nothing” system, easing prosecutorial burdens and ensuring proportionality between the *actus reus* and punishment.

#### D. Ensuring Causation

The proposed statutory scheme also ensures the appropriate causality for homicide offenses. Many DIH statutes impose a contributing cause standard or the slightly higher “but-for” cause standard, but do not account for the various intervening causes that may follow delivery of the drug.<sup>103</sup> Therefore, the proposed statute requires the drug delivery be a sufficiently independent cause of death. This causation standard is narrower than any “contributing cause,” “substantial factor,” or “resulting from” standards used in some state DIH statutes and will limit prosecutions where the causation link is too attenuated.<sup>104</sup>

“Resulting in” or “caused by” language to address causality is overly broad in the context of drug-related deaths. Despite some causal link, attenuating circumstances can weaken the connection between the use of a

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<sup>101</sup> Heroin Overdose Data, CTRS. FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/drugoverdose/deaths/heroin/index.html> (Nov. 28, 2022). *See also* *What is the Scope of Heroin Use in the United States?*, NAT’L INST. ON DRUG ABUSE, (Jan. 26, 2022).

<sup>102</sup> *Supra*, notes 24-25 and accompanying text.

<sup>103</sup> *See, e.g.*, FLA. STAT. § 782.04(1)(a) (2022); MICH. COMP. LAWS § 750.317a (2006); OKLA. STAT. tit. 21, § 701(b); 18 PA. CONS. STAT. § 2506(a); WASH. REV. CODE § 69.50.415(a) (2003); W. VA. CODE § 61-2-1 (2023).

<sup>104</sup> *See, e.g.*, FLA. STAT. § 782.04(1)(a) (2022); MICH. COMP. LAWS § 750.317a (2006); OKLA. STAT. tit. 21, § 701(b); 18 PA. CONS. STAT. § 2506(a); WASH. REV. CODE § 69.50.415(a) (2003); W. VA. CODE § 61-2-1 (2023).

drug and the subsequent death. In many circumstances, the foreseeability of death is tenuous. Some drug users ingest a combination of drugs simultaneously or use more than the recommended amount. DIH statutes must consider these and other intervening factors.

For example, the Illinois statute explicitly imposes liability if death results from the use of “any amount” of the delivered drug.<sup>105</sup> Thus, a distributor is liable for drug-induced homicide even if the decedent uses the drug far in excess of the recommended amount.<sup>106</sup> In such a case, the decedent’s decision to use more than the recommended amount suffices as an intervening and contributing cause.<sup>107</sup> Nonetheless, the Supreme Court of Illinois determined that the state legislature intended for the word “caused” in the statute to convey a “contributing cause” standard.<sup>108</sup>

The intent toward the resulting death included in this article’s proposed statute can be used to mitigate this issue. If an individual did not possess the requisite mental state regarding the resulting death, even if the delivered drug is a sufficiently independent cause of the death, liability cannot be imposed. Thus, if the decedent had a pre-existing condition that impacted their physical response to the drug, or ingested an excessive amount of the drug, such that the defendant can be said to have not acted with the requisite level of intent toward the death, they will not be liable.

Chain of custody is also an important consideration, particularly as it relates to causality. Notably, the Washington statute addresses the chain of custody of the drug.<sup>109</sup> In pertinent part, it requires that the person to whom the drug was delivered is the ultimate user.<sup>110</sup> The Illinois and Michigan statutes explicitly state that DIH liability results if any person dies from the use of the drug, not merely the person to whom it was delivered.<sup>111</sup>

This inattention to the chain of custody compounds with the issue of causation by raising questions as to the state of the drug from the moment it leaves the offender’s hands to the moment the decedent ingests the drug. Therefore, a proper DIH statute should impose an independently sufficient cause standard. In order to apply such a standard, the facts must indicate that the offender’s delivery contained a substance lethal or potent enough to be an independently sufficient cause of death. A direct chain of custody is

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<sup>105</sup> 720 ILL. COMP. STAT. § 5/9-3.3(a) (2018).

<sup>106</sup> *See id.*

<sup>107</sup> *See id.*

<sup>108</sup> *People v. Nere*, 115 N.E.3d 205, 221 (Ill. 2018) (rejecting the Supreme Court’s “but-for” causation standard in DIH cases and instead affirming the state’s “long-standing ‘contributing cause’ theory of causation”).

<sup>109</sup> *See* WASH REV. CODE § 69.50.415(a) (2003).

<sup>110</sup> *See id.*

<sup>111</sup> *See* 720 ILL. COMP. STAT. § 5/9-3.3(a) (2018); MICH. COMP. LAWS § 750.317a (2006).

necessary to ensure this level of causality.

As an additional safeguard, the offenses in the proposed statute require that the drug caused the death of the person to whom the defendant delivered the drug. This requirement ensures a clear chain of custody and removes questions as to the state of the drug at the moment of delivery. The first-degree murder felony offense in the proposed statute imposes liability for intentionally causing the death of another and does not require that it be the death of the person to whom the defendant delivered the drug. Chain of custody is unnecessary here because the defendant intended to cause death, therefore it does not matter who dies, so long as the defendant achieved their objective.

## CONCLUSION

DIH laws are a justifiable response to the opioid epidemic but require improvements to ensure the prosecutions comport with traditional notions of justice and fairness. This includes securing defendants' due process rights and preventing the use of blameless individuals as scapegoats in the opioid crisis.

It is prudent to abandon state and federal drug classifications for purposes of DIH statutes and, instead, look to the lethality of the drug as the guiding characteristic. The proposed statutory scheme uses marijuana, heroin, and fentanyl to construct an offense gradient, but the fundamental purpose of the proposal simply is to introduce a system in which lethality of a drug corresponds to the defendant's mental state and subsequently to the seriousness of the offense. Utilization of an offense gradient based on the lethality of the drug incorporates culpability and foreseeability of death to ensure charges proportional to the offender's blameworthiness.

Contemplation of mental state and imposition of a heightened causation requirement will introduce a significant limitation to the applicability of these statutes, but a limitation nonetheless necessary to safeguard against incrimination of blameless individuals while still allowing governments to hold accountable those responsible for causing deaths through the manufacture and sale of illicit substances. Until state and federal legislatures embrace these concepts and modify DIH statutes to reflect basic American criminal justice principles, prosecutors bear the responsibility of exercising prudence and mindfulness in deciding when to bring DIH charges.