

The Opioid Crisis and the Drug War at a Crossroads

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I. INTRODUCTION

John Boehner, the Republican former Speaker of the House of Representatives, and Ed Rendell, the former Chair of the Democratic National Committee and Governor of Pennsylvania, have something unusual in common: Each has publicly announced that he is part of an ongoing conspiracy to violate federal drug laws. It feels more than a little strange to write that. But it is true. In April 2018, Boehner joined the advisory board of Acreage Holdings,¹ which bills itself as having “the most diverse portfolio of any company in the American cannabis industry, with cultivation, processing and dispensing operations across 14 states with plans to expand.”² Even more daringly, in October 2018, Ed Rendell incorporated a nonprofit organization called Safehouse in order to open the first safe injection site in the United States; a safe injection site is a place where people can self-administer drugs in a controlled environment under medical supervision.³

That two prominent established political figures would so openly flout federal drug laws is indicative of a broader shift in thinking about the status of

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¹Daniel Victor, *John Boehner's Marijuana Reversal: 'My Thinking on Cannabis Has Evolved,'* N.Y. TIMES (Apr. 11, 2018), <https://www.nytimes.com/2018/04/11/us/politics/boehner-cannabis-marijuana.html> [https://perma.cc/5SMF-XD6Z].

²John Hageman, *Fargo, Bismarck Locations Among First ND Medical Marijuana Dispensaries Selected,* W. FARGO PIONEER (Sept. 24, 2018), <https://www.westfargopioneer.com/news/4503567-fargo-bismarck-locations-among-first-nd-medical-marijuana> [https://perma.cc/RZJ2-ZF3E].

³Bobby Allyn, *Former Gov. Ed Rendell Says 'Arrest Me First' for Backing Supervised Injection Facility,* WHYY (Oct. 2, 2018), <https://whyy.org/articles/former-gov-ed-rendell-says-arrest-me-first-for-backing-safe-injection-facility/> [https://perma.cc/6DWL-B9MC].

the war on drugs. For decades, the drug war enjoyed nearly universal support from elected officials from across the political spectrum and being seen as “soft” on drugs or crime was considered to be “one of the surest career-killers in American politics.”⁴ Recently, however, voicing opposition to the drug war has become fashionable. Politicians who have called the drug war a failure include conservatives like former New Jersey Governor Chris Christie and Kentucky Senator Rand Paul and progressives like New Jersey Senator Cory Booker and California Governor Gavin Newsom.⁵ Similarly, both of President Barack Obama’s “drug czars” said they thought it was time to end the war on drugs in favor of a different strategy.⁶

In an article published three years ago in this journal, I argued that these developments were signs of an emerging political consensus against the war on drugs.⁷ Since then, the effort to end the drug war has continued to gain momentum in some quarters. But there has also been a backlash as the Trump administration has sought to revive the drug war. Former Attorney General Jeff Sessions, whose harsh views on drugs are well-known,⁸ rescinded Obama-era Department of Justice policies that had limited the use of mandatory minimum penalties in lower-level drug cases.⁹ Former Deputy Attorney General Rod Rosenstein lamented the fact that federal drug prosecutions and sentences both decreased during the Obama administration and pledged to “work[] to reverse those trends.”¹⁰

With some leaders calling for an end to the drug war and others proposing to double down on it, U.S. drug policy appears to be at a crossroads. There is perhaps no better example of this dynamic than our response to the opioid epidemic, the topic of this symposium. On the one hand, policymakers have implemented a number of modest harm reduction-oriented policies, including some that would have been unthinkable at the height of the war on drugs. Forty states and the District of Columbia have passed “Good Samaritan” laws, which give people who call 911 to report a drug overdose immunity from prosecution

⁴ JIM WEBB, A TIME TO FIGHT: RECLAIMING A FAIR AND JUST AMERICA 216 (2008); *see also* Alex Kreit, *Drug Truce*, 77 OHIO ST. L.J. 1323, 1323 (2016).

⁵ *See* Kreit, *supra* note 4, at 1325–26 (discussing opposition to the drug war among well-known elected officials).

⁶ *Id.* at 1324.

⁷ *Id.* at 1325.

⁸ Sheldon Whitehouse, *Foreword*, 11 HARV. L. & POL’Y REV. 359, 373 (2017) (noting that before he became Attorney General, “Sessions spent years as one of the most vocal obstacles to criminal justice reform in Congress”).

⁹ Alan Vinegrad, *Commentary: DOJ Charging and Sentencing Policies: From Civiletti to Sessions*, 30 FED. SENT’G REP. 3 (2017) (discussing this development).

¹⁰ Rod J. Rosenstein, *Fight Drug Abuse, Don’t Subsidize It*, N.Y. TIMES (Aug. 27, 2018), <https://www.nytimes.com/2018/08/27/opinion/opioids-heroin-injection-sites.html> [https://perma.cc/9KW7-F5Z8].

for specified crimes like drug possession.¹¹ Approximately thirty different cities and counties have established Law Enforcement Assisted Diversion (LEAD) programs, which send some drug arrestees to treatment without criminal charges ever being filed.¹² With some support from the federal government, states have also enacted a range of laws to expand access to the anti-overdose drug naloxone.¹³ On the other hand, since 2011 at least thirteen states have enacted new drug war-style mandatory minimum penalties for opioid offenses.¹⁴ As already noted, the federal government has resumed seeking mandatory minimum penalties against lower-level drug offenders as part of what the Trump administration has referred to as a “war” on opioids.¹⁵ Trump has even proposed the death penalty for “drug dealers” and disturbingly praised Rodrigo Duterte, President of the Philippines, for carrying out a drug war in which there have been thousands of extrajudicial killings of suspected drug sellers and users.¹⁶

This Article considers the state of the war on drugs through the lens of the opioid crisis. I focus on two responses to the opioid epidemic—the pursuit of safe injection sites and the increase in drug-induced homicide prosecutions—that exemplify two divergent approaches: ending the drug war or doubling down on it. The Article proceeds in four parts. Parts I and II describe current efforts to establish safe injection sites and the recent surge in drug-induced homicide prosecutions, respectively, and situate both in the context of the war on drugs. In Part III, I argue that these two examples help to shed light on why turning enthusiasm for ending the drug war into concrete reform has been so challenging. In both cases, drug war supporters have been able to use long-dormant laws that were passed at the height of the drug war to frustrate reform efforts. Ending the drug war requires significant legislative change; reviving can be easily done with drug war-era laws that are already in place. Part IV concludes.

¹¹ *Drug Overdose Immunity and Good Samaritan Laws*, NAT’L CONF. ST. LEGISLATURES (June 5, 2017), <http://www.ncsl.org/research/civil-and-criminal-justice/drug-overdose-immunity-good-samaritan-laws.aspx> [https://perma.cc/7YD5-UYEC].

¹² Barbara Fedders, *Opioid Policing*, 94 IND. L.J. 389, 430–33 (2019) (discussing Law Enforcement Assisted Diversion programs).

¹³ Christopher T. Creech, Comment, *Increasing Access to Naloxone: Administrative Solutions to the Opioid Overdose Crisis*, 68 ADMIN. L. REV. 517, 524–25 (2016).

¹⁴ See Andrew M. Parker et al., *State Responses to the Opioid Crisis*, 46 J.L. MED. & ETHICS 367, 373 (2018).

¹⁵ *How We Will Win the War on Opioids*, WHITE HOUSE (Mar. 1, 2018), <https://www.whitehouse.gov/articles/will-win-war-opioids/> [https://perma.cc/3KKT-NLPX].

¹⁶ Maya Rhodan, *President Trump Is Officially Proposing That We Give Drug Traffickers the Death Penalty*, TIME (Mar. 19, 2018), <http://time.com/5205467/donald-trump-death-penalty-drug-traffickers-opioid/> [https://perma.cc/Q3DS-FPXV] (reporting that Trump told Duterte in a phone call that he had done an “unbelievable job” combatting the “drug problem” in the Philippines); see also *Philippines: Events of 2018*, HUM. RIGHTS WATCH, <https://www.hrw.org/world-report/2019/country-chapters/philippines> [https://perma.cc/ZS4C-3N7L].

II. SAFE INJECTION SITES

Second to state cannabis legalization laws, there is perhaps no better example of the political shift away from the war on drugs than efforts to establish safe injection sites in response to the opioid crisis.¹⁷ Safe injection sites are grounded in the principle of harm reduction.¹⁸ Harm reduction policies are not primarily concerned with reducing drug use.¹⁹ Instead, the strategy is to reduce the negative consequences associated with drug use.²⁰ Consistent with this approach, safe injection sites (also sometimes called supervised injection facilities or safe consumption rooms, among other terms)²¹ aim “to reduce morbidity and mortality by providing a safe environment for more hygienic use . . . [and] to reduce drug use in public and improve public amenity in areas surrounding urban drug markets.”²² They do this by providing a space for people to use drugs they have purchased elsewhere in a safe environment, with clean syringes, and with medical professionals on hand.²³ Many safe injection sites also provide other services to clients, including counseling, educational programming about communicable disease prevention, and referrals to health and social services programs.²⁴

Safe injection sites have been operating in other countries for decades. The first sanctioned facility opened in 1986 in Berne, Switzerland.²⁵ Today, there are approximately 100 supervised injection sites in ten different countries, including Canada.²⁶ Although there is some disagreement about the overall strength of the empirical evidence in support of safe injection sites, the studies to date have been overwhelmingly positive. A 2014 systemic review of the literature on safe injection sites examined seventy-five studies and concluded that injection sites “have largely fulfilled their initial objectives without enhancing drug use or drug trafficking.”²⁷ Specifically, the literature review

¹⁷ This Part draws heavily from my discussion of safe injection sites in Alex Kreit, *Safe Injection Sites and the Federal “Crack House” Statute*, 60 B.C. L. REV. 415, 420–28 (2019).

¹⁸ *Id.* at 420.

¹⁹ *Id.*

²⁰ *Id.*

²¹ Alex H. Kral & Peter J. Davidson, *Addressing the Nation’s Opioid Epidemic: Lessons from an Unsanctioned Supervised Injection Site in the U.S.*, 53 AM. J. PREVENTATIVE MED. 919, 919 (2017).

²² EUR. MONITORING CTR. FOR DRUGS AND DRUG ADDICTION, DRUG CONSUMPTION ROOMS: AN OVERVIEW OF PROVISION AND EVIDENCE 2 (2018), http://www.emcdda.europa.eu/system/files/publications/2734/POD_Drug%20consumption%20rooms.pdf [<https://perma.cc/57FT-AT2K>].

²³ Kral & Davidson, *supra* note 21, at 919 (providing an overview of safe injection sites).

²⁴ Kreit, *supra* note 17, at 422 n.42.

²⁵ EUR. MONITORING CTR. FOR DRUGS AND DRUG ADDICTION, *supra* note 22, at 2.

²⁶ Kral & Davidson, *supra* note 21, at 919.

²⁷ Chloé Potier et al., *Supervised Injection Services: What Has Been Demonstrated? A Systematic Literature Review*, 145 DRUG & ALCOHOL DEPENDENCE 48, 48 (2014).

found that the evidence suggests safe injection sites improve public health outcomes for drug users by reducing overdose deaths and increasing access to health care while also improving public safety outcomes for the community by reducing public drug use and the prevalence of dropped syringes in public places.²⁸ Further, the literature review found no evidence that safe injection sites increase drug use, which is the primary argument made by safe injection site opponents.²⁹ These results should not be terribly surprising, particularly with respect to reductions in overdose deaths. The opioid-receptor antagonist drug naloxone is very effective at reversing overdoses if it is administered relatively soon after the onset of symptoms.³⁰ And, of course, medical professionals are able to respond much more quickly to an overdose that occurs at a safe injection site than to one that occurs elsewhere.

Despite the evidence in support of safe injection sites, they were long considered to be political nonstarters in the United States because they were seen as incompatible with the war on drugs. The war on drugs has been organized around the principle of use reduction in general and an idealized vision of a “drug free society” in particular.³¹ The drug war’s concern with “the consumption of the prohibited substance rather than any secondary consequences that might ensue”³² is in tension with harm reduction measures like safe injection sites. And at the height of the drug war, opposition to harm reduction proposals went beyond a difference of opinion about balancing public policy goals. The war on drugs was framed as a life and death struggle in which, as President Reagan’s Attorney General Edwin Meese put it, “there are no neutrals.”³³ Regardless of the costs and benefits, safe injection sites and similar measures were considered to be unacceptable simply because they were a form of surrender.³⁴ Indeed, proponents of harm reduction proposals were themselves

²⁸ *Id.*

²⁹ *Id.* at 65. A 2018 review of the evidence by the RAND Corporation likewise found existing studies to be encouraging but struck a more cautious tone than the 2014 literature review. See BEAU KILMER ET AL., CONSIDERING HEROIN-ASSISTED TREATMENT AND SUPERVISED DRUG CONSUMPTION SITES IN THE UNITED STATES, RAND CORP. vi–xiii (2018), https://www.rand.org/content/dam/rand/pubs/research_reports/RR2600/RR2693/RAND_RR2693.pdf [<https://perma.cc/LX3F-X3P5>]. The RAND report found studies show that drug consumption that occurs at a safe injection site is less harmful, with a reduced risk of disease transmission. *Id.* at xi. But, the authors cautioned, that “[o]verall, the scientific evidence about the effectiveness of [supervised consumption sites] is limited in quality and the number of locations evaluated.” *Id.* at x.

³⁰ See Edward W. Boyer, *Management of Opioid Analgesic Overdose*, 367 NEW ENG. J. MED. 146, 149–51 (2012) (discussing the use of naloxone to treat overdoses).

³¹ Kreit, *supra* note 4, at 1336.

³² FRANKLIN E. ZIMRING & GORDON HAWKINS, *THE SEARCH FOR RATIONAL DRUG CONTROL* 9 (1992).

³³ DAN BAUM, *SMOKE AND MIRRORS: THE WAR ON DRUGS AND THE POLITICS OF FAILURE* 214 (1996).

³⁴ William J. Bennett, *The Drug War Worked Once. It Can Again.*, WALL ST. J. (May 15, 2001), <http://www.wsj.com/articles/SB989884118310019941> [<https://perma.cc/Y6ZD-PSNJ>]; see Editorial Staff, *The Controversial Debate on Supervised Injection*

seen as possible enemies in the war on drugs; President George H.W. Bush famously described the enemy as “[e]veryone who uses drugs. Everyone who sells drugs. And everyone who looks the other way.”³⁵

For decades, the drug war enjoyed nearly universal support among politicians. In this environment, safe injection sites were unable to gain traction even in politically progressive cities like San Francisco. In 2007, for example, drug policy reform advocates held a symposium on Vancouver’s safe injection site that was co-sponsored by San Francisco’s health department in an attempt to get the issue on the local political agenda.³⁶ The conference was promoted as an event to help city officials “figure out whether this is a way to reduce the harms and improve the health of our community.”³⁷ As might have been expected, federal officials came out strongly against the idea. In response to the conference, an Office of National Drug Control Policy representative described safe injection sites as “a form of giving up” and said it was “disconcerting” that San Francisco would even consider them.³⁸ But opposition at the time was not limited to the federal government. Even then-San Francisco Mayor Gavin Newsom, known for taking bold political stances on other progressive issues like marriage equality and marijuana legalization, declined to back the effort to study safe injection sites.³⁹ As a result, the initiative “just kind of crashed and burned,” according to one of its backers.⁴⁰

A little over ten years later, the picture is decidedly different. “There are at least thirteen efforts underway in U.S. cities and states to start an official

Facilities, LAGUNA TREATMENT HOSP., <https://lagunatreatment.com/supervised-injection-facilities/> [<https://perma.cc/L5N3-F4X2>] (last updated Sept. 20, 2019); *see also* Jonathan P. Caulkins & Peter Reuter, *Dealing More Effectively and Humanely with Illegal Drugs*, 46 CRIME & JUST. 95, 117 (2017) (“In the United States ‘harm reduction’ became a toxic term, seen within law enforcement circles as a Trojan horse for legalization. . . .”).

³⁵ BAUM, *supra* note 33, at 289 (quoting President George H.W. Bush). In this vein, former drug czar William J. Bennett once described state ballot measures to decrease penalties for marijuana possession as “the drug legalization movement’s advance on [the] home fronts” of those states. William J. Bennett, *Don’t Put Up with Pot, Ohio*, CIN. POST, Nov. 2, 2002, at A14.

³⁶ Lisa Leff, *San Francisco Considers Safe-Injection Site for Drug Addicts*, ASSOCIATED PRESS (Oct. 18, 2007), http://usatoday30.usatoday.com/news/health/2007-10-18-sf-injections_N.htm [<https://perma.cc/3EBM-LFSK>].

³⁷ *Id.*

³⁸ *Id.*

³⁹ *See* C.W. Nevius, *Support for Supervised Injection is Growing*, SFGATE (Oct. 15, 2007), <https://www.sfgate.com/bayarea/article/C-W-Nevius-Support-for-supervised-drug-2518428.php> [<https://perma.cc/PC67-XQGG>] (“Asked for a comment from Mayor Gavin Newsom, spokesman Nathan Ballard said, ‘The mayor is not inclined to support this approach, which quite frankly may end up creating more problems than it addresses.’”).

⁴⁰ Beth Schwartzapfel, *Is America Ready for Safe Injection Rooms?*, VICE (Nov. 6, 2015), https://www.vice.com/en_us/article/4wb5yb/is-america-ready-for-safe-injection-rooms-1106 [<https://perma.cc/25SV-XPA3>].

supervised injection site.”⁴¹ In four cities—New York, Philadelphia, San Francisco, and Seattle—officials have formally announced plans to open a safe injection site.⁴² Among this group, San Francisco and Philadelphia have arguably gone furthest. In February 2018, San Francisco’s Department of Public Health revealed that the city hoped to open two facilities in July 2018.⁴³ Although officials backed away from that plan, in late August 2018, they opened a nonoperational prototype safe injection site⁴⁴ and Mayor London Breed has consistently reiterated her intent to open a functioning injection site in the near future.⁴⁵ Efforts in Philadelphia have advanced even further. In January 2018, Philadelphia outlined a plan to find a nonprofit organization to open a safe injection site in the city.⁴⁶ For months, it seemed like the initiative was going nowhere. But, as noted in the introduction to this Article, former Pennsylvania Governor and Philadelphia Mayor Ed Rendell incorporated a nonprofit called Safehouse in October 2018 to open and operate the planned safe injection site.⁴⁷ Safehouse began to work toward its goal until it was sued by the United States Attorney for the Eastern District of Pennsylvania in February 2019.⁴⁸

⁴¹ Bobby Allyn, *Cities Planning Supervised Drug Injection Sites Fear Justice Department Reaction*, NPR (July 12, 2018), <https://www.npr.org/sections/health-shots/2018/07/12/628136694/harm-reduction-movement-hits-obstacles> [https://perma.cc/DM8R-QVWT].

⁴² See Kreit, *supra* note 17, at 427 (providing an overview of current efforts to establish safe injection sites in the United States). Denver officials abandoned their effort in early 2019—at least, temporarily—after failing to gain support for their effort at the state level. Anna Staver, *Colorado Lawmakers Won’t Vote on Safe Injection Sites in 2019. House Democratic Leader Blames Denver*, DENV. POST (Feb. 19, 2019), <https://www.denverpost.com/2019/02/19/safe-injection-sites-denver-colorado/> [https://perma.cc/4N7U-RU8F].

⁴³ Heather Knight, *SF Safe Injection Sites Expected to Be First in Nation, Open Around July 1*, S.F. CHRON. (Feb. 6, 2018), <https://www.sfchronicle.com/news/article/SF-safe-injection-sites-expected-to-be-first-in-12553616.php> [https://perma.cc/XA9T-FN5B].

⁴⁴ Laura Waxmann, *Mock Safe Injection Site Opens in SF Amid Threat of Federal Prosecution*, S.F. EXAMINER (Aug. 30, 2018), <http://www.sfexaminer.com/mock-safe-injection-site-opens-sf-amid-threat-federal-prosecution/> [https://perma.cc/HP7G-BSS6]. San Francisco’s effort has gained support from some state lawmakers, who introduced a bill in early 2019 to allow the sites under state law. Dominic Fracassa, *California Bill Allowing San Francisco Safe Injection Site Reintroduced*, S.F. CHRON. (Feb. 4, 2019), <https://www.sfchronicle.com/bayarea/article/California-bill-allowing-San-Francisco-safe-13589277.php> [https://perma.cc/M5CL-WAS6].

⁴⁵ See Heather Knight, *Breed Says Fight for Safe Injection Sites in SF Isn’t Over*, S.F. CHRON. (Oct. 2, 2018), <https://www.sfchronicle.com/bayarea/heatherknight/article/Breed-says-fight-for-safe-injection-sites-in-SF-13273455.php> [https://perma.cc/7N WG-MK2M].

⁴⁶ Elana Gordon, *What’s Next for ‘Safe Injection’ Sites in Philadelphia?*, NPR (Jan. 24, 2018), <https://www.npr.org/sections/health-shots/2018/01/24/580255140/whats-next-for-safe-injection-sites-in-philadelphia> [https://perma.cc/39CM-6KQD].

⁴⁷ Allyn, *supra* note 3.

⁴⁸ Bobby Allyn, *U.S. Prosecutors Sue to Stop Nation’s First Supervised Injection Site for Opioids*, NPR (Feb. 6, 2019), <https://www.npr.org/sections/health-shots/2019/>

As a result of federal opposition, which is discussed more below in Part III, efforts to open a facility have not yet moved past the planning stages. But the fact that safe injection sites are receiving serious consideration from so many state and local lawmakers says a great deal about the state of the war on drugs. In just over a decade, safe injection sites have gone from being politically off-limits, even in San Francisco, to a mainstream policy issue in a number of cities and states. Indeed, if not for federal opposition, safe injection sites would almost certainly be operating in one or more cities already. No doubt, the severity of the opioid crisis is what has prompted state and local lawmakers to consider safe injection sites. In addition, media coverage of the opioid epidemic that has tended to focus on “the white prescription opioid *cum* heroin user”⁴⁹ has surely contributed to the way politicians have responded to the opioid crisis. But the fact that this particular policy option is generating so much interest is also a testament to the changed politics of the war on drugs. In previous drug epidemics—from the crack epidemic in the 1980s⁵⁰ to the methamphetamine epidemic in the 2000s⁵¹—lawmakers almost uniformly responded with reactionary and punitive proposals. Over the past decade, the calls from politicians of all stripes to end to the drug war have changed the tenor of the discussion. This has created the political space for policy proposals like safe injection sites to be evaluated and debated on their merits, rather than being dismissed out-of-hand on ideological grounds.

III. DRUG-INDUCED HOMICIDE PROSECUTIONS

Although the opioid epidemic has seen U.S. policymakers embrace harm reduction-oriented policies in a way that would have been unthinkable a decade ago, there have also been signs of a backlash. At the federal level, the Trump administration’s interest in reviving the drug war has received a good deal of attention. But even before Trump took office, the war on drugs continued to

02/06/691746907/u-s-prosecutors-sue-to-stop-nation-s-first-supervised-injection-site [https://perma.cc/6XN4-FYQT]. Safehouse countersued in April. Aubrey Whelan, *Supervised Injection Site Supporters Countersue Feds, Saying Their Philly Mission Comes from Religious and Medical Imperatives*, PHILA. INQUIRER (Apr. 3, 2019), <https://www.inquirer.com/health/supervised-injection-site-religious-beliefs-safe-house-lawsuit-philadelphia-20190403.html> [https://perma.cc/866X-B29W].

⁴⁹Julie Netherland & Helena B. Hansen, *The War on Drugs That Wasn’t: Wasted Whiteness, “Dirty Doctors,” and Race in Media Coverage of Prescription Opioid Misuse*, 40 CULTURE MED. & PSYCHOL. 664, 664 (2016) (italics added).

⁵⁰See Mona Lynch & Marisa Omori, *Crack as Proxy: Aggressive Federal Drug Prosecutions and the Production of Black-White Racial Inequality*, 52 L. & SOC’Y REV. 773, 774 (2018) (assessing the “racial legacy effects of the 1980s’ federal crack ‘war’”).

⁵¹See Note, *Cooking Up Solutions to a Cooked Up Menace: Responses to Methamphetamine in a Federal System*, 119 HARV. L. REV. 2508, 2514–15 (2006) (discussing the focus of state legislators on “criminal penalties” in their efforts to respond to the methamphetamine epidemic); *id.* at 2518 (describing federal prosecutors as being “in the vanguard on aggressively sentencing those trafficking in methamphetamine”).

march along, if only due to inertia. By and large, drug laws and enforcement budgets have not changed very much since the height of the war on drugs.⁵² Drug possession arrest rates have remained relatively steady, and sentences for drug trafficking offenses are still quite severe.⁵³ This is a reflection of the fact that rhetoric in favor of ending the drug war has not yet translated into significant legislative reform; most changes have occurred at the margins of drug policy, not its foundation.⁵⁴ The result is that “use of the criminal justice system continues to dominate local, state, and federal responses to increasing rates of opioid use and overdose.”⁵⁵

Indeed, in some respects, the war on drugs has intensified. The rise in drug-induced homicide prosecutions provides an example. Under drug-induced homicide statutes, drug distribution that results in death is punished as a homicide offense. Twenty states and the federal Controlled Substances Act (CSA) have a drug-induced homicide law.⁵⁶ Although the particulars of these laws vary, they generally make defendants strictly liable when death results from the distribution of a controlled substance.⁵⁷ Most were passed at the height of the war on drugs, in the 1980s and 1990s.⁵⁸ The federal law, for example,

⁵² Kreit, *supra* note 4, at 1324–25.

⁵³ Drug arrests have declined slightly since their high point in the mid-2000s. During Obama’s last year in office in 2016, there were just over 1.57 million drug arrests, down from 1.7 million at the year he was elected. Tom Angell, *Drug Arrests on the Rise in US: New FBI Data*, FORBES (Sept. 25, 2017), <https://www.forbes.com/sites/tomangell/2017/09/25/drug-arrests-on-the-rise-in-us-new-fbi-data/#26c49da87274> [<https://perma.cc/7VQH-BYFB>]. Marijuana arrests appear to account for the lion’s share of the decrease, likely due to marijuana decriminalization and legalization laws. See Alex Kreit, *Marijuana Legalization*, 1 REFORMING CRIM. JUST. 115, 119 (Erik Luna ed., 2017). With regard to sentencing, almost all of the federal drug mandatory minimum penalties enacted in the 1980s remain in place and federal drug sentences have decreased only slightly in recent years. See U.S. SENTENCING COMM’N., MANDATORY MINIMUM PENALTIES FOR DRUG OFFENSES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 11–15 (2017), https://www.uscc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171025_Drug-Mand-Min.pdf [<https://perma.cc/5DJA-NCTJ>]. In December 2018, Congress passed a notable sentencing reform bill, the FIRST STEP Act, which includes modest reductions to some mandatory minimum drug penalties. FIRST STEP Act of 2018, Pub. L. No. 115-391, § 401, 132 Stat. 5194 (2018). For an overview of the FIRST STEP Act, see *First Step Act: Signed into Law on December 21, 2018*, ESP INSIDER EXPRESS (Feb. 2019), https://www.uscc.gov/sites/default/files/pdf/training/newsletters/2019-special_FIRST-STEP-Act.pdf [<https://perma.cc/5SWF-7YMP>] [hereinafter *First Step Act*].

⁵⁴ See generally *First Step Act*, *supra* note 53 (summarizing legal changes pursuant to the First Step Act).

⁵⁵ DRUG POLICY ALL., AN OVERDOSE DEATH IS NOT MURDER: WHY DRUG-INDUCED HOMICIDE LAWS ARE COUNTERPRODUCTIVE AND INHUMAN 6 (2017), https://www.drugpolicy.org/sites/default/files/dpa_drug_induced_homicide_report_0.pdf [<https://perma.cc/J9GH-W9PH>] [hereinafter DRUG POLICY ALL.].

⁵⁶ See *id.* at 56–60 (summarizing existing drug-induced homicide statutes).

⁵⁷ *Id.*

⁵⁸ *Id.*

was passed in 1986 and provides for a twenty year mandatory minimum sentence “if death or serious bodily injury results from the use of”⁵⁹ an illegally distributed drug. Although most of these laws have been on the books for decades, they were not frequently employed until recently.⁶⁰ This has changed over the past few years as more police and prosecutors have come to see them as a tool for responding to the opioid crisis. Some police and prosecutors have adopted policies of treating every overdose death as a homicide scene.⁶¹ The DEA has worked to encourage this approach by offering trainings to patrol officers on investigating overdose death cases.⁶² Drug-induced homicide prosecutions have skyrocketed as a result. Although no database tracks these prosecutions, two recent studies based on news articles both concluded that there has been a dramatic increase in drug-induced homicide prosecutions over the past decade, with one of the studies finding a 300% spike between 2011 and 2016.⁶³

To appreciate why this trend suggests a revival of the war on drugs, it is important to understand the broad reach of drug-induced homicide laws. First, drug-induced homicide laws are strict liability offenses that, many courts have held, also dispense with traditional proximate cause requirements.⁶⁴ Because the government does not need to show that a defendant was reckless or even criminally negligent, the laws are not limited to sellers who are particularly culpable, such as a seller who distributes a substance claiming it to be cocaine while knowing that it is laced with fentanyl.⁶⁵ With respect to causation,

⁵⁹ 21 U.S.C. § 841(b)(1)(A) (1986).

⁶⁰ DRUG POLICY ALL., *supra* note 55, at 11 (“Though many drug-induced homicide laws have sat idly on the books since their enactment decades ago, prosecutors are now reinvigorating them with a rash of drug-induced homicide charges in the wake of increasing overdose deaths.”).

⁶¹ *E.g.*, Justin Fenton, *Baltimore Homicide Detectives to Begin Investigating Drug Overdoses*, BALT. SUN (May 2, 2017), <http://www.baltimoresun.com/news/maryland/crime/bs-md-ci-baltimore-police-investigate-overdoses-20170501-story.html> [<https://perma.cc/HD37-CEC6>] (reporting that “[f]or the first time, Baltimore police have begun investigating overdoses in an effort to trace drugs back to dealers” via a task force of five detectives “operat[ing] out of the homicide unit”); *see also* Jeff Mordock, *N.Y. Police Now Treat Drug Overdose Sites as Crime Scenes in Bid to Take Down Dealers*, WASH. TIMES (Feb. 19, 2019), <https://www.washingtontimes.com/news/2019/feb/19/new-york-opioid-overdose-sites-now-crime-scenes/> [<https://perma.cc/K5GY-UCJH>].

⁶² Fenton, *supra* note 61 (reporting that more than 1000 patrol officers had been trained by the DEA as of mid-2017).

⁶³ DRUG POLICY ALL., *supra* note 55, at 2, 11–14; *see also* Leo Beletsky, *America’s Favorite Antidote: Drug-Induced Homicide in the Age of the Overdose Crisis*, 2019 UTAH L. REV. 833, 873 (finding “a sharp upward trend” in drug-induced homicide prosecutions beginning in 2009 that indicates a “spike in prosecutions”).

⁶⁴ *See* DRUG POLICY ALL., *supra* note 55, at 9–10.

⁶⁵ *Cf.* Annamarya Scaccia, *How Fentanyl Is Contaminating America’s Cocaine Supply*, ROLLING STONE (Oct. 9, 2018), <https://www.rollingstone.com/culture/culture-features/fentanyl-cocaine-how-contamination-happens-735155/> [<https://perma.cc/WA9D-Z9UG>].

although the Supreme Court has held that the federal drug-induced homicide statute incorporates a but-for causation requirement,⁶⁶ it left the question of whether the offense requires proof of proximate causation unresolved.⁶⁷ Most circuit courts have held that the law does not include a foreseeability requirement, however.⁶⁸ These courts have reasoned that the statute's language is plain and "unambiguous and that giving effect to its plain meaning prohibits us from superimposing upon the statute a foreseeability or proximate cause requirement."⁶⁹ Although there are relatively few published opinions addressing whether the intervening cause doctrine—which holds that "the causal link between [a defendant's] conduct and the victim's death [is] severed when the victim exercised his own free will"⁷⁰—applies to drug-induced death cases, the little case law on the question suggests it does not.⁷¹ In its absence, drug-induced homicide statutes might apply even where death resulted because a person took an unusually large amount of the drug or mixed the drug with other substances. One federal district court judge went so far as to write that "[s]uicide through heroin overdose meets the statute's terms."⁷²

Second, and perhaps even more significant, drug-induced homicide laws do not apply only to drug sellers but also to people who share drugs with friends or family members. This is because some state laws along with the federal Controlled Substances Act criminalize drug *distribution*, not drug *sale*.⁷³ Courts have consistently held that "the social sharing of a small quantity of drugs, without consideration, constitutes the distribution of drugs."⁷⁴ This background

⁶⁶ *Burrage v. United States*, 134 S. Ct. 881, 888 (2014) (citation omitted).

⁶⁷ *Id.* at 887 (noting that while the Court had also granted review on the question of foreseeability, "[w]e find it necessary to decide only" the question of actual causation).

⁶⁸ *See, e.g., United States v. Webb*, 655 F.3d 1238, 1250–52 (11th Cir. 2011) (citations omitted).

⁶⁹ *United States v. McIntosh*, 236 F.3d 968, 972 (8th Cir. 2001), *aff'd*, 332 F.3d 550 (8th Cir. 2003).

⁷⁰ *Lewis v. State*, 474 So. 2d 766, 771 (Ala. Crim. App. 1985).

⁷¹ *See United States v. Rodriguez*, 279 F.3d 947, 951 n.5 (11th Cir. 2002).

⁷² *Zanucoli v. United States*, 459 F. Supp. 2d 109, 112 (D. Mass. 2006) (emphasis added). *But see Rodriguez*, 279 F.3d at 951 n.5, 952 (citation omitted) (observing that some circuits "have not addressed whether there is an intervening cause exception" to the federal drug-induced homicide statute and declining to decide the issue in light of the disposition of the case).

⁷³ 21 U.S.C. § 841(a) (2012); *United States v. Swiderski*, 548 F.2d 445, 449 (2d Cir. 1977) (discussing drug laws).

⁷⁴ *United States v. Wallace*, 532 F.3d 126, 128–29 (2d Cir. 2008) (citations omitted) (collecting cases). This rule is limited somewhat by the so-called "joint-user" defense, which has been recognized by a number of courts. This doctrine 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—simple joint possession, without any intent to distribute the drug further." *Swiderski*, 548 F.2d at 450. The legal basis for this rule is that users who jointly acquire drugs to use with each other are in either constructive (or actual) possession of the drugs from the time of the purchase. *Id.* Because a person cannot distribute an item to someone who already possesses it, joint

principle of drug laws dramatically expands the reach of drug-induced homicide statutes, which typically apply to any drug trafficking offense that results in death, including distribution.

Of course, prosecutors could use their discretion to only charge sellers with drug-induced homicide. Although some prosecutors presumably do just that, others have decided to apply drug-induced homicide laws as aggressively as possible.⁷⁵ Indeed, the limited data available suggests that users who shared drugs with friends or family members make up a shockingly high percentage of drug-induced homicide defendants. In his recent study of drug-induced homicide prosecutions, Leo Beletsky found that *half* of the drug-induced homicide defendants in his data set “were not, in fact, ‘dealers’ in the traditional sense, but friends and partners to the deceased.”⁷⁶ Similarly, journalists who reviewed drug-induced homicide prosecutions in Wisconsin in 2017 reported that nearly 90% of the 100 cases they reviewed involved “either low-level street dealers or friends and relatives of the person who overdosed.”⁷⁷ Not infrequently, spouses find themselves the target of these prosecutions. Consider one representative case. Jennifer Marie Johnson was convicted of third-degree murder under Minnesota’s drug-induced homicide law after her husband overdosed in March 2013.⁷⁸ Johnson had shared some of her prescribed liquid methadone with her husband, at his request, “to help him fall asleep. He then took more without asking her permission. When [her husband] started to have difficulty breathing, Jennifer yelled to her daughter to call 911, and tried to revive him while they waited for help.”⁷⁹ Johnson’s husband died and Johnson was sentenced to six years in prison.⁸⁰

Even when drug-induced homicide laws are applied to drug sellers, they rarely ensnare higher-level operators. Because each link in the distribution chain makes it more difficult to prove even but-for causation, the typical drug-induced homicide investigation begins and ends with the person who distributed drugs to the end-user.⁸¹ This is almost never a high- or even mid-level drug trafficker but, instead, a street level seller who deals in relatively small quantities of drugs.⁸² These kinds of low-level sellers are exceedingly unlikely to have any control over whether the drugs are cut with fentanyl or other dangerous

purchasers cannot be convicted of distributing drugs to each other. *See id.* (finding that joint users cannot distribute to each other and discussing the rationale as to why).

⁷⁵ DRUG POLICY ALL., *supra* note 55, at 14.

⁷⁶ Beletsky, *supra* note 63, at 873–74.

⁷⁷ Jack Shuler, *Overdose and Punishment*, NEW REPUBLIC (Sept. 10, 2018), <https://newrepublic.com/article/150465/prosecutors-reviving-reagan-era-drug-induced-homicide-laws> [<https://perma.cc/RVZ2-AKK9>]. These findings mirrored a similar review of New Jersey drug-induced homicide prosecutions in the early 2000s, which found that 25 of the 32 cases reviewed “involved friends of the person who overdosed.” *Id.*

⁷⁸ DRUG POLICY ALL., *supra* note 55, at 28.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.* at 42.

⁸² *Id.*

adulterants.⁸³ Not infrequently, they are users themselves, selling drugs in order to get money to pay for their own supply.⁸⁴ Thus, although some drug-induced homicide laws purport to be targeted at “‘entrepreneurial drug dealers who traffic in large amounts of illegal drugs for profit,’ rather than users who sell to support their habit,”⁸⁵ the practical reality of drug markets in combination with the broad reach of the laws means that very few drug-induced homicide defendants fall into that category. Instead, most drug sellers who are prosecuted for drug-induced homicide are no different than any other low-level drug seller.⁸⁶

The surge in prosecuting friends, family members, and low-level sellers for homicide offenses as a result of an overdose embodies the drug war philosophy. A core feature of the drug war has been the widespread application of unforgiving criminal penalties that bear no relationship to blameworthiness or efficacy.⁸⁷ War connotes an existential threat and so, in the war on drugs, drug crimes came to be thought of as offenses “of the highest order,”⁸⁸ despite the fact that drug exchanges are consensual transactions. Lengthy and far-reaching mandatory minimum drug penalties were “viewed as a statement that society would no longer tolerate the illegal drug epidemic.”⁸⁹ In order to “send a message,” punishment was “pegged at a level that the legislature considers appropriate for a highly culpable participant . . . [and] just punishment for lesser roles is inevitably precluded.”⁹⁰

Like the archetypical drug war policy of mandatory minimum penalties, drug-induced homicide statutes can impose severe punishments on low-level sellers and even on users who share drugs with friends or family members. This is because, in most states, legislators did not narrowly craft drug-induced homicide statutes to focus on their purported targets of higher-level drug traffickers or traffickers who knowingly sell drugs with dangerous adulterants.⁹¹ Instead, just as with mandatory minimum penalties based on drug type and quantity, lawmakers appear to have entrusted the reach of the laws to

⁸³ *Id.* at 17.

⁸⁴ DRUG POLICY ALL., *supra* note 55, at 41 (discussing studies suggesting that a large percentage of people convicted of drug trafficking offenses also use drugs and observing that “[i]t is widely understood among experts who study drug markets that many sellers are suffering from a substance use disorder and are selling to support their own drug use”).

⁸⁵ Shuler, *supra* note 77 (quoting Vermont’s legislative findings).

⁸⁶ DRUG POLICY ALL., *supra* note 55, at 42.

⁸⁷ See Kreit, *supra* note 4, at 1337–38.

⁸⁸ *People v. Profit*, 183 Cal. App. 3d 849, 870 (Cal. Ct. App. 1986).

⁸⁹ William W. Wilkins, Jr. et al., *Competing Sentencing Policies in a “War on Drugs” Era*, 28 WAKE FOREST L. REV. 305, 315 (1993).

⁹⁰ Stephen J. Schulhofer, *Rethinking Mandatory Minimums*, 28 WAKE FOREST L. REV. 199, 211 (1993).

⁹¹ See DRUG POLICY ALL., *supra* note 55, at 9, 59, 65, 67 n.49 (discussing the strict liability mens rea imposed in drug-induced homicide statutes).

prosecutorial discretion.⁹² And, as with the application of mandatory minimum penalties based on drug type and quantity, prosecutions all too often target the low-hanging fruit.⁹³ Unless one subscribes to the view that—in the words of one prosecutor—“[e]ven if you’re an addict, once you cross that line and give it or sell it to someone, you become a dealer,”⁹⁴ it is hard to escape the conclusion that the aggressive use of drug-induced homicide statutes divorces punishments from blameworthiness.

Drug-induced homicide prosecutions are perhaps even harder to justify on utilitarian grounds. Like other drug war-era policies, they are meant to send a message for its own sake.⁹⁵ In contrast to safe injection sites, there is no empirical evidence whatsoever demonstrating that drug-induced homicide prosecutions achieve their stated goals. Nor is there much reason to think these prosecutions will reduce drug trafficking in general or trafficking in drugs cut with dangerous adulterants in particular.⁹⁶ If prosecutions were limited to sellers who knew they were selling adulterated drugs or to higher-level participants responsible for deciding what to cut the drugs with, they might incentivize sellers to take greater care to protect the health of their buyers. But, as discussed above, most cases involve low-level sellers and users who share with one another—groups that have little or no control over what is in their product. Tellingly, even some of the prosecutors who pursue these cases have said they do not believe they have any deterrent effect,⁹⁷ let alone an effect sufficient to justify the cost of prosecuting the cases and imprisoning the defendants who are convicted. Worse, there is some reason to think that drug-induced homicide prosecutions might contribute to the overdose death problem by deterring people from calling 911 to report an overdose.⁹⁸ Despite all of this, as with most

⁹² See Schulhofer, *supra* note 90, at 202 (noting that mandatory minimum drug penalties “in effect delegate to prosecutors the power to decide whether the statute is really a mandate to impose a minimum sentence or instead is only a source of discretion”).

⁹³ See DRUG POLICY ALL., *supra* note 55, at 42.

⁹⁴ John Keilman, *Who Counts As a Drug Dealer? As Heroin Overdoses Soar, Drug-Induced Homicide Laws Blurs Line Between Exploiter and Victim*, CHI. TRIB. (Aug. 10, 2018), <http://www.chicagotribune.com/suburbs/ct-met-drug-induced-homicide-law-heroin-overdose-20180807-story.html> [<https://perma.cc/3CS8-9444>].

⁹⁵ Shuler, *supra* note 77 (quoting a prosecutor who said, following a drug-induced homicide conviction, that the case “sent a strong message that cavalier use of drugs in our community isn’t going to be tolerated”).

⁹⁶ See Beletsky, *supra* note 63, at 875–77 (arguing that drug-induced homicide prosecutions are unlikely to have a deterrent effect on drug sales in general or especially risky drug sales in particular); see also DRUG POLICY ALL., *supra* note 55, at 39.

⁹⁷ Rosa Goldensohn, *They Shared Drugs. Someone Died. Does That Make Them Killers?*, N.Y. TIMES (May 25, 2018), <https://www.nytimes.com/2018/05/25/us/drug-overdose-prosecution-crime.html> [<https://perma.cc/XX8Y-8YPE>] (reporting a prosecutor answering “No” to the question “whether overdose prosecutions have had an impact on the street”).

⁹⁸ DRUG POLICY ALL., *supra* note 55, at 40 (arguing that “rather than reduce fatalities, drug-induced homicide laws only result in additional overdose deaths due to people failing to summon medical help for overdoses out of fear of prosecution”).

drug war policies, drug-induced homicide prosecutions are pursued because they further a zero-tolerance ideology.⁹⁹ There is no need to show that the policy is likely to produce tangible benefits or even to study the question. Regardless of the costs and benefits, the policy is considered to be worthwhile because it is a “tough” response to drugs.

IV. THE DRUG WAR AT A CROSSROADS

Efforts to establish safe injection sites and the increase in drug-induced homicide prosecutions represent two competing visions for how to respond to the opioid epidemic. They also help to provide some insight into one of the reasons why ending the war on drugs is much more easily said than done: the availability of rarely used but broadly written drug war-era laws. So long as they remain on the books, these long-dormant drug war-era statutes can quickly be put into action at any time. Because of this dynamic, prosecutors have been able to double down on the war on drugs by aggressively charging and prosecuting drug-induced homicide cases, and the Department of Justice (“DOJ”) has been able to single-handedly stymie local efforts to establish safe injection sites. In both cases, broadly written laws passed in the 1980s that were dormant or near dead—the “zombie laws” of the drug war¹⁰⁰—are being employed in ways their drafters likely did not intend in order to breathe new life into the drug war.¹⁰¹

Federal opposition to safe injection sites provides an especially striking example of the scope of drug war-era laws and their potential to prevent reform today. Four cities have announced plans to open safe injection sites but none have done so due at least in part to threats of federal prosecution.¹⁰² In Philadelphia, the United States Attorney for the Eastern District of Pennsylvania preemptively sued the nonprofit Safehouse to block a safe injection site from opening.¹⁰³ Although the DOJ has not taken a formal position on safe injection sites, the United States Attorney for the Eastern District of Pennsylvania’s position does not appear to be an outlier. In an August 2018 *New York Times* editorial, then-Deputy Attorney General Rod Rosenstein pledged to take “swift and aggressive action” against any city or state that opens a safe injection site.¹⁰⁴ What is especially striking about Rosenstein’s threats and the lawsuit against Safehouse is the legal basis for the federal government’s opposition to safe injection sites. Safe injection sites do not manufacture, distribute, or possess

⁹⁹ Shuler, *supra* note 77 (citation omitted).

¹⁰⁰ I thank Eve Hanan for suggesting this phrase.

¹⁰¹ See Erik Luna & Paul G. Cassell, *Mandatory Minimalism*, 32 CARDOZO L. REV. 1, 25 (2010) (discussing the moral panic surrounding crack cocaine in the context of the Anti-Drug Abuse Act of 1986); see also U.S. SENTENCING COMM’N, 2017 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS S-41 tbl.17, S-104 tbl.33 (statistics showing how little this statute is used).

¹⁰² See Kreit, *supra* note 42 and accompanying text.

¹⁰³ Allyn, *supra* note 48.

¹⁰⁴ Rosenstein, *supra* note 10.

illegal drugs and it is unlikely site operators could be considered accomplices to drug possession.¹⁰⁵ One might naturally wonder, then, why it is that federal prosecutors have proclaimed safe injection sites to be illegal. After all, federal law does not make it a crime to provide health services to people who use illegal drugs.

The argument that safe injection sites violate federal law is grounded in a rarely used statute passed at the height of the war on drugs, the so-called federal “crack house” law.¹⁰⁶ That law makes it a crime to “manage or control any place, whether permanently or temporarily, either as an owner, lessee, agent, employee, occupant, or mortgagee, and knowingly and intentionally rent, lease, profit from, or make available for use, with or without compensation, the place for the purpose of unlawfully manufacturing, storing, distributing, or using a controlled substance.”¹⁰⁷ Formally titled “[m]aintaining drug-involved premises,”¹⁰⁸ the law is often referred to as the crack house statute because it was passed in response to concerns about “so-called ‘crack-houses’[] where ‘crack’, [sic] cocaine and other drugs are manufactured and used.”¹⁰⁹ It was passed near the height of the drug war and during the moral panic surrounding crack cocaine,¹¹⁰ as part of the Anti-Drug Abuse Act of 1986.¹¹¹

The legislative history of the law makes clear that it was written with crack houses in mind. Both “the short title and the Congressional Record synopsis refer to manufacturing and crack houses.”¹¹² The Senate summarized the new law as one “that ‘outlaws operation of houses or buildings, so-called ‘crack houses’[] where ‘crack’, [sic] cocaine and other drugs are manufactured and

¹⁰⁵ Assuming *arguendo* that a safe injection facility facilitates the possession of a controlled substance, accomplice liability attaches only to those who act “with the intent of facilitating the offense’s commission.” *Rosemond v. United States*, 572 U.S. 65, 71 (2014). Safe injection site operators do not intend to help people possess drugs or to encourage drug use; their purpose is to provide medical services to injection drug users. See Scott Burris et al., *Federalism, Policy Learning, and Local Innovation in Public Health: The Case of the Supervised Injection Facility*, 53 ST. LOUIS U. L.J. 1089, 1100, 1133 (2009) (“An [sic] SIF is providing a space for use of controlled substances not for its own sake or for profit, but in order to promote drug treatment, prevent disease, and avoid overdose mortality.”).

¹⁰⁶ Complaint for Declaratory Judgment at 6–7, *United States v. Safehouse*, No. 2:19-cv-00519-GAM (E.D. Pa. Feb. 5, 2019), <https://www.safehousephilly.org/sites/default/files/attachments/2019-02/1-main.pdf> [<https://perma.cc/R2UA-3PP3>] (alleging that Safehouse’s proposed safe injection site would violate the crack house statute).

¹⁰⁷ 21 U.S.C. § 856(a) (2012).

¹⁰⁸ *Id.*

¹⁰⁹ 132 CONG. REC. 26,474 (daily ed. Sept. 26, 1986) (excerpt of Senate Amendment No. 3034 to H.R. 5484).

¹¹⁰ See Luna & Cassell, *supra* note 101, at 25 (discussing the moral panic surrounding crack cocaine in the context of the Anti-Drug Abuse Act of 1986).

¹¹¹ *United States v. Sturmoski*, 971 F.2d 452, 462 (10th Cir. 1992) (discussing the legislative history of the crack house statute).

¹¹² *United States v. Tamez*, 941 F.2d 770, 773 (9th Cir. 1991).

used.”¹¹³ Since drug manufacturing and possession were already federal crimes,¹¹⁴ the crack house statute seemed designed more to meet a political need than to fill a real gap in the law. Not surprisingly then, crack house statute prosecutions are exceedingly rare. In 2017, maintaining a drug-involved premises was the primary offense of conviction for just 24 of the 19,750 drug offenses that received federal sentences.¹¹⁵ Despite this, the text of the law can apply to individuals with only a tenuous connection to drugs. Courts have consistently held that the statute “only requires that a defendant has the purpose of maintaining property where drug use takes place, and not that the defendant intends the drug use to occur.”¹¹⁶ As a result, “a ‘defendant may be liable if he manages or controls a building that others use for an illicit purpose, and he either knows of the illegal activity or remains deliberately ignorant of it.’”¹¹⁷ Based on this interpretation, it seems likely that courts would find that the crack house statute applies to safe injection site operators since they would have knowledge their clients were coming to the facility for the purpose of using drugs.¹¹⁸ To be sure, the legal status of safe injection sites has not yet been tested in court; Safehouse is vigorously fighting the DOJ’s lawsuit against them.¹¹⁹ And, as I have argued elsewhere, there may be a legal avenue for cities or states to open government-run safe injection sites without federal interference.¹²⁰

Whichever side prevails in the looming conflict over the legal status of safe injection sites, however, it is striking that a drug war-era law that was passed in response to concerns about so-called crack houses might, years later, block cities from establishing safe injection sites. Congress certainly was not thinking about safe injection sites when it passed the crack house statute.¹²¹ But, like many laws enacted at the height of the war on drugs, the crack house statute’s text sweeps much more broadly than the problem to which it was addressed.¹²² And

¹¹³ *Sturmoski*, 971 F.2d at 462 (quoting 132 CONG. REC. S13,780 (daily ed. Sept. 26, 1986)).

¹¹⁴ See 21 U.S.C. § 844 (1994); see also 21 U.S.C. § 841(a)(2012).

¹¹⁵ U.S. SENTENCING COMM’N, *supra* note 101, at S-41 tbl.17, S-104 tbl.33.

¹¹⁶ *United States v. Tebeau*, 713 F.3d 955, 960 (8th Cir. 2013).

¹¹⁷ *Id.* at 961 (quoting 8th Cir. Model Crim. Jury Instr. § 6.21.856B).

¹¹⁸ See *Kreit*, *supra* note 17, at 432–34 (analyzing application of the crack house statute to safe injection site operators based on the prevailing interpretation of the statute’s mens rea provisions).

¹¹⁹ Bobby Allyn, *Supporters Sue to Open Safe Injection Site in Philadelphia, Citing Religious Freedom*, NPR (Apr. 13, 2019), <https://www.npr.org/sections/health-shots/2019/04/13/710253334/supporters-sue-to-open-safe-injection-site-in-philadelphia-citing-religious-free> [<https://perma.cc/F6JV-S9JB>].

¹²⁰ See *Kreit*, *supra* note 17, at 442–62 (arguing that the Controlled Substances Act’s immunity provision might apply to shield a state- or local-government-run safe injection site from federal interference).

¹²¹ See *United States v. Sturmoski*, 971 F.2d 452, 462 (10th Cir. 1992) (discussing the legislative history of the crack house statute).

¹²² See 21 U.S.C. § 856(a)(2) (2012); see *United States v. Tamez*, 941 F.2d 770, 773 (9th Cir. 1991) (discussing legislative history).

so, more than three decades later, the DOJ may be able to employ the law against safe injection site operators. If the strategy succeeds, federal prosecutors will have blocked safe injection sites without Congress ever considering whether or not safe injection sites are good policy or whether this is an issue that should be decided at the national or the local level.

The rise in drug-induced homicide prosecutions paints a similar picture about the competing efforts to end or to reinvigorate the war on drugs. Like the crack house statute, most drug-induced homicide laws were passed at the height of the drug war.¹²³ In fact, the federal drug-induced homicide provision was part of the same bill as the crack house statute, the Anti-Drug Abuse Act of 1986.¹²⁴ The federal drug-induced homicide provision was motivated by outcry over the cocaine overdose death of star college basketball player Len Bias.¹²⁵ A number of states followed Congress's lead and most legislators appeared to see these laws as targeted at "drug dealers" in general and higher-level drug dealers specifically.¹²⁶

Although some lawmakers may have imagined the laws would also be employed against low-level sellers, there is reason to think many would not have realized that friends and spouses who share drugs with one another could be subject to drug-induced homicide charges. It is exceedingly rare for people to be prosecuted for drug distribution based on social sharing because these kinds of exchanges are well hidden from the police. The odds of being caught for sharing drugs with someone else in your home or even in public are quite low. As a result, at the time the federal drug-induced death statute was passed, a number of federal circuit courts had not yet resolved the question of "whether the social sharing of a small quantity of drugs, without consideration, constitutes the distribution of drugs within the meaning of" the CSA.¹²⁷

Until recently, drug-induced homicide prosecutions were also relatively rare. But, as discussed above, they have exploded over the past few years, mostly because some police and prosecutors have decided to investigate every overdose as a homicide.¹²⁸ Because drug users often share with one another (as anyone who has been offered a beer at a friend's house can attest), a sizeable

¹²³ See *Burrage v. United States*, 134 S. Ct. 881, 886 (2014) (outlining the legislative history of the federal drug-induced homicide laws, including enactment).

¹²⁴ *Id.* ("[I]n 1986 . . . Congress enacted the Anti-Drug Abuse Act, 100 Stat. 3207, which redefined the [CSA] offense categories, increased the maximum penalties and set minimum penalties for many offenders, including the 'death results' enhancement at issue here." (citations omitted)).

¹²⁵ Beletsky, *supra* note 63, at 869–70 (discussing Len Bias's death and passage of the federal drug-induced homicide-provision). Indeed, drug-induced homicide statutes are sometimes referred to as by shorthand "Len Bias laws." Goldensohn, *supra* note 97.

¹²⁶ Goldensohn, *supra* note 97 ("The Len Bias laws were supposed to go after drug dealers—'greed-soaked mutants,' Howell Heflin of Alabama called them on the Senate floor.").

¹²⁷ *United States v. Wallace*, 532 F.3d 126, 128–29 (2d Cir. 2008) (collecting cases, only one of which was decided prior to 1986).

¹²⁸ See discussion *supra* Part III.

number of drug-induced deaths result from the “distribution” of drugs between friends and spouses. Outside of drug-induced homicide cases, police typically expend no investigative resources targeting friends who share illegal drugs with each other. But these kinds of exchanges have increasingly been the focus of drug-induced homicide enforcement.¹²⁹ Conduct that has never been of particular concern to law enforcement (the social sharing of drugs) is now leading to homicide charges because of the expansive application of rarely used drug war-era laws. In this way, prosecutors have been able to single-handedly breathe new life into the war on drugs, even as many lawmakers have expressed interest in moving toward a public health approach to drug policy.¹³⁰

The rise in drug-induced homicide prosecutions also undermines more recent, public health-oriented legislation. While drug-induced homicide laws may not directly block reform, they work at cross-purposes with the Good Samaritan laws that have been passed in forty states.¹³¹ Lawmakers have embraced Good Samaritan laws in response to increasing evidence that “[t]he most common reason people cite for not calling 911 [in response to an overdose] is fear of police involvement.”¹³² In order to encourage people to call 911, Good Samaritan laws give limited immunity (most often, immunity from prosecution for simple drug possession) to people who call 911 to report an overdose death.¹³³ But by increasingly targeting friends and family members for drug-induced homicide charges, prosecutors are frustrating these laws by deterring people from calling for help in response to an overdose “for fear of prosecution for manslaughter or murder.”¹³⁴ Much like the DOJ’s expansive application of a dormant drug war-era law has blocked safe injection sites, the expansive application of drug-induced homicide laws allows prosecutors to single-handedly set back current day reform efforts.

V. CONCLUSION

The past decade has seen a great deal of enthusiasm for establishing a new, public health-oriented approach to drug policy. Barack Obama’s first drug czar, Gil Kerlikowske, said upon taking office that it was time to retire the drug war strategy.¹³⁵ This change in rhetoric has coincided with some reforms on the state and local level, through the establishment of programs like Law Enforcement Assisted Diversion (LEAD) and Good Samaritan laws. It has also led lawmakers

¹²⁹ See Beletsky, *supra* note 63, at 873–74 (citations omitted) (discussing charges against friends and family members).

¹³⁰ See *id.* at 860–63 (discussing “[t]he [e]mergence of a ‘[p]ublic [h]ealth’ [a]pproach”).

¹³¹ DRUG POLICY ALL., *supra* note 55, at 40.

¹³² *Id.*

¹³³ *Id.* (discussing Good Samaritan laws).

¹³⁴ *Id.*

¹³⁵ Gary Fields, *White House Czar Calls for End to ‘War on Drugs’*, WALL ST. J. (May 14, 2009), <http://www.wsj.com/articles/SB124225891527617397> [<https://perma.cc/2NLF-EVRA>].

in some states to repeal some mandatory minimum drug penalties. Similarly, under Attorney General Eric Holder, the Department of Justice placed modest limits on the use of federal mandatory minimum drug penalties. But achieving significant and lasting reform will require some very heavy lifting. At the federal level, Congress will need to dramatically revise federal drug laws, beginning with mandatory minimum penalties; a Department of Justice charging policy or modest legislative reform is insufficient.¹³⁶ In the states, programs like LEAD will need to be turned into lasting changes to state law, perhaps with a view toward even bolder reforms along the lines of Portugal's decriminalized civil drug court system.

Even as efforts to end the drug war have continued to gain momentum, there have been growing calls to revive it. This leaves the country in a pivotal moment for drug policy, particularly in the context of the opioid epidemic. It is possible to imagine a near future in which safe injection sites are operating in multiple cities, Congress has finally enacted meaningful mandatory minimum reforms, and one or more states are eyeing decriminalizing drug possession. It is also easy to imagine a future in which reform efforts have stalled, the federal government has beaten back safe injection sites, and Congress has enacted a new set of harsh mandatory minimum drug penalties. Or perhaps the next decade of drug policy may include components of each approach. We may see a reduction in the criminalization of drug possession and an increase in enforcement against drug "sellers" (a group that, of course, also includes many users). Or drug policy may become much more decentralized, with some states and localities continuing to wage war and others turning to harm reduction measures. Whatever the future holds, the battle over safe injection sites and the recent increase in drug-induced homicide prosecutions shows that drug war supporters currently have the structural upper hand. The height of the drug war saw lawmakers pass a dizzying array of broadly worded and increasingly severe criminal statutes. Some of these laws were never widely used. But as long as they remain in effect, prosecutors can bring these moribund laws back to life to frustrate the efforts of those who hope to see an end to the war on drugs.

¹³⁶ Cf. Jelani Jefferson Exum, *From Warfare to Welfare: Reconceptualizing Drug Sentencing During the Opioid Crisis*, 67 U. KAN. L. REV. 941, 956–57 (2019) (discussing the enactment of the FIRST STEP Act, which reduced mandatory minimum sentences in a narrow class of cases, and noting that "the mandatory minimum sentences applicable to drug offenses remain largely unchanged since the Anti-Drug Abuse Act of 1986").