Drug-Induced Homicide Laws: A Misguided Response to Overdose Deaths

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Background

Overdose death rates in the United States have more than doubled over the past decade, surpassing motor vehicle accidents as the leading cause of injury-related death in the country. According to the Centers for Disease Control and Prevention, 47,055 people – an average of 128 people a day – died from drug overdoses in 2014. More than 18,000 overdose deaths in 2014 involved prescription opioids, such as hydrocodone (Vicodin™) and oxycodone (OxyContin™), while an additional 10,000 fatalities were attributed to heroin. Synthetic opioids, such as fentanyl, claimed nearly 5,550 lives.

Policymakers are understandably alarmed at the overdose crisis with which they are now confronted. The public is calling for help and solutions. Elected officials unfamiliar with, or resistant to, harm reduction, prevention, and treatment interventions, however, are introducing punitive, counter-productive legislative measures in a misguided effort to reduce overdose fatalities. In particular, some states, including New York (AB 8616), Ohio (HB 270), and Virginia (HB 615, SB 66) are considering bills that would allow prosecutors to charge people who provide the drugs that ultimately contribute to an overdose death with homicide.

More than 20 other states already have laws allowing similar charges. Known as “drug-induced homicide,” these laws range from capital one offenses that impose the death penalty or a life sentence to lesser prison sentence terms under various felony-murder, depraved heart, or involuntary or voluntary manslaughter statutes. Though many of these laws have sat idle on the books since their enactment decades ago during the height of the war on drugs, prosecutors are now reinvigorating them with a rash of drug-induced homicide charges in the wake of increasing overdose deaths.

There is no existing evidence, however, that indicates that further criminalizing opioid sales by allowing a charge of murder or manslaughter will achieve the goal of reducing overdose fatalities. Rather, drug-induced homicide laws are actually more likely to harm the very people they are seeking to protect, and to further reduce access to the critical services that do have the potential to save lives.

Drug-Induced Homicide Laws Will Not Curb Overdoses

Drug-Induced Homicide Undermines the Rationale Behind 911 Good Samaritan Laws

The importance and efficacy of providing limited criminal immunity to those who seek medical assistance in the event of an overdose is evidenced by the 35 states that have passed some form of “Good Samaritan” law. The most common reason people cite for not calling 911 is fear of police involvement. It is accordingly widely recognized that reducing barriers to calling 911 has the potential to save victims of overdose from severe injury and death.

Drug-induced homicide laws, on the other hand, discourage people from seeking help for fear of prosecution for manslaughter or murder. In Illinois, in the majority of drug-induced homicide cases there was an opportunity to save the overdose victim but the defendants chose inaction because of fear of prosecution. This is unsurprising – most states do not provide immunity from drug-induced homicide even if they have a Good Samaritan law, or, in the case of new legislation, are introducing harsh new criminal penalties that undermine Good Samaritan laws already in place. Rather than reducing the potential for mortality, as supposedly intended, drug-induced homicide laws will only result in additional overdose deaths due to fear of prosecution.
Drug-Induced Homicide Will Not Deter Drug Selling or Reduce Future Overdoses

Presumably, the intent of punishing people who supply drugs with incredibly harsh sentences like murder or manslaughter is to deter others from also supplying drugs that could lead to an overdose. But, it is widely understood, both in the general population as well as the academic and scientific communities, that increased arrests or increased severity of criminal punishment for drug-related offenses do not, in fact, result in less use (demand) or sales (supply).¹⁰ In other words, punitive sentences for drug offenses have no deterrent effect.

The supply chain for controlled substances is not ameliorated because a single seller is incarcerated, whether for drug-induced homicide or otherwise. Supply follows demand; not the other way around. Indeed, numerous studies have found that incarceration of drug dealers simply results in a “replacement effect,” meaning that the market responds to the demand for drugs by replacing drug sellers sent to prison with either new recruits or by the increased drug selling of dealers already in the market.¹¹ One such study concluded that the main effect of imprisoning drug sellers “is merely to open the market for another seller.”¹²

Drug-induced homicide laws, then, might fulfill an instinct for retribution, but they do nothing to reduce demand and necessarily implicate additional people in sustaining the supply chain that fulfills continuing demand. Neither of these approaches does anything to prevent future deadly drug overdoses.

Drug-Induced Homicide Targets the Wrong Point of Intervention

Drug-induced homicide laws assume that the seller can play some role in reducing overdose deaths – presumably by not supplying the drug in the first place. But, as already noted, as long as the demand exists, there will be supply to meet it. There are a host of factors that contribute to an overdose death, including tolerance, poly-drug use, circumstances of consumption, and familiarity with the substance – none of which can be controlled by the person who supplied the drugs. Indeed, 77% of prescription opioid overdose deaths and 67% of heroin overdose deaths are the result of mixing opioids with other drugs or alcohol.¹³ As a result, cases of drug-induced homicide are difficult to prove and win, primarily because of questions of intent (or, rather, lack thereof) and causation, and therefore require a significant outpouring of legal and other resources that could be better utilized. Were the resources focused on a different intervention point, such as education on the dangers of mixing substances or reducing demand, for example, the chances of reducing overdose death would correspondingly improve.

Drug-Induced Homicide Perpetuates the Harms of Criminalization

Drug-Induced Homicide Punishes Users Despite the Intent to Punish “Sellers”

Many of the drug-induced homicide laws already in existence as well as those being proposed as new legislation are touted as intended to punish so-called “professional” drug sellers who profit from their user clients’ addictions. But, the distinction between “seller” and “user” is artificial. Though data evaluating the drug use history of people who sell drugs is scant, a 2004 Bureau of Justice report found that an astonishing 70% of people incarcerated for drug trafficking in state prison used drugs themselves in the month prior to the offense.¹⁴ It is widely understood among experts who have studied drug markets that many sellers are people who are addicted and selling to support their own drug use. Moreover, the drug-induced homicide laws are often drafted so broadly that they, in many cases, encompass drug delivery or aiding and abetting drug use (even if between friends or people who are using drugs together).¹⁵ As a result, more often than not, the people being punished are the very people that the drug-induced homicide laws are actually intended to protect – people who are at risk of death due to a substance use disorder.

Drug-Induced Homicide Laws Foster Poor Prosecutorial Discretion

New Jersey’s law proves illustrative. There, the legislature specifically intended that the law be applied to “upper echelon” drug dealers or “kingpins” in the organized drug trade.¹⁶ In the majority of cases, however, the law has been used to “prosecute minors with no record or evidence of prior drug dealing, family members who engaged in drug use ‘recreationally,’ and ‘small time users,’ whom the legislature stated should be rehabilitated, not incapacitated.”¹⁷ In fact, out of the 32 drug-induced homicide prosecutions
identified by the New Jersey Law Journal in the early 2000s, 25 involved prosecutions of friends of the decedent who did not deal drugs in any significant manner. Accordingly, people who use drugs and are in the most desperate need of services are, instead, facing significant amounts of time behind bars as a result of their addiction.

Many of the drug-induced homicide cases recently prosecuted have involved defendants that have sold some form of fentanyl, a synthetic, rapid-acting opiate analgesic often added to heroin to increase its potency. Fentanyl has been widely reported in the media as one reason overdose fatalities are increasing. However, in the vast majority of cases, street-level sellers who are supplying heroin likely do not know it has had fentanyl added to it. Rather, fentanyl is generally manufactured in labs in Mexico and mixed with heroin before shipment. Even though the Drug Enforcement Administration has confirmed that they have found little evidence that fentanyl is added to heroin in the United States, low-level sellers who are unaware of the makeup of their product and its potency, and who are likely users themselves, have increasingly faced murder and manslaughter charges rather than being offered the assistance and treatment necessary to move beyond their addiction and their need to support it through selling opioids.

**Drug-Induced Homicide Reduces Access to Needed Services**

Rather than diminishing the harms of drug misuse, criminalizing people who sell and use drugs amplifies the risk of fatal overdoses and diseases, increases stigma and marginalization, and drives people away from needed treatment, health, and harm reduction services. Reducing the role of the criminal justice system is therefore critical to ensuring that people who use drugs are able to access vital treatment and harm reduction services.

**Effective Interventions to Decrease Overdose Exist**

There is no evidence that drug-induced homicide charges are effective at reducing overdose deaths or curtailing the use or sale of controlled substances. On the other hand, proven strategies are available to reduce the harms associated with drug misuse, treat dependence and addiction, improve immediate overdose responses, enhance public safety, and prevent fatalities.

These strategies include expanding access to the life-saving medicine naloxone and its associated training; improving fact-based drug education for young people that includes an overdose prevention and response component; enacting legal protections that encourage people to call for help for overdose victims; training people how to prevent, recognize and respond to an overdose; increasing access to medication-assisted treatment, including methadone and buprenorphine; and implementing safe injection facilities.

For more information on fighting overdose and harm reduction strategies, please visit: [www.drugpolicy.org/drug-overdose](http://www.drugpolicy.org/drug-overdose) and [www.drugpolicy.org/harm-reduction](http://www.drugpolicy.org/harm-reduction).

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2 Id.
3 Id. (a certain number of overdose deaths involve both prescription opioids and heroin—in 2013, it was 1,342).
4 Id.


8 C.J. Banta-Green et al., Washington's 911 Good Samaritan Drug Overdose Law - Initial Evaluation Results, Alcohol & Drug Abuse Institute, University of Washington, 2011, available at http://adai.uw.edu/pubs/infobriefs/ADAI-IB-2011-05.pdf (initial results from an evaluation of Washington State's Good Samaritan law, adopted in 2010, found that 83 percent of people who use opioids said they would be more likely, and less afraid, to call 911 in the event of a future overdose after learning about the law).


10 See, e.g., Donald Green & Daniel Winik, Using Random Judge Assignments to Estimate the Effects of Incarceration and Probation on Recidivism Among Drug Offenders, 48(2) Criminology 357, 357–387 (May 2010) (study found that variations in prison and probation time have no detectable effect on rates of re-arrest and suggests that, at least among those facing drug-related charges, incarceration and supervision seem not to deter subsequent criminal behavior); Samuel R. Friedman et al., Drug Arrests and Injection Drug Deterrence, 101(2) American Journal of Public Health 344, 347 (2011) (“Changes in hard drug arrest rates did not predict changes in [injection drug use] population rates. These results are inconsistent with criminal deterrence theory and raise questions about whether arresting people for hard drug use contributes to public health.”); Valerie Wright, Deterrence in Criminal Justice Evaluating Certainty vs. Severity of Punishment, The Sentencing Project (November 2010) (“Existing evidence does not support any significant public safety benefit of the practice of increasing the severity of sentences by imposing longer prison terms. In fact, research findings imply that increasingly lengthy prison terms are counterproductive. Overall, the evidence indicates that the deterrent effect of lengthy prison sentences would not be substantially diminished if punishments were reduced from their current levels.”)


17 James H. Knight, The First Hit’s Free ... or Is It? Criminal Liability for Drug-Induced Death in New Jersey, 34 Seton Hall L. Rev. 1327, 1332 (2004).


22 See, e.g., Samuel R. Friedman et al., Relationships of Deterrence and Law Enforcement to Drug-Related Harms Among Drug Injectors in US Metropolitan Areas, 20(1) AIDS 93, 93-99 (2006); Caitlin Elizabeth Hughes and Alex Stevens, What Can We Learn from the Portuguese Decriminalization of Illicit Drugs?, 6 British Journal of Criminology 50 (2010).