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"Retribution, Not a Solution": Drug-Induced Homicide in North Carolina

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“Retribution, Not a Solution”: Drug-Induced Homicide in North Carolina

ABSTRACT

Two men—we’ll call them John and Will—share an apartment. Unfortunately, both men are addicted to heroin. The men are struggling to get by. Neither one of them would consider themselves “drug dealers,” but both have made minor sales here and there to help support their drug habit, and both have had their share of run-ins with the law. One evening, John tells Will he is going to pick up some heroin, and John asks Will if he wants any. Will decides to chip in; he gives some money to John. John takes the money, pools it with his own, and travels across town to his dealer. He picks up the drugs, travels back to the apartment, and hands Will his share of the drugs. Tragically, Will overdoses, and cannot be revived. Do John’s actions constitute murder? Or perhaps the better question—should John’s actions be prosecuted as murder?

North Carolina, along with the rest of the nation, is facing an opioid crisis. Policymakers and law enforcement are scrambling to find a solution. Holding dealers of illegal drugs responsible for the deaths of overdose victims has been one of North Carolina’s answers—this Comment analyzes North Carolina’s Drug-Induced Homicide laws.

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INTRODUCTION

Every day in the United States, more than 130 lives are lost to opioid overdose.¹ In 2017, the Centers for Disease Control and Prevention (“CDC”) recorded 2,414 drug overdose deaths of North Carolinians.² The National Institute on Drug Abuse recorded that 1,953 of these deaths involved opioids; a death toll that has increased dramatically over the last five years.³ On a national scale, in 2017 the CDC recorded over 70,000 overdose deaths—an increase of 9.6% from 2016.⁴ To put this in context, the total number of American casualties in the Vietnam War was 58,220.⁵ What’s clear is this: North Carolina, and the nation as a whole, is experiencing a drug crisis. More specifically, North Carolina is facing an opioid epidemic—one that has left policymakers and law enforcement scrambling for a solution.

1. *Opioid Overdose Crisis*, NAT’L INST. ON DRUG ABUSE (revised Jan. 2019), <https://perma.cc/ML3B-RNHM>.

2. Nat’l Ctr. for Health Statistics, *Stats of the State of North Carolina*, CENTERS FOR DISEASE CONTROL & PREVENTION (Apr. 10, 2018), (on file with Campbell Law Review) [hereinafter *Stats of the State of North Carolina*].

3. NAT’L INST. ON DRUG ABUSE, NORTH CAROLINA OPIOID SUMMARY (2019), <https://perma.cc/WXF2-GCW6>. “Opioids” include illegal drugs like heroin along with synthetic opiates like fentanyl, oxycodone (OxyContin), hydrocodone (Vicodin), codeine, morphine, and many others. *Opioids*, NAT’L INST. ON DRUG ABUSE, <https://perma.cc/TT6K-M6H2>.

4. *Drug Overdose Deaths*, CENTERS FOR DISEASE CONTROL & PREVENTION (July 27, 2019), <https://perma.cc/ZT78-DZ7W>.

5. *Vietnam War U.S. Military Fatal Casualty Statistics*, NAT’L ARCHIVES, <https://perma.cc/29HJ-QKNA>.

In the wake of the opioid epidemic, a controversial tactic has emerged: North Carolina is one of more than twenty other states that are increasingly treating overdose deaths as homicides ("drug-induced homicide").⁶ That is, those who supply the drugs are held criminally accountable for the death of the overdose victim.⁷ North Carolina previously relied upon a second-degree murder statute—N.C. Gen. Stat. Section 14-17(b)(2)—for such an offense,⁸ however, it has enacted N.C. Gen. Stat. Section 14-18.4, which supplants the need for section 14(17)(b)(2) in this context.⁹ This new legislation, having taken effect on December 1, 2019, creates the offenses of "Death by Distribution" and "Aggravated Death by Distribution," enacted with "the intent . . . to strengthen the laws to act as a greater deterrent to persons who want to illegally distribute opioids and further exacerbate the opioid epidemic."¹⁰

Drug addiction in the United States ("U.S.") has traditionally been treated as a criminal justice issue¹¹; thus, the prosecution of drug-induced homicide as a tactic to combat the opioid epidemic should come as no surprise. However, in its implementation, the effectiveness of this tactic as a "deterrent" becomes questionable, at best. North Carolina has seen a continuous increase in opioid overdose death rates over the last five years,¹² despite prosecutors actively pursuing drug-induced homicide cases.¹³ Regardless, this past July, Governor Cooper signed Republican sponsored

6. See Rosa Goldensohn, *They Shared Drugs. Someone Died. Does That Make Them Killers?*, N.Y. TIMES (May 25, 2018), <https://perma.cc/9HDZ-2WBK>; DRUG POLICY ALL., AN OVERDOSE DEATH IS NOT MURDER: WHY DRUG-INDUCED HOMICIDE LAWS ARE COUNTERPRODUCTIVE AND INHUMANE 2 (2017), <https://perma.cc/Y8W3-A4TH>. The following states currently have specific drug-induced homicide laws: Alaska, Arizona, Colorado, Delaware, District of Columbia, Florida, Illinois, Kansas, Louisiana, Michigan, Minnesota, Nevada, New Hampshire, New Jersey, North Carolina, Oklahoma, Pennsylvania, Rhode Island, Tennessee, Vermont, Washington, West Virginia, Wisconsin, and Wyoming. *Drug Induced Homicide Laws*, PRESCRIPTION DRUG ABUSE POL'Y SYS. (Jan. 1, 2019), <https://perma.cc/KY28-92LM>.

7. See Goldensohn, *supra* note 6.

8. N.C. GEN. STAT. § 14-17(b)(2) (2017).

9. See Act of July 8, 2019, No. 2019-83, §14, 2019 N.C. Adv. Legis. Serv. 83 (LexisNexis) (codified as N.C. GEN. STAT. § 14-18.4 (2019)).

10. *Id.* The two new offenses are listed as Class C and Class B2 felonies, respectively. *Id.*

11. See Don Stemen, *Beyond the War: The Evolving Nature of the U.S. Approach to Drugs*, 11 HARV. L. & POL'Y REV. 375, 376 (2017).

12. See NAT'L INST. ON DRUG ABUSE, *supra* note 3.

13. See DRUG POLICY ALL., *supra* note 6, at 11 (explaining that southern states, like North Carolina, have "rapidly expand[ed] their use of [drug-induced homicide] laws since 2013").

House Bill 474,¹⁴ the precursor bill to what was just codified as N.C. Gen. Stat. Section 14-18.4 (hereinafter, “House Bill 474”).¹⁵ In effect, the new law beefs up the State’s drug-induced homicide law; the new offenses carry harsher sentences and are easier to prosecute.¹⁶

Aside from the increasing overdose rates in North Carolina, various other concerns arise as to the actual effect and impact of prosecuting drug-induced homicide. Notably, these concerns involve the potential contradictory effect on North Carolina’s Good Samaritan laws,¹⁷ and the likelihood that friends, family, and fellow users—not traffickers and career drug dealers—will be targeted by this statute.¹⁸ This Comment will address these issues, and consider what, if any, purpose of punishment is actually being achieved.

Section I of this Comment provides a brief history of U.S. drug policy, highlighting the racial animus, fear, and dehumanization that shaped it. Before addressing the drug-induced homicide laws and their effect, it is important to understand how the United States came to be so reliant on the criminal justice system to solve its drug problems.

Section II of this Comment will address both North Carolina’s previous drug-induced homicide statute—captured in section 14-17(b)(2) of the North Carolina General Statutes—and the new legislation enacted in July

14. § 14, N.C. Adv. Legis. Serv. 83; see Sessi Kuwabara Blanchard, *New North Carolina Drug-Induced Homicide Law Ramps Up Punishments*, FILTER (July 9, 2019), <https://perma.cc/TKC2-ZPJ2>.

15. See § 14, N.C. Adv. Legis. Serv. 83. For the purposes of clarity and consistency, N.C. GEN. STAT. § 14-18.4 (2019) will be referred to simply as House Bill 474 for the remainder of this Comment.

16. See Blanchard, *supra* note 14. “Death by Distribution” and “Aggravated Death by Distribution” do not require malice. Rather, the government must prove a negative—that the defendant did not act with malice. § 14, N.C. Adv. Legis. Serv. 83. Under North Carolina’s previous drug-induced homicide statute, N.C. GEN. STAT. § 14-17(b)(2), prosecutors were required to show malice; that is, that the defendant was sufficiently aware of the risks of drug use to warrant a second-degree murder conviction. Blanchard, *supra* note 14; see N.C. GEN. STAT. § 14-17(b).

17. Blanchard, *supra* note 14. Representative Marcia Morey of the North Carolina General Assembly fears that “[t]his [bill] can deter Good Samaritans from calling 911 in case of an overdose to get medical help for someone who might be dying from an overdose.” *Id.* (second alteration in original).

18. See *Drug-Induced Homicide*, HEALTH JUST., <https://perma.cc/XXC9-HE9R>. A computer-generated random subsample conducted by the Health and Justice Lab at Northeastern University School of Law found that less than half (47%) of the prosecuted drug-induced homicide cases involved a traditional “dealer/buyer” relationship. *Id.* Fifty percent of the cases involved the prosecution of individuals that were caretakers, family, friends, or partners. *Id.*

2019 in House Bill 474.¹⁹ This section will analyze each statute as written, as well as the difficulties associated with their implementation.

Section III of this Comment will address the concerns regarding the impact and effectiveness of prosecuting drug-induced homicide cases, determining what purpose of punishment, if any, is actually being achieved. This section will be framed around the four most common purposes of punishment: deterrence, retribution, incapacitation, and rehabilitation.

Lastly, section IV of this Comment will provide a proposed solution—the addition of an element to the new laws in House Bill 474 to better ensure that only high-level drug dealers, traffickers, and kingpins are targeted by the new statute.²⁰

I. WAR ON DRUGS

A. An Introduction to the War on Drugs

The United States spends nearly fifty billion dollars annually on the War on Drugs.²¹ The term “War on Drugs” refers to the United States’ efforts to combat drug abuse by way of the criminal justice system.²² President Richard Nixon popularized the term after his infamous press conference on June 18, 1971, initiating what he referred to as an “all-out offensive,” identifying drug use as “public enemy number one.”²³ However, this “offensive” started well before Nixon, as is evidenced by our nation’s very first drug laws.

B. Early U.S. Drug Policy (c. 1900–1960)

The nation’s first drug laws were less about the dangers of the drugs and more about the people associated with them.²⁴ In 1909, the United States enacted its first federal drug law banning non-medical use of a

19. § 14, N.C. Adv. Legis. Serv. 83.

20. As opposed to friends, family, and fellow users involved in low-level drug transactions.

21. *Drug War Statistics*, DRUG POL’Y ALLIANCE, <https://perma.cc/5XSY-CG3H>.

22. Chris Barber, *Public Enemy Number One: A Pragmatic Approach to America’s Drug Problem*, RICHARD NIXON FOUND. (June 29, 2016), <https://perma.cc/25JD-YAT2>.

23. *Id.*

24. See *A Brief History of the Drug War*, DRUG POL’Y ALLIANCE, <https://perma.cc/S6KB-8J3P>. Race and nationality were primary motivating factors in the country’s decision to criminalize certain drugs. See *id.*

narcotic—opium.²⁵ Shortly thereafter, the Harrison Narcotics Tax Act of 1914 (“Harrison Act”) levied taxes on the importation, exportation, manufacturing, and distribution of opium and cocaine.²⁶ Those advocating for the Harrison Act’s passage perpetuated false and racially fueled narratives—black men under the influence of drugs “murdering whites,” “degenerate Mexicans smoking marijuana,” and “Chinamen’ seducing white women.”²⁷ These narratives were further perpetuated by a twisted ideology that it was a duty of the white race to save races considered to be inferior.²⁸

The nation’s next focus was marijuana. Again, the focus was less on the drug itself, and more on twisted racial stereotypes. Enter Harry Anslinger: the first commissioner of the Federal Bureau of Narcotics,²⁹ and also the individual who publicly stated that “[r]eefers makes darkies think they’re as good as white men.”³⁰ Anslinger’s tactic to push his policy was race-based, de-humanizing drug users with the largescale publication of false anecdotes. His stories included tales of black males seducing white females, crazed children murdering their entire families, and drug-induced suicides, stating that all were a direct result of marijuana.³¹ In 1937, Anslinger drafted the Marijuana Tax Act of 1937, which effectively banned its sale and use.³² The Act subsequently passed, and Anslinger’s racist tactics prevailed.³³

The 1950s came with an effort to provide uniformity in sentencing, with the introduction of mandatory maximum and minimum sentencing. Legislation, including the Boggs Act, imposed maximum criminal penalties for certain drug crimes and established mandatory minimum prison

25. *Laws*, NAT’L ALLIANCE ADVOCATES FOR BUPRENORPHINE TREATMENT, <https://perma.cc/KS5D-YLZ4> (last modified Sept. 9, 2016). This was dubbed the Smoking Opium Exclusion Act. *Id.*

26. *Id.*; Harrison Narcotics Tax Act of 1914, ch. 1, 38 Stat. 785 (1914).

27. Joseph D. McNamara, *The American Junkie*, HOOVER INSTITUTION (Apr. 30, 2004), <https://perma.cc/B39L-U84Y>.

28. *Id.*

29. David McDonald, *The Racist Roots of Marijuana Prohibition*, FOUND. FOR ECON. EDUC. (Apr. 11, 2017), <https://perma.cc/PA9R-7CTV>.

30. *Id.*

31. See Harry J. Anslinger, *Marijuana - Assassin of Youth*, AM. MAG. (July 1937), <https://perma.cc/9GPJ-EPVQ>. Anslinger compiled many of these false narratives in what was known as the “Gore Files,” which included over 200 stories of violent crimes he claimed were the result of marijuana use, all of which have been more or less disproved. Earl Perkins, *Victor Licata’s Strange Legacy*, THURSDAY REV. (May 30, 2014), <https://perma.cc/PDU5-LKPL>.

32. See *The Man Who Declared War on Drugs*, WNYC STUDIOS (Aug. 25, 2017), <https://perma.cc/RPA3-DMGZ>.

33. See *id.*

sentences.³⁴ Congress subsequently passed the Narcotics Control Act, which increased the Boggs Act's penalties and mandatory prison sentence minimums for violations of existing drug laws.³⁵ In the 1970s, partly due to evidence that mandatory minimums were not effective to reduce crime, the federal government began repealing mandatory minimum sentencing laws, including those imposed by the Boggs Act and Narcotics Control Act.³⁶ Consequently, the sentencing policies at both the state and federal level were left largely unstructured for a period of time.³⁷ The courts were left with indeterminate sentencing models that gave judges and parole boards a high degree of discretion, allowing for individually tailored sentences.³⁸ This, however, was only temporary; mandatory maximum and minimums were soon to reemerge. The next two decades would set the stage for what we, today, commonly refer to as the "War on Drugs."

C. Rise of the War on Drugs (c. 1960–1980)

In response to the counter-culture movements of the 1960s and 1970s, President Nixon made his notorious declaration: "America's public enemy number one in the United States is drug abuse. In order to fight and defeat this enemy, it is necessary to wage a new, all-out offensive."³⁹ But just like the justifications behind one of the nation's first drug laws, the Harrison Act,⁴⁰ Nixon's new campaign was not about the drugs. John Ehrlichman, top Nixon aide, later reflected on Nixon's position:

"You want to know what this was really all about . . . ? The Nixon campaign in 1968, and the Nixon White House after that, had two enemies: the antiwar left and black people. You understand what I'm saying? We knew we couldn't make it illegal to be either against the war or blacks, but by getting the public to associate the hippies with marijuana and blacks with heroin, and then criminalizing both heavily, we could disrupt those communities. We could arrest their leaders, raid their homes, break up their meetings, and vilify them night

34. *Laws, supra* note 25.

35. *Id.*

36. Stemen, *supra* note 11, at 376–77.

37. *Id.* at 386.

38. *Id.*

39. Richard Nixon, *Remarks About an Intensified Program for Drug Abuse Prevention and Control*, AM. PRESIDENCY PROJECT (June 17, 1971), <https://perma.cc/V52U-8RPE>.

40. *See supra* text accompanying notes 25–27, discussing the Harrison Act.

after night on the evening news. Did we know we were lying about the drugs? Of course we did.”⁴¹

As troubling as these words from John Ehrlichman are, it comes as no surprise that the “all-out offensive” on drugs was racially and politically motivated. Up to this point, this was a seemingly standard operating procedure for U.S. drug policy.

In 1970, drugs were classified into schedules: Congress passed the Controlled Substance Act, which categorized illegal drugs into one of five schedules, ranging between Schedule I and Schedule V.⁴² Schedule I is reserved for what Congress considered the most dangerous drugs that have no medicinal purpose and which carry the stiffest penalties.⁴³ Schedule V drugs are those which Congress classified as the least dangerous drugs.⁴⁴ Not surprisingly, given that marijuana was commonly associated with the anti-war left, Nixon categorized marijuana as a Schedule I drug—albeit on a temporary basis—despite his own drug commission’s recommendation to decriminalize marijuana for private, personal use.⁴⁵

For a short time—from 1973 to 1977—multiple states shifted their approach to marijuana by decriminalizing possession.⁴⁶ Upon President Jimmy Carter’s inauguration, the Senate Judiciary Committee voted in favor of decriminalizing “up to an ounce of marijuana for personal use.”⁴⁷ Efforts were also made to provide drug treatment programs through the Narcotic Addict Treatment Act of 1974, which amongst other things, allowed the registration of practitioners providing drug treatment programs, including methadone clinics.⁴⁸ At least for the moment, the United States

41. Dan Baum, *Legalize It All*, HARPER’S MAG. (Apr. 2016), <https://perma.cc/QNE9-AQXW> (quoting Presidential aide, John Ehrlichman).

42. *See Drug Scheduling*, U.S. DRUG ENFORCEMENT ADMIN., <https://perma.cc/3KBB-FPBN>.

43. *Id.*

44. *See Laws*, *supra* note 25.

45. *A Brief History of the Drug War*, *supra* note 24. Interestingly, despite its legal use for recreational purposes in ten states, and our nation’s capital, marijuana is still to this day listed as a Schedule I drug by the Drug Enforcement Agency, alongside heroin and LSD. *Drug Scheduling*, *supra* note 42.

46. *A Brief History of the Drug War*, *supra* note 24.

47. *Id.*

48. *Laws*, *supra* note 25. Methadone has been used for decades (since the 1950s) to treat opioid dependence. WORLD HEALTH ORG., CLINICAL GUIDELINES FOR WITHDRAWAL MANAGEMENT AND TREATMENT OF DRUG DEPENDENCE IN CLOSED SETTINGS 73 (2009). However, Methadone is also an addictive opiate. *Id.* Methadone treatment is a maintenance program; a government provided and regulated substitute for heroin/opioids. *See id.* Thus, in this Author’s opinion, rather than resorting to criminal activity, addicts can rely on their daily dose of doctor approved methadone—courtesy of Uncle Sam.

appeared to be trending towards drug policies less reliant on the criminal justice system.

D. Rising Crime Rates, Ronald Reagan, Mass Incarceration, and "Just Say No" (c. 1980–2000)

The late 1970s and the 1980s saw a significant rise in crime and drug use rates; this combined with the increasing politicization of the issues decreased confidence in rehabilitative, drug treatment methods.⁴⁹ Upon the election of Ronald Reagan in 1980, the nation's drug policy trend away from the criminal justice system was over. President Reagan re-perpetuated Nixon's War on Drugs policies when he stated, "[W]e've taken down the surrender flag and run up the battle flag."⁵⁰ The "battle" ensued, not surprisingly through the use of the nation's default solution to its drug problem: the criminal justice system.

Mandatory minimum sentences were being re-implemented.⁵¹ Prison populations began to rapidly increase.⁵² The emergence of crack-cocaine in the mid-1980s coincided with a call for zero tolerance drug policies,⁵³ and tremendous disparities in sentencing between crack-cocaine versus powder cocaine disproportionately affected black Americans.⁵⁴ Nancy Reagan's "Just Say No" campaign was highly publicized.⁵⁵ Drug policies focusing on harm reduction rather than criminalization, such as access to

49. Stemen, *supra* note 11, at 381–82.

50. Ronald Reagan, *Radio Address to the Nation on Federal Drug Policy*, AM. PRESIDENCY PROJECT (Oct. 2, 1982), <https://perma.cc/L3H3-Z33Z>.

51. Stemen, *supra* note 11, at 388. North Carolina implemented its mandatory minimum sentencing structure in 1994 with the North Carolina Structure Sentencing Act. James J. Collins & Donna L. Spencer, *Evaluation of North Carolina's 1994 Structured Sentencing Law 1992-1998*, INTER-U. CONSORTIUM FOR POL. AND SOC. RES. (Mar. 30, 2006), <https://perma.cc/Q3MW-DN92>.

52. *Criminal Justice Facts*, SENT'G PROJECT, <https://perma.cc/CHN9-JXJ7> ("[T]he number of people incarcerated for drug offenses in the U.S. skyrocketed from 40,900 in 1980 to 452,964 in 2017.")

53. See, e.g., Ronald J. Ostrow, *Casual Drug Users Should Be Shot, Gates Says*, L.A. TIMES (Sept. 6, 1990), <https://perma.cc/C6GC-68VW>. Los Angeles Police Chief Daryl Gates was quoted at a Senate hearing stating casual drug users "ought to be taken out and shot." *Id.* Interestingly, Gates later founded the DARE program that attempted to educate young people to the dangers of drugs. *A Brief History of the Drug War*, *supra* note 24.

54. See Danielle Kurtzleben, *Data Show Racial Disparity in Crack Sentencing*, U.S. NEWS & WORLD REP. (Aug. 3, 2010), <https://perma.cc/A4UU-SQEZ>.

55. *A Brief History of the Drug War*, *supra* note 24.

clean syringes, were abandoned and even blocked.⁵⁶ It is during this era in United States drug policy that drug-induced homicide prosecutions emerged.

E. Len Bias and the Introduction of Drug-Induced Homicide (c. late 1980s)

The crack epidemic of the 1980s was heavily politicized. Like Harry Anslinger's 1930s campaign against marijuana,⁵⁷ the "crack epidemic" often perpetuated false or exaggerated anecdotes of drug use.⁵⁸ Amidst the hysteria, the story of Len Bias emerged, provoking a response that included some of the harshest drug policies to date, policies which included the prosecution of overdose deaths as homicides.⁵⁹

Len Bias was a college basketball star and regarded as the best college player in America for the University of Maryland.⁶⁰ On June 17, 1986, Bias was selected by the Boston Celtics as the second-overall pick in the NBA draft, only to die of a cocaine overdose less than two days later.⁶¹ His death was highly publicized, creating panic across the nation and inciting political campaigns that demanded a more aggressive drug policy.⁶² More specifically, the public outrage towards Bias's alleged supplier and his subsequent acquittal instigated a push to prosecute drug dealers for murder.⁶³ At the federal level, Congress passed the 1988 Anti-Drug Abuse Act, which created a mandatory minimum sentence of twenty years for cases where the illegal sale of drugs resulted in death or serious injury⁶⁴ (this was the same law that implemented extremely disproportionate sentencing for crack

56. *Id.* Allowing for unrestricted access to clean syringes was an effort to protect against the spread of infectious disease. *Id.* This blocked access coincided with the outbreak of HIV/AIDS, a disease capable of being spread through the sharing of used syringes. *Id.*

57. See *supra* text accompanying notes 29–32.

58. See *A Brief History of the Drug War*, *supra* note 24. For example, in President George H.W. Bush's first prime-time address to the nation in 1989, he held up a plastic bag with a white substance, purportedly crack-cocaine, and stated that it was "'seized a few days ago in a park across the street from the White House.'" Michael Isikof, *Drug Buy Set Up for Bush Speech*, WASH. POST (Sept. 22, 1989), <https://perma.cc/47K3-ZHNG>. The seizure was actually a set-up orchestrated by the DEA to help President Bush illustrate how widespread the drug trade was. *Id.*

59. Thomasi McDonald, *How the 'Len Bias Law' of 1988 Is Being Used to Get Longer Prison Sentences Today*, NEWS & OBSERVER (Nov. 1, 2017), <https://perma.cc/YM9Q-KJ57>.

60. Michael Weinreb, *The Day Innocence Died*, ESPN, <https://perma.cc/XH76-BM7G>.

61. *Id.*

62. See Goldensohn, *supra* note 6.

63. See *id.*

64. McDonald, *supra* note 59.

versus powder cocaine⁶⁵). On the state level, so-called "Len Bias" or "drug delivery resulting in death" laws began to emerge.⁶⁶

F. Modern Drug Policy and the Opioid Epidemic (c. 2000–2018)

Within the last twenty years, policymakers, as well as the general public, have increasingly recognized the flaws of the criminal justice system approach to solving the nation's drug problems.⁶⁷ The War on Drugs costs the United States upwards of \$47 million annually.⁶⁸ Every twenty-five seconds, someone in the United States is arrested for drug possession.⁶⁹ In 2016, 456,000 people were incarcerated in the United States for drug law violations—representing one-fifth of the nation's total prison population.⁷⁰ Another 1.15 million individuals were on probation or parole in 2016 for drug related crimes.⁷¹ The statistics show all of this, even while incarceration has been shown to have little effect on substance abuse rates.⁷² Yet, this is just the tip of the iceberg: the disproportionate impact on minority communities has led to what one legal scholar, Graham Boyd, refers to as the "new Jim Crow."⁷³ At 12% of the nation's total population, black Americans make up 62% of state incarcerated drug offenders.⁷⁴ Consider what a felony drug charge does to an individual's opportunities in life: amongst other things, it significantly hinders their ability to vote, find employment, find housing, enlist in the armed forces, obtain a passport, or obtain federal student aid.⁷⁵ Thus, Graham Boyd is not wrong in likening the War on

65. Kurtzleben, *supra* note 54.

66. See Goldensohn, *supra* note 6. One of these states is our very own North Carolina. DRUG POLICY ALL., *supra* note 6, at 36.

67. Stemen, *supra* note 11, at 376.

68. *Drug War Statistics*, *supra* note 21.

69. Betsy Pearl, *Ending the War on Drugs: By the Numbers*, CTR. FOR AM. PROGRESS (June 27, 2018), <https://perma.cc/NU7G-Y8RL>.

70. *Id.*; *Drug War Statistics*, *supra* note 21.

71. Pearl, *supra* note 69.

72. *More Imprisonment Does Not Reduce State Drug Problems*, PEW CHARITABLE TR. (Mar. 2018), <https://perma.cc/9FEM-5LUR>. In a letter sent to the President's Commission on Combating Addiction and the Opioid Crisis, Pew Charitable Trusts sent its findings of their study on the relationship between imprisonment rates and states' drug problems. *Id.* at 1. The study compared state incarceration rates with self-reported drug use, drug arrests, and overdose deaths. *Id.* The Pew study found that higher rates of incarceration do not translate to lower rates of drug use. *Id.* at 5.

73. Christopher J. Coyne & Abigail R. Hall, *Four Decades and Counting: The Continued Failure of the War on Drugs*, CATO INST. 11 (Apr. 12, 2017), <https://perma.cc/RES9-YRPD>.

74. *Id.* at 12.

75. See *id.*

Drugs to a “new Jim Crow”—it has effectively rendered entire swaths of our nation second-class citizens.

With the benefit of hindsight—namely, the failed policies of the War on Drugs—America has seen a shift in attitude towards drug policy. In 2014, the Pew Research Center conducted a nationwide survey that found 67% of Americans were in favor of providing treatment for drug users over prosecuting for possession.⁷⁶ The states have followed suit: between 2009 and 2013, forty states took steps to ease their drug laws.⁷⁷ Eleven states and the District of Columbia have legalized marijuana for recreational use.⁷⁸ However, while some states have relaxed their drug laws, they have strengthened others. For example, North Carolina enacted “Good Samaritan Laws” in 2013⁷⁹ which provide immunity to those who call 911 in response to an overdose; yet in 2019, enacted House Bill 474 created a specific drug-induced homicide statute which, by the General Assembly’s own words, “strengthen[s] the laws” in an effort to deter the illegal sale of opioids.⁸⁰

On October 26, 2017, President Trump declared the opioid crisis a public health emergency, rather than a criminal one.⁸¹ As was the case with the crack epidemic of the 1980s, the opioid epidemic has captured the nation’s attention, as it rightly should: “Drug overdoses have become the leading cause of death for Americans under 50.”⁸² Roughly 70,237 Americans died from drug overdose in 2017 alone.⁸³ Of these deaths, 47,600 were caused by opioids.⁸⁴ North Carolina lost 2,414 of its citizens to drug

76. *America’s New Drug Policy Landscape*, PEW RES. CTR. (Apr. 2, 2014), <https://perma.cc/R999-BBQ2>.

77. Drew Desilver, *Feds May Be Rethinking the Drug War, but States Have Been Leading the Way*, PEW RES. CTR. (Apr. 2, 2014), <https://perma.cc/J9RX-BTY9>. The steps taken to ease states’ drug laws included: “lowering penalties for possession and use of illegal drugs, shortening mandatory minimums or curbing their applicability, removing automatic sentencing enhancements,” and establishing or expanding drug court jurisdiction. *Id.*

78. *Drug War Statistics*, *supra* note 21. The states that have legalized marijuana for recreational use: Alaska, California, Colorado, Illinois, Maine, Massachusetts, Michigan, Nevada, Oregon, Vermont, and Washington. *Id.*

79. Act of Apr. 9, 2013, No. 2013-23, § 1, 2013 N.C. Sess. Law 72 (codified as amended at N.C. GEN. STAT. § 90-96.2 (2017)).

80. H.B. 474, 2019 Gen. Assemb. (N.C. 2019).

81. Greg Allen & Amita Kelly, *Trump Administration Declares Opioid Crisis a Public Health Emergency*, NPR (Oct. 26, 2017), <https://perma.cc/3H2E-5LSV>.

82. Sheila Kaplan, *C.D.C. Reports a Record Jump in Drug Overdose Deaths Last Year*, N.Y. TIMES (Nov. 3, 2017), <https://perma.cc/6V9J-YR7K>.

83. *Drug Overdose Deaths*, *supra* note 4.

84. *Id.*

overdose in 2017.⁸⁵ The CDC has listed North Carolina as one of the twenty-three "[s]tates with significant increases in drug overdose death rates from 2016 to 2017."⁸⁶ The alarming statistics coupled with the ensuing public debate has our nation desperate for a solution.

While progress has been made at both the state and federal level to shift drug policy away from the criminal justice system,⁸⁷ the current drug crisis has tempted state officials, prosecutors, legislators, and even the general public, to go back to war—as has repeatedly been the approach throughout the history of U.S. drug policy. This leads us to the particular "weapon" at issue: the prosecution of drug-induced homicide.

II. DRUG-INDUCED HOMICIDE LAWS IN NORTH CAROLINA

In North Carolina, drug-induced homicide offenses committed before December 1, 2019, have, or will be prosecuted under the second-degree murder statute.⁸⁸ The statute requires proof that the defendant previously possessed the drugs, that the defendant unlawfully gave them to the victim, and that the drugs were the cause of the victim's death.⁸⁹ Section 14-17(b)(2) of the North Carolina General Statutes sets forth this rule:

The murder is one that was proximately caused by the unlawful distribution of any opium, opiate, or opioid; any synthetic or natural salt, compound, derivative, or preparation of opium, or opiate, or opioid; cocaine or other substance described in G.S. 90-90(1)d.; methamphetamine; or a depressant described in G.S. 90-92(a)(1), and the ingestion of such substance caused the death of the user.⁹⁰

85. *Stats of the State of North Carolina*, *supra* note 2.

86. *Drug Overdose Deaths*, *supra* note 4. These states include Alabama, Arizona, California, Connecticut, Delaware, Florida, Georgia, Illinois, Indiana, Kentucky, Louisiana, Maine, Maryland, Michigan, New Jersey, New York, North Carolina, Ohio, Pennsylvania, South Carolina, Tennessee, West Virginia, and Wisconsin. *Id.* The States with the highest drug overdose death rates in 2017 were West Virginia, Ohio, Pennsylvania, the District of Columbia, and Kentucky. *Id.*

87. North Carolina's legislature has passed "911 Good Samaritan" laws, promoted the use and dispersal of opioid antagonists like Narcan, authorized needle exchange programs, funded treatment initiatives, and limited opioid prescriptions. *See* N.C. GEN. STAT. § 90-96.2 (2017).

88. *See* N.C. GEN. STAT. § 14-17(b)(2) (2017).

89. *Id.*

90. *Id.*

This statute also requires the state to prove malice.⁹¹ Malice is “based on an inherently dangerous act or omission, done in such a reckless and wanton manner as to manifest a mind utterly without regard for human life and social duty and deliberately bent on mischief.”⁹² Malice can be implied solely based on the nature of the act itself—for example, when one’s actions demonstrate an extreme indifference for the value of human life.⁹³ Further, malice can be implied if the act or omission of an act is “inherently dangerous,”⁹⁴ which North Carolina courts have held to include unlawfully providing opiates or opioids to another.⁹⁵

Historically, to satisfy the malice requirement in the context of N.C. Gen. Stat. 14-17(b)(2), prosecutors could rely on the mere act of dealing or providing a dangerous substance.⁹⁶ However, this was not a *per se* rule: prosecutors were still left with the hurdle of proving to a jury the defendant was aware of the risks to a level that justified a second-degree murder charge.⁹⁷ Consequently, in practice, prosecutors in North Carolina didn’t attempt to take the case to trial; rather, charging a defendant with second-degree murder under Section 14-17(b)(2) was a plea-bargaining tool.⁹⁸ In effect, those charged under Section 14-17(b)(2) would “plea down” to the lesser charge—involuntary manslaughter, as to avoid the risk of a longer sentence at trial. Thus, Section 14-17(b)(2) effectively became a tool to ensure conviction for involuntary manslaughter—a Class F felony carrying a mandatory maximum sentence of three years in prison.⁹⁹

As has been eluded, the North Carolina General Assembly recently determined that holding individuals accountable under Section 14-17(b)(2)

91. See *State v. Linder*, 391 S.E.2d 820, 822 (N.C. Ct. App. 1990) (discussing sufficient evidence of malice in a second-degree unlawful distribution conviction and implying that it is required for second-degree murder under the statute).

92. N.C. GEN. STAT. § 14-17(b)(1).

93. See *id.*

94. See *id.*

95. See *State v. Pritchard*, No. COA16-8, 2016 N.C. App. LEXIS 783, at *6 (N.C. Ct. App. Aug. 2, 2016).

96. *Id.* at *6–*7 (finding that defendant who supplied morphine to an overdosed individual with knowledge of the dangers of morphine constituted malice necessary for second-degree murder); *State v. Barnes*, 741 S.E.2d 457, 465–66 (N.C. Ct. App. 2013) (finding that defendant’s supplying of methadone to overdosed individual with knowledge of the dangers of methadone satisfied the malice required for second-degree murder); *State v. Parlee*, 703 S.E.2d 866, 869–70 (N.C. Ct. App. 2011) (finding that defendant’s supplying of opioid to overdosed individual with knowledge of dangers of the opioid constituted the malice required for second-degree murder).

97. See *Blanchard*, *supra* note 14.

98. See *id.*

99. See *id.*

was not enough. On July 8, 2019, Governor Roy Cooper signed into law House Bill 474 which created two new crimes: death by distribution, and aggravated death by distribution.¹⁰⁰ The laws were crafted with "the intent . . . to strengthen the laws to act as a greater deterrent to persons who want to illegally distribute opioids and further exacerbate the opioid epidemic."¹⁰¹ Not only do these new laws eliminate the "malice" previously required under N.C. Gen. Stat. 14-17(b)(2), but they come with much longer prison sentences.¹⁰² Death by distribution and aggravated death by distribution are Class C and Class B2 felonies, respectively.¹⁰³ Under North Carolina's felony punishment chart, the *minimum* punishment range is four to six years for death by distribution, and roughly ten to thirteen years for aggravated death by distribution.¹⁰⁴ These minimums are just the baseline and this assumes that the defendant has not had any other previous convictions. Defendants with prior convictions face even longer sentences.¹⁰⁵ Realistically, defendants charged under these new statutes could face upwards of forty years in prison.¹⁰⁶

House Bill 474 sets out the crime of Death by Distribution as follows:

A person is guilty of death by distribution of certain controlled substances if all of the following requirements are met:

- (1) The person unlawfully sells at least one certain controlled substance.
- (2) The ingestion of the certain controlled substance or substances causes the death of the user.
- (3) The commission of the offense in subdivision (1) of this subsection was the proximate cause of the victim's death.
- (4) The person did not act with malice.¹⁰⁷

The crime of Aggravated Death by Distribution contains the same four elements of Death by Distribution, listed above, and adds a fifth element, as follows:

100. § 14, N.C. Adv. Legis. Serv. 83.

101. *Id.*

102. *Id.*; see *Felony Punishment Chart*, N.C. CTS. (Oct. 1, 2013), <https://perma.cc/YBS9-HQBG>.

103. § 14, N.C. Adv. Legis. Serv. 83.

104. See *Felony Punishment Chart*, *supra* note 102.

105. See *id.* Points represent prior convictions, which dictate the defendant's conviction level (Level I through Level VI). *Id.*

105. *Id.*

106. Blanchard, *supra* note 14.

107. § 14, N.C. Adv. Legis. Serv. 83.

(5) The person has a previous conviction under this section, G.S. 90-95(a)(1), 90-95.1, 90-95.4, 90-95.6, or trafficking in violation of G.S. 90-95(h), or a prior conviction in any federal or state court in the United States that is substantially similar to an offense listed, within seven years of the date of the offense. In calculating the seven-year period under this subdivision, any period of time during which the person was incarcerated in a local, state, or federal detention center, jail, or prison shall be excluded.¹⁰⁸

Interestingly, under these new laws in House Bill 474, the second element requires an unlawful *sale*,¹⁰⁹ as opposed to merely the unlawful *distribution* required under N.C. Gen. Stat. Section 14-17(b)(2).¹¹⁰ North Carolina's Supreme Court has interpreted "sale" under the Controlled Substances Act to mean "a *transfer* of property for a specified price payable in money."¹¹¹ Our Court of Appeals has held that "[t]he only difference in the terms 'sell' and 'delivery' is that money changes hands in a sale."¹¹² However, "money" in the context of the Controlled Substances Act has, in more recent years, been interpreted to include "any barter or other exchange of a controlled substance for consideration."¹¹³ Thus, rather than criminalizing the mere transfer of the unlawful substance, the legislator appears to be focusing on those gaining some form of value from the transaction—criminalizing the actual sale, in exchange for consideration, of the unlawful substance. Whether this slight narrowing as compared to N.C. Gen. Stat. Section 14-17(b)(2) will have any significant impact is doubtful, given the obvious: drugs are never free.

But will House Bill 474 have any significant impact, in general, in combatting North Carolina's opioid crisis? The Bill itself tells us this: drug-induced homicide will be easier to prosecute,¹¹⁴ and in practice, will result in convictions with longer sentences.¹¹⁵ Up until December 1, 2019, North Carolina's drug-induced homicide statute, N.C. Gen. Stat. Section 14-17(b)(2), was essentially a bargaining chip for prosecutors to secure involuntary manslaughter convictions, a Class F felony.¹¹⁶ Going forward,

108. *Id.*

109. *Id.*

110. N.C. GEN. STAT. § 14-17(b)(2) (2017).

111. *State v. Creason*, 326 S.E.2d 24, 28 (N.C. 1985).

112. *State v. Moore*, 384 S.E.2d 67, 69 (N.C. Ct. App. 1989).

113. *State v. Carr*, 549 S.E.2d 897, 903 (N.C. Ct. App. 2001).

114. "Death by Distribution" and "Aggravated Death by Distribution" do not require prosecutors to prove malice, as was required under the former drug-induced homicide statute. N.C. GEN. STAT. § 14-17(b)(2).

115. Blanchard, *supra* note 14.

116. *See id.*

prosecutors no longer need this bargaining chip.¹¹⁷ There is no concrete way of determining how many individuals these new laws will affect. In a fiscal review of House Bill 474, the Sentencing and Policy Advisory Commission admitted that there "is no historical data on this offense, or similar offenses to use as a proxy for predicting the total number of offenses" that will result from these new laws.¹¹⁸ Yet the Advisory Commission's report includes an estimate by the Conference of District Attorneys that "5% of the involuntary manslaughter convictions" would meet the requirements of the new laws.¹¹⁹ This would mean that, of the seventy-one involuntary manslaughter convictions in fiscal year 2018, four of them would have likely "reflect[ed] the criminal behavior of the...bill."¹²⁰ Again, however, these reports cannot accurately predict what prosecutors will choose to pursue with this new "weapon" in hand, courtesy of the North Carolina legislature. Of course, then, there is the larger question: would any of this "deter[] . . . persons who . . . illegally distribute opioids and further exacerbate the opioid epidemic?"¹²¹

III. PURPOSES OF PUNISHMENT ANALYSIS

What, if any, are the purposes of prosecuting drug-induced homicide? In *Kansas v. Hendricks*, the United States Supreme Court held that "retribution or deterrence" are "the two primary objectives of criminal punishment."¹²² The North Carolina General Assembly has made clear that the intent for House Bill 474 is to deter the illegal sale of opioids, and curb the opiate epidemic.¹²³ The following section will analyze deterrence theory, as well as retribution theory, and two other fairly common punishment theories—incapacitation, and rehabilitation—as they pertain to the prosecution of drug-induced homicide.

117. See § 14, N.C. Adv. Legis. Serv. 83. "This act [became] effective December 1, 2019, and applies to offenses committed on or after that date." *Id.*

118. JOHN POTEAT, FISCAL RESEARCH DIV., LEGISLATIVE INCARCERATION FISCAL NOTE, H.B. 474, 2019 Gen. Assemb., at 2 (N.C. 2019).

119. *Id.* at 4.

120. *Id.*

121. H.B. 474, 2019 Gen. Assemb. (N.C. 2019).

122. *Kansas v. Hendricks*, 521 U.S. 346, 361–62 (1997).

123. N.C. H.B. 474.

A. Deterrence

Deterrence theory is based on the idea that criminal sanctions will deter criminal activity.¹²⁴ As it applies to drug-induced homicide, the idea is that the potential harsh sentences for unlawfully distributing drugs will deter such behavior, which, in turn, will curb access to the drugs and result in fewer overdose deaths.¹²⁵ There are, however, many known flaws to this theory.

1. Social Science Research

Social science research has consistently shown that neither increases in frequency nor severity of criminal punishment has an effect on drug supply and demand.¹²⁶ In 2014, the Pew Research Institute sought to obtain a clearer understanding of to what degree imprisonment effects drug use.¹²⁷ In doing so, Pew used three measures—self reported drug use, drug arrests, and overdose deaths—and compared them with imprisonment rates.¹²⁸ The results showed that “higher rates of drug imprisonment did not translate into lower rates of drug use, arrests, or overdose deaths.”¹²⁹ Thus, the analysis found “no statistically significant” correlation between imprisonment rates and drug use.¹³⁰

But Pew’s study addresses the *rate* of the incarceration; what about increasing the length or severity of the sentence? Cambridge University has addressed this, conducting studies that did “not provide a basis for inferring that increasing the severity of sentences generally is capable of enhancing deterrent effects.”¹³¹ The Cambridge study did find that increased *certainty* of punishment (in other words, certainty of getting caught) rather than increased *severity* was associated with declining crime rates.¹³² Other studies have actually shown that longer prison sentences are correlated with higher recidivism rates, implying that longer sentences do not deter individuals from preventing future crimes upon their release.¹³³

124. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 16 (7th ed. 2015).

125. See DRUG POLICY ALL., *supra* note 6, at 2–4.

126. *More Imprisonment Does Not Reduce State Drug Problems*, *supra* note 72, at 1.

127. *Id.*

128. *Id.*

129. *Id.* at 5.

130. *Id.* at 1.

131. VALERIE WRIGHT, SENT’G PROJECT, DETERRENCE IN CRIMINAL JUSTICE 4 (Nov. 2010), <https://perma.cc/BDX5-PREZ>.

132. *Id.*

133. *Id.* at 6.

It is important to acknowledge that crime rates, on the whole, have consistently dropped over the last thirty years, lending a basis of argument for proponents of deterrence theory.¹³⁴ However, within the confines of the opioid epidemic, we have seen the opposite: drug overdose deaths have continued to rise as illegal drugs have become less expensive, more potent, and more easily accessible.¹³⁵ Overdose deaths have steadily increased in North Carolina from roughly 100 deaths in 1999 to over 1,300 deaths in 2016,¹³⁶ despite a 300% increase in overdose homicide prosecution reporting in the media between 2011 and 2016.¹³⁷ Thus, despite overall crime rates decreasing across the country, criminalization has not had the same effect on the sale and use of illegal drugs.

2. Assuming Rational Actors

Another flaw to deterrence theory is that it assumes rational actors are at play.¹³⁸ In other words, it assumes an individual's actions will be based on the probable consequences of that action.¹³⁹ The flaw in assuming rational actors are in play is that many of those likely to be charged for drug-induced homicide are themselves addicts.¹⁴⁰ A drug addict's rational analysis is easily overcome by the visceral urge to use drugs.¹⁴¹

Take a common example: an individual who wants to stop smoking tobacco (due to rational analysis of the probable consequences) is offered a cigarette and takes it anyway.¹⁴² This same visceral urge affects opiate addicts, only a drug addict's urge is exacerbated by a physical dependency that will result in days—even weeks—of painful withdrawals if they are to

134. See Kelli D. Tomlinson, *An Examination of Deterrence Theory: Where Do We Stand?*, 80 FED. PROB. J. 33, 34 (Dec. 2016), <https://perma.cc/UY8F-Y3SC>.

135. DRUG POLICY ALL., *supra* note 6, at 2, 4.

136. Susan M. Kansagra & Mandy K. Cohen, *The Opioid Epidemic in NC: Progress, Challenges, and Opportunities*, 79 N.C. MED. J. 157, 157 (2018), <https://perma.cc/RK4Y-94LM>.

137. DRUG POLICY ALL., *supra* note 6, at 11.

138. See Ronald L. Akers, *Rational Choice, Deterrence, and Social Learning Theory in Criminology: The Path Not Taken*, 81 J. CRIM. L. & CRIMINOLOGY 653, 654 (Fall 1990).

139. *Id.*

140. Those prosecuted for drug-induced homicide "tend to be fellow users, friends, or family." Blanchard, *supra* note 14 (quoting Jeremiah Goulka, senior fellow at the Health and Justice Lab at Northeastern University School of Law).

141. See Howard Rachlin, *In What Sense Are Addicts Irrational?*, 90 DRUG & ALCOHOL DEPENDENCE S92 (Sept. 2007), <https://perma.cc/B9B9-FMSF>.

142. *See id.*

stop using.¹⁴³ To make matters worse, roughly 80% of all criminal offenders have a substance use disorder, or an addiction.¹⁴⁴ The addict's thinking *is* rational in that to achieve the desired result (a high) or to pacify the urge enough to avoid withdrawals, the addict must buy more drugs. It is irrational in that, in doing so, the addict is at risk of all the dangers that come along with illicit drug use. Thus, the negative probable consequences of a user's actions can be overcome by a greater urge to use, despite any negative probable consequences.

Given the likelihood that many of those charged under North Carolina's drug-induced homicide laws will be addicts, it is unlikely that the threat of any criminal sanction, short of a death sentence, will deter the sale and use of drugs. To many addicts, the low-level sale¹⁴⁵ of drugs is just another way to get another fix.

3. *Deterring Medical Assistance*

Perhaps the most unfortunate effect of drug-induced homicide prosecutions is its potential deterrent effect on individuals who would otherwise seek "life-saving medical assistance" for someone experiencing a drug overdose.¹⁴⁶ Research has shown that the reason most people do not call 911 is for fear of the police getting involved.¹⁴⁷ In effect, drug users are led to believe that by calling 911 they are potentially signing up to be investigated for drug-induced homicide.¹⁴⁸

Good Samaritan laws¹⁴⁹ provide immunity for minor drug and alcohol violations to those who call 911 in response to an overdose.¹⁵⁰ North Carolina's efforts to encourage individuals to seek life-saving medical assistance are evidenced by its "911 Good Samaritan" laws, which went into effect in 2013.¹⁵¹ The hope is that those at the scene, often drug addicts themselves, will not let fear of prosecution be the reason they avoid calling

143. Mansi Shah & Martin R. Heucker, *Opioid Withdrawal*, STATPEARLS (June 4, 2019), <https://perma.cc/H8EM-H48Q>.

144. See William R. Kelly, *Why Punishment Doesn't Reduce Crime*, PSYCHOL. TODAY (Apr. 25, 2018), <https://perma.cc/BUP4-QSJ2>.

145. For purposes of this Comment, "low-level sale" refers to the small-scale sale of drugs, primarily to maintain the individual's own drug habit.

146. DRUG POLICY ALL., *supra* note 6, at 40.

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

151. See N.C. GEN. STAT. § 90-96.2 (2017).

911.¹⁵² However, these efforts are counteracted by the possibility of a drug-induced homicide investigation.¹⁵³ Critics of the Bill fear that those most likely to be with the victim—family members and friends—may be involved in the sale, and therefore will be deterred from calling 911.¹⁵⁴ Although the new laws are not supposed to interfere with the Good Samaritan laws, at least one North Carolina representative has deemed this “an unintended consequence but . . . a real consequence.”¹⁵⁵

Despite the legislative intent behind House Bill 474, and its corresponding new laws, deterrence through criminalization has not been an effective approach to the opioid crisis: the social science research, statistical data on rising drug overdose rates, and the realities of drug addiction have made this clear. Conversely, with its effect on the state’s Good Samaritan laws, House Bill 474 has the potential to further exacerbate the opioid epidemic—the very opposite of the bill’s purported goal.

B. Retribution

Aside from deterrence as a purpose for prosecuting drug-induced homicide, there is always retribution: the theory that punishment is justified if it is deserved.¹⁵⁶ It may be societal retaliation for a wrongdoer’s act, an effort to secure a moral balance in society, or even a message of defeat sent to the wrongdoer.¹⁵⁷ Prosecutions under N.C. Gen. Stat. Section 14-17(b)(2) have been largely motivated by the theory that “dealers” need to be held “accountable for the havoc they are creating.”¹⁵⁸ House Bill 474 and its new laws are similarly motivated, aimed at those “persons who want to illegally distribute opioids.”¹⁵⁹ In other words, punishment is justified for the unlawful distribution of illegal drugs to individuals who subsequently overdose.

Retribution as a purpose for prosecuting drug induced-homicide poses two primary issues: (1) the culpability of one individual for the voluntary action of another, and (2) the previous and current law’s use of “unlawful

152. *See id.*

153. *See* Blanchard, *supra* note 14.

154. *Id.*

155. *Id.* (quoting Rep. Marcia Morey).

156. DRESSLER, *supra* note 124, at 18.

157. *Id.*

158. Matthew Prensky, *Police Crackdown on Drug Dealers after Overdose Death*, E. CAROLINIAN (Sept. 26, 2016), <https://perma.cc/DA98-4RTK> (quoting Greenville, NC Police Sargent Joe Friday after Chief of Police Mark Holtzman announced the arrest of an individual charged with second-degree murder for providing drugs to another individual who overdosed).

159. Act of July 8, 2019, No. 2019-83 §14, 2019 N.C. Adv. Legis. Serv. 83 (codified as N.C. Gen. Stat. § 14-18.4 (2019)).

distribution”¹⁶⁰ and “unlawfully sells,”¹⁶¹ respectively, as the *actus reas*, or action, constituting the crime.

1. *Holding Individuals Culpable for the Actions of Others*

Under a retributivism approach, punishment is due when it is deserved—but the lines can become blurred in the context of drug-induced homicide. In effect, the individual who unlawfully distributes may be no more culpable than the individual who actually took the drugs.¹⁶² Where the overdose victim *voluntarily* takes a drug, how much weight should be given to this voluntary action? This is different from, for example, a drunk driver being held responsible for the victims of a car crash because there, the victims do not voluntarily submit themselves to the crash. However, victims of drug overdose often initiate the drug deal and voluntarily take them. Perhaps a hypothetical will illustrate this conundrum: two roommates, Albert and Benny, share an apartment. Albert gives money to Benny, who then goes to pick up drugs. Upon return, the roommates share the drugs. Tragically, Albert overdoses and dies. Is Benny responsible for Albert’s death because he sold and delivered the substance? Is he deserving of punishment for the death of his roommate? Upon considering such hypotheticals, many of which have actually occurred across the country,¹⁶³ it becomes less clear, whether punishment for drug-induced homicide is actually deserved.

If it is not the person who provided the drugs, then who is to blame? What is the proper course for redress? Civil liability is not an option because the voluntary action of the victim taking the lethal dose of drugs would constitute contributory negligence in North Carolina, barring a suit against the unlawful distributor for wrongful death.¹⁶⁴ Regardless, it is unlikely the individual who provided the drugs will have deep pockets. But in contrast to the criminal context, does it make sense that an individual who

160. N.C. GEN. STAT. § 14-17(b)(2) (2017).

161. § 14, N.C. Adv. Legis. Serv. 83.

162. See Bobby Allyn, *Bystanders to Fatal Overdoses Increasingly Becoming Criminal Defendants*, NPR (July 2, 2018), <https://perma.cc/QW6N-P4HN>.

163. For example, in New York, Richard Gaworecki was charged with criminally negligent homicide for the death of his friend, Nicholas McKiernan. Zachary A. Siegel & Leo Beletsky, *Charging ‘Dealers’ with Homicide: Explained*, APPEAL (Nov. 2, 2018), <https://perma.cc/XXM9-XDGK>. The men were in the same circle of friends, and frequently used together. *Id.*

164. See Haley M. Bunce, *System Shock: Fontenot Shows Why North Carolina’s Contributory Negligence Rule Must Go*, 93 N.C. L. REV. 623 (2015). “Since 1869, contributory negligence has barred North Carolina plaintiffs from recovering in negligence suits when the plaintiff’s own negligence contributed to his injuries.” *Id.* at 623.

provided the drugs can be held accountable for the intentional or negligent actions of another? Again, it is unclear where to direct punishment for retributive purposes.

Then there is the elephant in the room: are these deaths not, in reality, a symptom of a much larger issue: the disease of addiction?¹⁶⁵ Obviously, the State cannot prosecute a disease, and not all individuals even acknowledge addiction as a disease,¹⁶⁶ despite most medical associations acknowledging it as such.¹⁶⁷ While a tangible culprit can be posted across the headlines to make people think something is being done to fight the opioid epidemic, there remains the intangible underlying problem: addiction and the demand for drugs. The CDC report in 2016 found that over 10% of the U.S. population (ages twelve and up) had used an illegal drug in the previous month.¹⁶⁸ Some state representatives would rather combat this problem by providing better drug treatment and drug courts.¹⁶⁹ Yet, these voices have apparently been drowned out by those in favor of House Bill 474, even where those charged will often be friends, partners, siblings, or fellow addicts—not drug kingpins or traffickers.¹⁷⁰

2. *The Language of N.C. Gen. Stat. Section 14(17)(b)(2) and House Bill 474*

The language of N.C. Gen. Stat. 14(17)(b)(2) and the new laws in House Bill 474 establish the action, or *actus reus*, of the crimes as the unlawful distribution or unlawful sale of a controlled substance.¹⁷¹ As a result, anyone who unlawfully gives drugs to another individual can be prosecuted for drug-induced homicide, regardless of how small-scale the transaction.¹⁷² Essentially, it is up to the district attorney to decide who to prosecute, a

165. See *Opioid Overdose Crisis*, *supra* note 1.

166. See, e.g., Tim Holden, *Addiction Is Not a Disease*, 184(6) CANADIAN MED. ASS'N J. 679 (Apr. 3, 2012), <https://perma.cc/5BEY-JQVH> (“The statement . . . that addiction is a disease is not supported by the evidence and reads more like a political policy statement than a reasoned intellectual argument.”).

167. See *Addiction as a Disease*, CTR. ON ADDICTION, <https://perma.cc/4SFR-KHXH>; David Sheff, *Why We Should Treat, Not Blame Addicts Struggling to Get ‘Clean,’* PBS (Apr. 5, 2013), <https://perma.cc/F34X-9WYZ>.

168. Nat'l Ctr. for Health Statistics, *Illicit Drug Use*, CENTERS FOR DISEASE CONTROL & PREVENTION (May 3, 2017), <https://perma.cc/6TEB-DMVY> [hereinafter *Illicit Drug Use*].

169. Blanchard, *supra* note 14.

170. *Id.*

171. See N.C. GEN. STAT. § 14-17(b)(2) (2017); H.B. 474, 2019 Gen. Assemb. (N.C. 2019).

172. See *supra*, note 171.

responsibility that is allotted great discretion.¹⁷³ Such discretion is dangerous amidst an opioid crisis, one which tempts a tough criminal justice response.

Due to the necessity for a causal relationship between the supplier of the drugs and the overdose victim, friends, family, and fellow users are likely to be charged under the new laws in House Bill 474. Jeremiah Goulka, a senior fellow at the Health In Justice Action Lab at Northeastern University's law school, believes "[k]ingpins, or traffickers centrally positioned in the supply-chain, are likely not to be prosecuted under [House Bill 474]."¹⁷⁴ But there is a problem with this: a normal day in the life of a drug addict involves using and finding ways and means to use more.¹⁷⁵ It is not uncommon for a drug addict to play many different roles throughout any given day.¹⁷⁶ The person playing the role of "dealer," in its most basic definition, can often change depending on a variety of circumstances: who has a car, who has gas money, who knows the dealers, who is in withdrawals and is desperate to get more drugs, and, rather simply, who wants to get high.¹⁷⁷ These drug users participating in low-level drug deals are not the individuals for whom these drug-induced homicide statutes were intended.¹⁷⁸ They are at the bottom of the totem pole—not the big time dealers and suppliers of the illegal drug trade.

Buncombe County, North Carolina has been one of many jurisdictions in North Carolina actively pursuing drug-induced homicide cases, purportedly with the proper prosecutorial restraint.¹⁷⁹ John Thomas, of the Buncombe County Anti-Crime Task Force, was quoted as saying: "[t]his is the biggest tool we have in our toolbox to go after these opiate dealers and traffickers who are killing people in our community," and later continuing, "[w]e want to send a message to traffickers and dealers that if we can prove you contributed to somebody's death we're going to charge you with murder."¹⁸⁰ It appears from Thomas's statements that low-level drug users are not the ones intended to be prosecuted, a proposition that has been echoed

173. DRUG POLICY ALL., *supra* note 6, at 41.

174. Blanchard, *supra* note 14.

175. See NARCOTICS ANONYMOUS WORLD SERVS., INC., NARCOTICS ANONYMOUS 3 (6th ed. 2008).

176. See Goldensohn, *supra* note 6.

177. See *id.*

178. See DRUG POLICY ALL., *supra* note 6, at 36.

179. Sam Degrove, *Police Investigate Hillcrest OD as Homicide; Witness Says 'Bad' Drugs Might Be to Blame*, ASHEVILLE CITIZEN TIMES (June 27, 2018), <https://perma.cc/7526-9KAA>.

180. *Id.* (internal quotation marks omitted).

across the country.¹⁸¹ However, that was not the case for Gavin Andrew Remaley.¹⁸² In 2018, the Asheville Police Department charged Remaley with second-degree murder for the overdose death of his roommate.¹⁸³ Remaley was an addict who had struggled for years and made low-level drug deals to support his addiction.¹⁸⁴ His roommate, Matthew Dillingham, was also a drug user, introduced to opioids through his doctor.¹⁸⁵ Remaley provided the drug which subsequently resulted in the overdose death of Dillingham.¹⁸⁶ Dillingham left behind a mother and two children.¹⁸⁷ The District Attorney pursuing the charges, Todd Williams, provided his reasoning for prosecuting these crimes: "we have to get the message out to those who are supplying our community with these deadly substances that it's not acceptable."¹⁸⁸ With a pending second-degree murder charge over his head, Remaley continued to struggle with his addiction.¹⁸⁹ He never made it to trial.¹⁹⁰ On November 2, 2018, Remaley died of a heroin overdose. He left behind his parents, his girlfriend, and his dog. Remaley's father described the second-degree murder charge as "retribution, not a solution."¹⁹¹

In another example, one victim's own family protested the drug-induced homicide charge of a friend. Their daughter, Elisif Janis Bruun, died of a drug overdose while living in a healing community in North Carolina.¹⁹² Police authorities and investigators worked diligently to track down the source of the lethal dose of drugs, tracing it back to Sean Harrington, a friend of Bruun's who was living in a cardboard box under an overpass in Philadelphia.¹⁹³ Facing charges of second-degree murder, Harrington was

181. For example, Vermont's statute states, "[m]any 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." DRUG POLICY ALL., *supra* note 6, at 9 (internal quotation marks omitted). New Jersey's statute was intended to penalize "upper echelon members of organized narcotics trafficking networks." *Id.* (internal quotation marks omitted).

182. Josh Shaffer, *More Than an Addict, Never a Killer*, NEWS & OBSERVER (Nov. 27, 2018), (on file with Campbell Law Review).

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.*

188. *Buncombe County District Attorney Candidates Tackle the Issues*, WLOS (May 3rd, 2018), (on file with Campbell Law Review).

189. Shaffer, *supra* note 182.

190. *Id.*

191. *Id.* (internal quotation marks omitted).

192. DRUG POLICY ALL., *supra* note 6, at 37.

193. *Id.*

arrested and extradited to North Carolina.¹⁹⁴ He waited two years in jail before he was released because the Bruun family would not cooperate with the prosecution.¹⁹⁵ In a speech, Brunn's father stated, "I fundamentally believe homicide charges around drug distribution misplaces the blame: the disease is the culprit in almost all cases, not the provider."¹⁹⁶

In light of the opioid epidemic, relying merely on prosecutorial restraint will not be enough to prevent the charging of friends, family, and fellow users for the low-level sale of a controlled substance. The mentality amongst prosecutors is "[y]ou owe me for that dead kid,"¹⁹⁷ but in reality, this retribution is often misplaced, leading to the prosecution of individuals that are merely a symptom of a larger problem. While these laws could prove effective in pursuing drug kingpins and traffickers, the only way to ensure this is statutory limitations enacted by the legislature.

C. Incapacitation and Rehabilitation

Incapacitation is the theory that by taking someone out of society and putting them into jail or prison, the individual cannot continue inflicting whatever harm it is for which he or she was arrested.¹⁹⁸ In theory, if drug-induced homicide statutes were used to take big-time suppliers and dealers off the streets, there would be no question as to the benefits to society. However, this has not been the case; as previously addressed, drug-induced homicide statutes have been disproportionately prosecuted against low-end dealers and drug addicts.¹⁹⁹ The theory's major flaw is that taking one drug dealer off the street just creates room for another one, regardless of the level of the drug dealer.²⁰⁰

Rehabilitation is the theory that, through punishment, criminals can be rehabilitated, reformed, and put back into society.²⁰¹ In the context of prosecuting drug-induced homicide, the justification would be exposure to the

194. *Id.*

195. *Id.*

196. *Id.* (footnote omitted).

197. See Goldensohn, *supra* note 6 (quoting Pete Orput, Chief Prosecutor in Washington County, Minnesota).

198. DRESSLER, *supra* note 124, at 17.

199. See DRUG POLICY ALL., *supra* note 6, at 36.

200. *Id.* at 39 (discussing the "replacement effect" in which "the market responds to the demand for drugs by replacing drug sellers sent to prison with new recruits or by increased drug selling by actors already in the market").

201. DRESSLER, *supra* note 124, at 17, 22.

various means of reform within the criminal justice system.²⁰² Both N.C. Gen. Stat. 14(17)(b)(2) and the new laws in House Bill 474 fail to give any reference or indication that the penalties attached are for the purpose of rehabilitation;²⁰³ however, this does not mean rehabilitation is an impossible result.

Once viewed as a popular punishment theory—one which was believed to provide prisoners the opportunity to demonstrate penance²⁰⁴—rehabilitation theory fell out of favor in the 1970s upon the nation's general consensus that it did not work.²⁰⁵ However, societal attitudes have since changed²⁰⁶ and prisons have continued to offer educational and vocational programs, as well as psychological and drug treatment counseling.²⁰⁷ With the ever-continuing medical advances in pharmacology, genetics, and neuroscience, the potential effectiveness of new rehabilitative methods is promising.²⁰⁸ But if rehabilitation was the justification for North Carolina's drug induced-homicide laws, they wouldn't come with the potential of decades-long sentences. The behavior associated with these crimes (the unlawful possession, sale, and delivery of drugs) are all by themselves punishable criminal offenses. Drug-induced homicide laws were crafted to extend the sentences associated with these offenses—they were drafted to punish, and to deter the behavior. Whether those that are convicted are rehabilitated is an unrelated matter.

Thus, deterrence and retribution appear to be the primary purposes of both N.C. Gen. Stat. 14(17)(b) and the new laws in House Bill 474; the latter specifically enacted "to act as a greater deterrent to persons who want to illegally distribute opioids and further exacerbate the opioid epidemic."²⁰⁹ Unfortunately, prosecuting drug-induced homicide may only be adding fuel to an already blazing fire.

202. See Kathryn M. Campbell, *Rehabilitation Theory*, ENCYC. OF PRISONS & CORR. FACILITIES (2005), <https://perma.cc/7XV4-N6NB>.

203. See N.C. GEN. STAT. § 14-17(b)(2) (2017); H.B. 474, 2019 Gen. Assemb. (N.C. 2019).

204. Mirko Bagaric et al., *Mitigating America's Mass Incarceration Crisis Without Compromising Community Protection: Expanding the Role of Rehabilitation in Sentencing*, 22 LEWIS & CLARK L. REV. 1, 36 (2018).

205. Meghan J. Ryan, *Science and The New Rehabilitation*, 3 VA. J. CRIM. L. 261, 265 (2015).

206. *Id.*

207. *Id.* at 285; *Alcoholism & Chemical Dependency Programs*, N.C. DEP'T OF PUB. SAFETY, <https://perma.cc/9EWX-EMVD> (North Carolina's prison Alcohol and Chemical Dependency Programs).

208. Ryan, *supra* note 205, at 335.

209. H.B. 474, 2019 Gen. Assemb. (N.C. 2019).

IV. PROPOSED SOLUTION

North Carolina cannot simply incarcerate its way out of this drug problem—the history of the War on Drugs has lent credence to this. That is not to say, however, that incarceration is always unnecessary. Rather, if the North Carolina legislature intends punishment to deter drug sales and to curb the opioid crisis, it should also ensure that only culpable individuals are targeted. That being said, North Carolina cannot rely on prosecutorial discretion, alone, to ensure drug-induced homicide laws are utilized appropriately. If the new crimes created by House Bill 474, themselves, ensured that *only* high-level, career drug dealers and kingpins were targeted—not friends, family members, and fellow addicts participating in the low-level sale of drugs—many concerns with the Bill would be alleviated. North Carolina’s General Assembly should amend House Bill 474 to ensure that only those truly responsible for this drug crisis are prosecuted—those responsible for the large-scale influx of illegal drugs into our communities.

In an effort to both appease those who favor House Bill 474 and to mitigate the concerns of those against it, the North Carolina General Assembly should add an additional element to the crimes of Death by Distribution and Aggravated Death by Distribution, prohibiting the prosecution of individuals directly next in line in the chain of possession (“next-in-line prosecutions” or “next-in-line individuals”). To reiterate: these crimes require a causal connection between the person who sold the deadly substance and the victim—thus, the last individual in possession of the drugs before the victim obtained possession is likely to be charged. These next-in-line individuals are often friends, family, and fellow users; they are also most likely the ones to find or be with the victim in the occurrence of an overdose. The addition of this element preventing the prosecution of next-in-line individuals would encourage law enforcement to investigate up the drug supply-chain (potentially leading to higher-level suppliers), mitigate the counterproductive effects on the Good Samaritan Laws (potentially saving lives),²¹⁰ and better ensure that friends, family, and fellow addicts are not those prosecuted.

This proposed additional element would not, of course, be foolproof. By preventing the prosecution of next-in-line individuals in the chain of possession, it still is possible that the next individual in the chain of possession to be charged will be a friend, family, fellow user involved in low-level drug sales; however, this would be a step in the right direction. Law

210. Prohibiting “next-in-line” prosecutions would ensure that those individuals most likely to find or be with the overdose victim will not avoid calling 911 due to a fear of prosecution.

enforcement, by statute, will be encouraged to investigate up the drug ladder to higher-level dealers, rather than pursuing the low-hanging fruit.

This proposed new element would come with an exception to be applied when the person next-in-line *is* a drug kingpin (the "kingpin exception"). A defendant could be convicted under this "kingpin exception" only where there is evidence to establish, beyond a reasonable doubt, that the individual plays a major role in a sophisticated drug distribution network. This eliminates the possibility of a next-in-line individual escaping liability when he or she actually is a major player in the drug trade. Mere evidence of past possession charges, or unlawful distribution will not be enough—the State will have the burden to establish beyond a reasonable doubt that the kingpin exception applies, ultimately to be decided by a jury.

Prohibiting next-in-line prosecutions of drug-induced homicide will provide a barrier of protection for those who are merely addicts involved in low-level drug sales—they are but a symptom of a much larger problem. This Comment does not attempt to solve that problem—the nation's drug problem—but rather argues for an immediate amendment to an otherwise unbridled tactic. Statutory guidance is necessary to ensure prosecutors utilize proper discretion when prosecuting drug-induced homicide cases. If North Carolina truly wants to reduce the harms inflicted by the opioid epidemic—rather than increase them—the current drug-induced homicide laws must be amended.

CONCLUSION

There is no single solution to what is inevitably a serious and longstanding drug crisis in North Carolina. This Comment has honed-in on a specific tactic—the prosecution of drug-induced homicide—that without careful and thoughtful implementation will do more harm than good. House Bill 474, having just taken effect on December 1, 2019, must be amended. As written, it's open season for prosecutors to charge anyone—even friends, family, fellow addicts—for small-scale unlawful drug sales that lead to an overdose. Of the two purposes for punishment which realistically apply—deterrence and retribution—neither justify such a harsh criminalization tactic. Whether it was opium in the early 1900s, marijuana in the 1930s, or crack-cocaine in the 1980s, the response has always been the same: harsh criminalization. These policies have not worked. Here we are in 2019, amidst another drug crisis, claiming nearly 130 lives every day. A common saying goes, "when the only tool you have is a hammer, everything looks like a nail." With the benefit of hindsight, North Carolina should put down the hammer, or at least resist the temptation to immediately begin swinging away—there are other tools to combat this opioid crisis. As written, House

Bill 474 is not one of them; the General Assembly should amend the new laws if they are to have any positive impact in combatting the State's opioid crisis.

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*J.D. Candidate 2020, Campbell University School of Law. The author would, first and foremost, like to recognize the family of the late Gavin Remaley, who was a friend of the author, and the inspiration behind this Comment. The author would also like to thank his family and friends for their unwavering support, and the *Campbell Law Review* Vol. 42 team for their time, energy, and attention to this publication.