FROM OVERDOSE TO CRIME SCENE: THE INCOMPATIBILITY OF DRUG-INDUCED HOMICIDE STATUTES WITH DUE PROCESS

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ABSTRACT

As the opioid epidemic ravages the United States, federal and state legislators continue to seek various ways to mitigate the crisis. Though public health advocates have successfully pushed for harm-reduction initiatives, a contrasting punitive response has emerged. Across the country, prosecutors and legislators are turning to drug-induced homicide ("DIH") statutes as a law-and-order response to the crisis. DIH statutes, which can carry sentences as severe as life in prison, impose criminal liability on anyone who provided drugs that led to a fatal overdose. Though DIH laws are often justified as tools to target large-scale drug distributors, in reality, they more often target friends or family of the deceased. Troublingly, despite the foundational criminal law principle that intent is required to impose culpability, DIH laws are strict liability offenses, requiring no intent toward the resulting death.

Examining the development of strict liability offenses in the American legal system, this Note asserts that criminal intent—mens rea—is an indispensable due process protection in homicide law. It argues that DIH laws, though not facially unconstitutional, are functionally anti-constitutional—inconsistent with the spirit, if not the letter, of due process. This Note is the first to reconcile DIH statutes with the broader context of strict liability criminal jurisprudence, contending that these laws impose punishment far in excess of the culpability they require. Accordingly, it calls upon state legislatures to repeal or amend these laws, offering various frameworks to better align DIH statutes with the protections required for criminal defendants.

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> *"[A]s a vitious will without a vitious act is no civil crime, so, on the other hand, an unwarrantable act without a vitious will is no crime at all."*
>
> *William Blackstone*[1]

> *"It used to be that cops would get called to a hotel and find someone with a needle in their arm and they would often go, 'Well, that's a real tragedy,' and bag him up . . . . It's been part of my job to convince them it's not over . . . . The way I see i[t], if you kill one of my kids, you owe me for one dead kid and I want to collect."*
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> *Pete Orput*, Washington County Attorney, MN[2]

INTRODUCTION

In July 2013, Jarret McCasland, twenty-four years old, accompanied his nineteen-year-old girlfriend, Flavia Cardenas, while she purchased heroin from a dealer outside Baton Rouge, Louisiana.[3] Flavia paid for the drugs and asked Jarret to carry them in his pocket on their return home.[4] The pair had a history of drug abuse; they were arrested together on possession charges earlier that year, and Flavia had once been hospitalized for an overdose before ever meeting Jarret.[5] That evening in July, they both used heroin and, at Flavia's request, Jarret injected her with cocaine.[6] The next morning, Flavia was

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1. 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 21 (Oxford, Clarendon Press 4th ed. 1770).

2. Sarah Horner, *Metro Prosecutors Ramp Up Pursuit of Drug Dealers in Overdose Cases*, PIONEER PRESS (Oct. 25, 2017, 9:55 AM), https://www.twincities.com/2017/10/25/twin-cities-metro-prosecutors-ramp-up-pursuit-of-drug-dealers-in-overdose-cases [https://perma.cc/R7JD-WEL2].

3. *See* Jamie Peck, *Why Heroin Addicts Are Being Charged with Murder*, ROLLING STONE (Aug. 2, 2018, 12:36 PM), https://www.rollingstone.com/culture/culture-features/heroin-opioid-addicts-charged-with-murder-o-d-703242 [https://perma.cc/P9GW-5GTL] (stating the couple "habitually used drugs together in their town outside of Baton Rouge" and describing their movements on the night in question).

4. LINDSAY LASALLE, DRUG POL'Y ALL., AN OVERDOSE DEATH IS NOT MURDER: WHY DRUG-INDUCED HOMICIDE LAWS ARE COUNTERPRODUCTIVE AND INHUMANE 35 (2017), http://www.drugpolicy.org/sites/default/files/dpa_drug_induced_homicide_report_0.pdf [https://perma.cc/YRG5-3ZH8].

5. Joe Gyan Jr., *Jury Convicts Denhan Springs Man of Murder, Was Accused of Injecting Girlfriend with Heroin Before Her Death*, ADVOCATE (Apr. 30, 2019, 2:55 PM), https://www.theadvocate.com/baton_rouge/news/article_f28cf6b4-d4ad-5a4e-bf11-a57dd04866aa.html [https://perma.cc/YS2T-UN9S].

6. *See* LASALLE, *supra* note 4, at 35; Jessica Pishko, *When Using Heroin with a Friend Gets You Charged with Murder*, MOTHER JONES (Jan. 2018), https://www.motherjones.com/crime-justice/2017/12/using-heroin-gets-you-charged-with-murder [https://perma.cc/KP6T-6WYH]. At

dead.[7] Shortly thereafter, Jarret was arrested by the Baton Rouge police and charged with her murder.[8]

At trial, state pathologists testified that Flavia died of respiratory failure induced by a heroin overdose.[9] Expert testimony produced by the defense claimed that Flavia died from a multi-drug combination, stating that her body "was a soup of very dangerous drugs."[10] Despite conflicting testimony regarding the exact time of death, cause of death, and who purchased or administered which drugs, Jarret was found guilty of second-degree murder.[11] The judge handed down the mandatory sentence—noting that its severity "bother[ed him] tremendously"—and Jarret, a then twenty-seven-year-old addict, received life in prison without parole.[12]

Jarret was convicted under a Louisiana drug-induced homicide ("DIH") statute imposing criminal liability on anyone who "unlawfully distributes or dispenses a controlled dangerous substance . . . which is the direct cause of the death of the recipient who ingested" the substance.[13] Louisiana is not the only state with a specific offense treating deaths resulting from the delivery of certain drugs as homicides.[14] As of January 2019, twenty-five jurisdictions have enacted DIH statutes.[15] Penalties for these offenses vary, though the majority of them impose sentences of at least ten years.[16] In six jurisdictions, the

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trial, Jarret denied giving Flavia anything besides cocaine, testifying that he watched her buy the heroin and inject herself with it. *Id.* However, Flavia's friend testified that Jarret also injected Flavia with heroin. Gyan, *supra* note 5.

7. Gyan, *supra* note 5.

8. Peck, *supra* note 3.

9. *Id.*

10. *Id.*

11. *Id.*

12. Joe Gyan Jr., *Judge Refuses To Alter Life Sentence for Denham Springs Man in Girlfriend's Alleged Heroin Death*, ADVOCATE (June 17, 2019, 4:21 PM), https://www.theadvocate.com/baton_rouge/news/article_01619b17-92ec-52b3-a998-f22430e3f9fc.html [https://perma.cc/5LPK-7M3D].

13. LA. STAT. ANN. § 14:30.1(3) (2016). The shorthand "DIH" is not commonly used in previous academic literature regarding this topic. This Note borrows the acronym from Northeastern University School of Law's Health in Justice Action Lab. *E.g.*, *Drug-Induced Homicide*, HEALTH JUST. ACTION LAB, https://www.healthinjustice.org/drug-induced-homicide [https://perma.cc/M2KD-KSVY].

14. *See Drug Induced Homicide Laws*, PRESCRIPTION DRUG ABUSE POL'Y SYS. (2019), http://www.pdaps.org/datasets/drug-induced-homicide-1529945480-1549313265-1559075032 [https://perma.cc/PCA4-SAGJ] (compiling DIH statutes throughout the United States that are valid at least through January 1, 2019).

15. *Id.*

16. *Id.* (follow "3.1. What is the minimum incarceration period?" hyperlink).

minimum penalty is life in prison.[17] In two jurisdictions, the maximum penalty is death.[18]

Louisiana's statute was enacted in 1987 as part of a nationwide trend at the height of the Reagan administration's "war on drugs."[19] After a high-profile celebrity overdose death in 1986,[20] public outcry led to multiple jurisdictions enacting harsh laws to prosecute those who sold drugs that led to accidental overdoses.[21] Despite the prevalence of

17. *Id.*

18. *Id.* (follow "4.1. What is the maximum incarceration period?" hyperlink). The two states that offer a death penalty for DIH crimes are Florida and Oklahoma. *Id.* Colorado's DIH law previously had the potential to be a capital offense, *id.*, but the state repealed the death penalty in March 2020, Act of Mar. 23, 2020, ch. 61, 2020 Colo. Sess. Laws 204. To date, it appears that no one convicted under a DIH statute has received the death penalty. The Author determined this by reviewing death row information for the states listed above. This search was limited to actual convictions, and as such would not reveal any situations where the prosecution sought a death penalty charge but did not obtain it.

Florida's DIH statute was enacted in 1972, LASALLE, *supra* note 4, at 57, and there have been no capital convictions under this statute since, *see Execution Database*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/executions/execution-database [https://perma.cc/MKB4-R8N7] (listing ninety-nine executions since 1972); *Death Row Roster*, FLA. DEP'T CORR., http://www.dc.state.fl.us/OffenderSearch/deathrowroster.aspx [https://perma.cc/7WVJ-Q98F] (listing 339 inmates on Florida's death row). Individual Google searches for each inmate either executed or on death row revealed that none were convicted of DIH (database of search results on file with the *Duke Law Journal*). Oklahoma's DIH statute was enacted in 1996, LASALLE, *supra* note 4, at 59, and there have been no capital convictions under this statute since, *see Execution Database*, *supra* (listing 112 inmates executed since 1996); *Inmates Sentenced to Death*, OKLA. DEP'T CORR., http://doc.ok.gov/Websites/doc/images/DRMR%202-11-2020%20NAME_NUMBER.pdf [https://perma.cc/Z6HE-64JU] (listing forty-seven current death row inmates). Individual Google searches for each inmate either executed or on death row revealed that none were convicted for DIH (database of search results on file with the *Duke Law Journal*). Colorado's DIH law was enacted in 1990, LASALLE, *supra* note 4, at 56, and there were no capital convictions found for a DIH offense in Colorado after that date, *see* MICHAEL L. RADELET, THE HISTORY OF THE DEATH PENALTY IN COLORADO 266–77 (2016) (listing all Colorado capital sentences from 1975 to 2015).

19. LASALLE, *supra* note 4, at 2, 58.

20. Rising basketball star Len Bias died from a cocaine overdose two days after being drafted by the Boston Celtics. Rosa Goldensohn, *They Shared Drugs. Someone Died. Does That Make Them Killers?*, N.Y. TIMES (May 25, 2018), https://nyti.ms/2xdSzPy [https://perma.cc/PWN2-VVLH]. A friend of Bias was accused of providing the drugs but was later acquitted. *Id.* The outcry over Bias's death spurred jurisdictions to pursue drug dealers, who were referred to by one senator as "greed-soaked mutants." *Id.*

21. LASALLE, *supra* note 4, at 2; Jon Schuppe, *30 Years After Basketball Star Len Bias' Death, Its Drug War Impact Endures*, NBC NEWS (June 19, 2016, 8:37 AM), https://www.nbcnews.com/news/us-news/30-years-after-basketball-star-len-bias-death-its-drug-n593731 [https://perma.cc/3FVP-4PQV]. On the federal level, Congress added a previously rejected "death results" enhancement to the Controlled Substances Act ("CSA"), imposing a mandatory minimum sentence of twenty years for distribution of certain controlled substances whose use results in death. 21 U.S.C. § 841(b)(1)(C) (2018); Brief for the United States at 3–4, Burrage v. United States, 571 U.S. 204 (2014) (No. 12-7515).

DIH statutes, prosecutions under these provisions were initially rare.[22] Rather than viewing overdose deaths as homicides, law enforcement typically treated these tragedies as unintentional accidents with "no crime involved."[23]

In the last decade, however, the escalation of the U.S. opioid epidemic has instigated a sharp rise in DIH prosecutions.[24] Largely due to the surge of prescription opioid addiction rates and the widespread availability of heroin and synthetic opioids such as fentanyl, overdose deaths dramatically increased.[25] Though some advocates effectively lobbied for harm reduction, prevention, and treatment interventions, many elected officials instead pushed for punitive responses to a public health crisis.[26] As a result, prosecutors dusted off previously idle DIH statutes and legislatures pushed to enact new ones.[27]

DIH statutes are often justified as a "law-and-order" solution to the opioid epidemic.[28] They are intended to penalize drug "kingpins"

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22. LASALLE, *supra* note 4, at 2.

23. Mark M. Neil, *Prosecuting Drug Overdose Cases: A Paradigm Shift*, NAGTRI J., Feb. 2018, at 26, http://www.naag.org/assets/redesign/files/journal/NAGTRI%20Journal%20Feb%202018_final_pdf.pdf [https://perma.cc/U2AT-QTS9].

24. LASALLE, *supra* note 4, at 7; *see infra* Part I.C.

25. LASALLE, *supra* note 4, at 5–7; *see* HOLLY HEDEGAARD, MARGARET WARNER & ARIALDI M. MINIÑO, NAT'L CTR. FOR HEALTH STAT., DRUG OVERDOSE DEATHS IN THE UNITED STATES, 1999–2016, at 1–2 (2017), https://www.cdc.gov/nchs/data/databriefs/db294.pdf [https://perma.cc/V78R-LLMM] ("The rate [of overdose deaths] increased on average by 10% per year from 1999 to 2006, by 3% per year from 2006 to 2014, and by 18% per year from 2014 to 2016.").

26. LASALLE, *supra* note 4, at 6–7, 15–16.

27. At least six states enacted DIH laws between 2003 and 2017. LASALLE, *supra* note 4, at 56–60. Additionally, in 2019, North Carolina enacted a "Death by Distribution" statute, Act of July 8, 2019, 2019 N.C. Sess. Laws 83 (codified as amended at N.C. GEN. STAT. § 14-18.4 (2019)), and Mississippi proposed its own DIH law. *Infra* note 267 and accompanying text. In 2018, the U.S. Department of Justice even urged federal prosecutors to seek capital punishment for overdose deaths when they considered it "appropriate." Press Release, U.S. Dep't of Just., Attorney General Sessions Issues Memo to U.S. Attorneys on the Use of Capital Punishment in Drug-Related Prosecutions (Mar. 21, 2018), https://www.justice.gov/opa/pr/attorney-general-sessions-issues-memo-us-attorneys-use-capital-punishment-drug-related [https://perma.cc/JF97-Q53A].

28. LASALLE, *supra* note 4, at 7; *see, e.g.*, N.J. STAT. ANN. § 2C:35.1.1 (West 2016) (targeting "those repeat drug offenders and upper echelon members of organized narcotics trafficking networks who pose the greatest danger to society"); Act approved June 4, 2003, No. 54, sec. 1, 2003 Vt. Acts & Resolves 141, 141 (codified as amended in scattered sections of VT. STAT. ANN. tits. 13, 18, 23 (West 2020)) ("Many people who become addicted to illegal drugs resort to small scale sale of drugs to support their addiction. This act is not directed at those people . . . ."). Though the statutes identify their purpose as targeting large-scale drug dealers, their plain text imposes liability for "[*a*]*ny person*" who delivers the controlled substance that results in death. *E.g.*, N.J. STAT. ANN. § 2C:35-9(a) (emphasis added).

by providing strict punishments to deter "the most culpable and dangerous" drug dealers.[29] The reality, however, is that prosecutions not only target "entrepreneurial drug dealers who traffic in large amounts of illegal drugs for profit,"[30] but also focus on friends, family, and partners of the deceased.[31] Because proving the direct cause of death can be difficult, prosecutors tend to focus on the last person to touch the drugs before the deceased consumed them rather than charging large-scale dealers higher up in the distribution chain.[32] Often, the person charged is a fellow addict sharing drugs or is "simply the last person to see the deceased alive."[33] Thus, rather than being essential tools to curb the epidemic, these overbroad laws unnecessarily add to an abundance of available statutes for prosecuting drug offenses.[34] While affirming Jarret's conviction, the Louisiana Court of Appeal acknowledged that while the DIH statute may have been *intended* to target "sellers of drugs," it effectively "provide[d] for a much larger class of offenders"; namely, "anyone who simply physically delivers a proscribed drug."[35]

Moreover, DIH statutes require no intent toward the death itself. This enables the widespread surge in DIH prosecutions, despite the "universal and persistent" tenet of criminal law that "injury can amount to a crime only when inflicted by intention."[36] DIH statutes do not require mens rea (criminal intent) for the homicide, thus operating either explicitly or implicitly as strict liability crimes.[37] A defendant

29. N.J. STAT. ANN. § 2C:35-1.1; *see also, e.g.*, N.C. GEN. STAT. § 14-18.4(a) (encouraging "the criminal justice system to hold illegal drug dealers accountable").

30. Sec. 1, 2003 Vt. Acts & Resolves 141.

31. *See Drug-Induced Homicide*, *supra* note 13 (estimating that at least half of all DIH prosecutions are brought against friends, family members, or partners of the deceased).

32. LASALLE, *supra* note 4, at 42.

33. *Id.*

34. *Infra* notes 262–63 and accompanying text.

35. State v. McCasland, 218 So. 3d 1119, 1126 (La. Ct. App. 2017).

36. Morissette v. United States, 342 U.S. 246, 250 (1952).

37. *See* Neil, *supra* note 23, at 27 (describing the various approaches states have used to prosecute DIH cases). Strict liability offenses do not necessarily mean that *no* mental state is necessary to commit the crime. WAYNE R. LAFAVE, CRIMINAL LAW 358–59 (6th ed. 2017). Rather, "a crime may be defined so as to require one type of fault as to one element, another type as to another element, and no fault at all as to a third element." *Id.* Essentially, "strict liability crimes contain a material element for which the actor's culpability is irrelevant." Alan C. Michaels, *Constitutional Innocence*, 112 HARV. L. REV. 828, 830 (1999). These offenses are not always explicitly defined as strict liability, as "[i]t is rare if ever that the legislature states affirmatively in a statute that described conduct is a crime though done without fault." LAFAVE, *supra*, at 359.

must be "culpable for the underlying distribution offense but no culpability is required for the deadly result."[38] Functionally, this "ease[s] the prosecution's path to conviction,"[39] as the government only has to prove beyond a reasonable doubt that the defendant intended to deliver the banned substance, not that the defendant intended to kill.[40]

Legislatures enjoy expansive freedom to determine "the extent to which moral culpability should be a prerequisite to conviction."[41] Even so, enacting laws that impose harsh penalties but contain no minimum mens rea requirements runs counter to what is widely considered to be the very foundation of American criminal jurisprudence.[42] Mens rea is often regarded as "the measuring rod for our system of criminal responsibility,"[43] essential to imposing liability for causing death.[44] Unsurprisingly, then, strict liability criminal laws and their logical counterpart, the felony murder doctrine, have been heavily criticized as denying due process.[45] These laws premise liability on a false construct of blameworthiness rather than assessing defendants via a measure of true culpability.[46]

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38. State v. Maldonado, 645 A.2d 1165, 1170 (N.J. 1994).

39. *Morissette*, 342 U.S. at 263.

40. *McCasland*, 218 So. 3d at 1127. DIH statutes usually cover a broad range of behavior such as distributing, dispensing, and delivering drugs. Functionally, this means they cover "anyone who simply *physically delivers* a proscribed drug." *Id.* at 1126 (emphasis added). Thus, the statutes are sometimes read so broadly as to provoke absurd results. To quote Judge Richard Posner, vacating a DIH homicide conviction:

> Suppose you have lunch with a friend, order two hamburgers, and when your hamburgers are ready you pick them up at the food counter and bring them back to the table and he eats one and you eat the other. It would be very odd to describe what you had done as "distributing" the food to him.

Weldon v. United States, 840 F.3d 865, 866 (7th Cir. 2016).

41. Powell v. Texas, 392 U.S. 514, 545 (1968) (Black, J., concurring).

42. Richard A. Wasserstrom, *Strict Liability in the Criminal Law*, 12 STAN. L. REV. 731, 731 (1960). *See generally* Francis Bowes Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55 (1933) [hereinafter Sayre, *Public Welfare*] (outlining the rise of the exception for public welfare offenses and arguing that, despite the presence of this exception, a mens rea requirement is still vitally necessary for certain crimes).

43. Rudolph J. Gerber, *The Felony Murder Rule: Conundrum Without Principle*, 31 ARIZ. ST. L.J. 763, 771 (1999).

44. *See* Sayre, *Public Welfare*, *supra* note 42, at 56 ("To inflict substantial punishment upon one . . . who caused injury through reasonable mistake or pure accident, would so outrage the feelings of the community as to nullify its own enforcement.").

45. *See, e.g.*, Gerber, *supra* note 43, at 763 (describing the felony murder rule's imposition of strict homicide liability as "unfair, unprincipled and inconsistent with other criminal and civil standards").

46. *Id.* at 771.

The relationship between mental state and punishment, a concept which is almost intuitive,[47] is so fundamental to criminal law as to seem worthy of a constitutional guarantee.[48] The irrationality of strict liability crimes, in the due process sense, is that they lack the basic requirement of actual blameworthiness—namely, the "social stigma which a finding of guilt carries that distinguishes the criminal penalty from all other sanctions."[49] Although due process requires that every element of an offense be proved beyond a reasonable doubt,[50] strict liability offenses lessen this burden, elevating the convenience of the prosecution over the interests of the defendant.[51] Yet strict liability offenses, and DIH laws in particular, are frequently and almost invariably upheld as constitutional.[52] As DIH prosecutions surge and an increasing number of defendants like Jarret are tarred with the brush of murderer,[53] it becomes more difficult to understand how this is consistent with due process.

This Note grapples with that difficulty, asserting that mens rea is an indispensable due process protection in homicide law, even if it is not a constitutional guarantee. By examining the development of strict liability offenses in the American legal system, this Note contends that DIH laws, though not facially unconstitutional, are functionally anti-

47. Morissette v. United States, 342 U.S. 246, 250–51 (1952) (suggesting that a criminal intent requirement "is almost as instinctive as the child's familiar exculpatory 'But I didn't mean to'").

48. For a discussion on why the notion that "the criminal sanction is inappropriate in the absence of *mens rea*" has not been as embraced by courts as it has been by legal scholars, and how the Court's failure to create an "adequate method of interpretation of criminal statutes" without explicit mens rea requirements has compounded the issue, see Herbert L. Packer, *Mens Rea and the Supreme Court*, 1962 SUP. CT. REV. 107, 107–11 [hereinafter Packer, *Mens Rea*].

49. Richard G. Singer, *The Resurgence of Mens Rea: III—The Rise and Fall of Strict Criminal Liability*, 30 B.C. L. REV. 337, 404–05 (1989).

50. *In re* Winship, 397 U.S. 358, 364 (1970) ("[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.").

51. *See* Joseph E. Kennedy, *The Story of* Staples *and the Innocent Machine Gun Owner: The Good, the Bad and the Dangerous*, *in* CRIMINAL LAW STORIES 85, 89 (Donna Coker & Robert Weisberg eds., 2013) ("Since unsafe or unsanitary conditions could threaten the welfare of many people at once, the legislature was presumed to be deliberately omitting mental state requirements in order to ease the burden of proof of prosecutors . . . .").

52. *Infra* Part III; *see also* Michaels, *supra* note 37, at 832 ("[F]or over seventy-five years the Court has affirmed and reaffirmed that strict liability as a general matter is constitutional.").

53. *See* LASALLE, *supra* note 4, 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."). Recent analyses of media mentions of DIH prosecutions suggest they increased by 300 percent from 2011 to 2016. *Id.*

constitutional—inconsistent with the spirit, if not the letter, of due process.[54] While previous literature on these laws has focused on their potential Eighth Amendment concerns or their myriad policy implications,[55] no concerted attempt has been made to analyze DIH statutes within the greater context of the often-confounding strict liability criminal jurisprudence. This Note makes that attempt, arguing these statutes, as they are frequently applied, impose punishments far in excess of the culpability they require.

To be clear, this Note does not articulate a specific constitutional challenge to these laws, nor does it contend with the potential difficulties in raising such a challenge. Rather, it lays out a conceptual roadmap to understand the tensions inherent in these statutes, drawing on constitutional principles to examine their inconsistencies with due process. It asserts that these inconsistencies render these statutes not only irrational, but also counter to the very framework that shapes our understanding of criminal law. Finally, given the futility of these laws and the numerous concerns they raise, this Note calls on state legislatures to repeal or amend DIH statutes to reconcile them with the protections our system guarantees to criminal defendants.

Part I describes the opioid epidemic and evaluates public health and criminal justice responses to the crisis. Part II analyzes the historical roots of the mens rea requirement, discussing the rise of the public welfare exception and examining the complicated jurisprudence

54. *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819) (stating the means the government uses to achieve its ends must be "consist[ent] with the letter and spirit of the constitution").

55. *See generally* Leo Beletsky, *America's Favorite Antidote: Drug-Induced Homicide in the Age of the Overdose Crisis*, 2019 UTAH L. REV. 833 (examining DIH laws through the lens of public health and advocating for an inter-disciplinary approach rather than a criminal response); J. Richard Broughton, *The Opioid Crisis and the Federal Death Penalty*, 70 S.C. L. REV. 611 (2019) (advocating for the passage of a federal death penalty statute to prosecute DIH cases, but acknowledging the potential for Eighth Amendment issues); James H. Knight, Note, *The First Hit's Free . . . Or Is It? Criminal Liability for Drug-Induced Death in New Jersey*, 34 SETON HALL L. REV. 1327 (2004) (arguing that New Jersey's DIH law, as applied, contravenes legislative intent); Stormie B. Mauck, Note, *Drug Dealer or Murderer? Pennsylvania's Approach to Drug Delivery Resulting in Death*, 123 PENN ST. L. REV. 813 (2019) (discussing Eighth Amendment challenges to Pennsylvania's DIH law and concluding the DIH law, though constitutional, is ineffective and costly); Lynne H. Rambo, Note, *An Unconstitutional Fiction: The Felony Murder Rule as Applied to the Supply of Drugs*, 20 GA. L. REV. 671 (1986) (arguing that applying felony murder logic to DIH laws contradicts longstanding causation and proportionality principles, potentially creating Eighth Amendment violations); Blair Talty, Note, *New Jersey's Strict Liability for Drug-Induced Deaths: The Leap from Drug Dealer to Murderer*, 30 RUTGERS L.J. 513 (1999) (describing New Jersey's law as a harsh legislative overreach, flagging a potential due process concern before engaging in an Eighth Amendment analysis).

surrounding strict liability offenses and felony murder. Part III examines DIH statutes in light of due process concerns, highlighting their constitutional implications and inconsistencies. Part IV calls for a legislative response, arguing that retributive measures that deny liberty without requiring appropriate culpability offend the fundamental notions of justice necessary to maintain the moral ballast of our legal system.

I. THE RISE OF DIH STATUTES

Drug-related overdose fatalities in the United States have nearly quadrupled since the beginning of the twenty-first century, resulting in a devastating and rapidly growing public health crisis.[56] Although state and federal governments have only recently described the current state of affairs as an "epidemic,"[57] legislative attempts to reckon with America's deep dependence upon opioids are not new.[58] This Part first provides a background of responses to the opioid crisis and then examines the enactment and enforcement of DIH laws.

A. The War on Drugs and Initial DIH Enactments

Though American society had a relatively permissive attitude toward narcotic use in the early half of the Republic, social and moral concerns prompted regulatory changes around the beginning of the twentieth century.[59] Descriptions of drug users as criminals and "deviant" addicts fueled public support for increasingly punitive measures.[60] As federal regulations cracked down on physicians who

56. Beletsky, *supra* note 55, at 840.

57. *Id.* at 844–46; *see, e.g.*, Press Release, Roy Cooper, Governor of North Carolina, Governor Cooper Signs the Opioid Response Act and Other Bills Into Law (July 22, 2019), https://governor.nc.gov/news/governor-cooper-signs-opioid-response-act-and-other-bills-law [https://perma.cc/NJU5-99BE] (describing the passage of the Opioid Epidemic Response Act); Press Release, Office of the Press Sec'y, The White House, FACTSHEET: Obama Administration Announces Public and Private Sector Efforts to Address Prescription Drug Abuse and Heroin Use (Oct. 21, 2015), https://obamawhitehouse.archives.gov/the-press-office/2015/10/21/fact-sheet-obama-administration-announces-public-and-private-sector [https://perma.cc/DS7D-BZHN] (describing the prescription drug and heroin crisis as an "epidemic").

58. *See* Katharine A. Neill, *Tough on Drugs: Law and Order Dominance and the Neglect of Public Health in U.S. Drug Policy*, 6 WORLD MED. & HEALTH POL'Y 375, 380–85 (2014) (tracing the development of U.S. drug policy from the 1900s through the 1980s).

59. *Id.* at 380–81.

60. *See id.* at 381 ("This construction of the addict as psychologically dysfunctional paved the way for public support of incarcerating addicts in later decades."); *see also A Brief History of the Drug War*, DRUG POL'Y ALL., http://www.drugpolicy.org/issues/brief-history-drug-war [https://

sold narcotics, an expanding black market developed for heroin, opium, and cocaine, furthering the image that drug use was a primarily criminal activity.[61]

Despite some subtle shifts toward expanding treatment,[62] the law-and-order approach to drug regulation dominated the latter half of the century. In the 1980s, federal and state governments increased law enforcement funding to wage the "war on drugs," escalated the criminalization of drug use, and ramped up fervent anti-drug rhetoric.[63] The Anti-Drug Abuse Act of 1986, for example, imposed new mandatory minimum sentences for possession of controlled substances and expanded the punitive focus to include drug users, not just high-level distributors.[64] These policies, combined with increased media attention and public pressure to appear "tough on crime," spurred federal and state politicians of both parties to champion harsher statutory solutions, including DIH laws.[65] Despite this push, these laws were rarely enforced in the first few decades of their existence. This apathy is possibly explained by predominating stereotypes of overdose victims as deviant addicts unworthy of assistance,[66] or by the perception of the opioid epidemic as solely an "urban" problem, not one shared by society at large.[67]

These DIH statutes remained mostly unused even as the growing prevalence of prescription opioids led to an increase in overdose deaths in the 1990s.[68] Between 1999 and 2011, oxycodone consumption

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perma.cc/94PH-PSU7] (noting that initial anti-drug legislation was disproportionately targeted at Chinese immigrant populations, Black men in the South, and Mexican migrants).

61. *See* Neill, *supra* note 58, at 380–81 (describing the passage of the Harrison Narcotic Drug Act of 1914); Beletsky, *supra* note 55, at 853 ("In the years since the establishment of this drug control framework, the availability and purity of illicit substances on the American black market have only increased, while their prices have fallen.").

62. *See* Neill, *supra* note 58, at 383 ("This shift in the social construction of the addict necessitated a shift in the policy tools used . . . [as] evidenced in the expansion of drug treatment . . . .").

63. *Id.*; *A Brief History of the Drug War*, *supra* note 60.

64. Neill, *supra* note 58, at 384.

65. *Id.*; LASALLE, *supra* note 4, at 2.

66. *See* Neill, *supra* note 58, at 380 (discussing depictions of drug users as "undeserving").

67. *See id.* at 387 (discussing the overtones of drug-war rhetoric and stating that "[r]ace rarely was mentioned explicitly; instead the discussion was couched in terms of 'urban' and 'inner city' drug use"). As a "whiter and wealthier" generation of drug users emerged, *id.* at 383, policymakers perhaps became more apt to view those who died of overdoses as victims.

68. *Opioid Basics: Understanding the Epidemic*, Ctrs. for Disease Control & Prevention (Dec. 19, 2018), https://www.cdc.gov/drugoverdose/epidemic/index.html [https://perma.cc/KZP4-7RKA].

increased by almost 500 percent;[69] in the same time period, the opioid-overdose death rate more than tripled.[70] Subsequent efforts to restrict opioid access had unintended consequences, as restrictions upon prescription opioids caused many dependent patients to transition to black market drugs, particularly heroin.[71] This, coupled with the arrival of synthetic and highly potent opioids such as fentanyl, caused the overdose death rate to surge again, increasing from 45,055 overdose deaths in 2014 to 67,367 in 2018.[72]

B. A Harm-Reduction Approach

In response to this rapid increase of deaths, and with a growing recognition that drug war policies failed to effectively reduce drug use, alternative approaches to the zero-tolerance law-and-order model have emerged.[73] Intensified lobbying for a public health approach to

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69. Andrew Kolodny, David T. Courtwright, Catherine S. Hwang, Peter Kreiner, John L. Eadie, Thomas W. Clark & G. Caleb Alexander, *The Prescription Opioid and Heroin Crisis: A Public Health Approach to an Epidemic of Addiction*, 2015 ANN. REV. PUB. HEALTH 559, 560, https://www.annualreviews.org/doi/pdf/10.1146/annurev-publhealth-031914-122957 [https://perma.cc/ZY56-W3BW].

70. LI HUI CHEN, HOLLY HEDEGAARD & MARGARET WARNER, NAT'L CTR. FOR HEALTH STAT., DRUG-POISONING DEATHS INVOLVING OPIOID ANALGESICS: UNITED STATES, 1999–2011, at 1 (2014).

71. *See* Sarah G. Mars, Philippe Bourgois, George Karandinos, Fernando Montero & Daniel Ciccarone, *"Every 'Never' I Ever Said Came True": Transitions from Opioid Pills to Heroin Injecting*, 25 INT. J. DRUG POL'Y 257, 265 (2014) (describing study results suggesting that "medical and regulatory attempts to curb this [widespread availability of opioids] through monitoring and limiting prescribing, appear to be drawing a new generation into higher risk heroin injecting"); *see also Opioid Basics*, *supra* note 68 (describing the "second wave" of the opioid crisis arriving around 2010 with the increased prevalence of heroin use).

72. Rose A. Rudd, Puja Seth, Felicita David & Lawrence Scholl, Ctrs. for Disease Control & Prevention, *Increases in Drug and Opioid-Involved Overdose Deaths—United States, 2010–2015*, 65 MORBIDITY & MORTALITY WKLY. REP. 1445, 1445 (2016), https://www.cdc.gov/mmwr/volumes/65/wr/mm655051e1.htm [https://perma.cc/9JJK-YX66]; *see Opioid Basics*, *supra* note 68 (describing the "third wave" of the opioid crisis). Several reports suggest that opioid overdose rates are increasing even more during the COVID-19 pandemic. AM. MED. ASS'N, ADVOCACY RESOURCE CENTER, ISSUE BRIEF: REPORTS OF INCREASES IN OPIOID RELATED OVERDOSE AND OTHER CONCERNS DURING COVID PANDEMIC *passim* (2020), https://www.ama-assn.org/system/files/2020-09/issue-brief-increases-in-opioid-related-overdose.pdf [https://perma.cc/7ATH-MW2B] (compiling national and state reports on increasing opioid-use mortality rates). The true scope of the fallout from the pandemic may not be known for some time.

73. *See* Neill, *supra* note 58, at 387–89 (describing the shift to a "harm-reduction approach [which] recognizes the permanence of drugs in society and instead of trying to eradicate drug use, focuses on minimizing harm associated with drug use for the individual and society"). This shift to a more compassionate approach may be partly spurred by the fact that heroin is now "ravaging largely white communities," rather than being perceived as just an epidemic based in "poor, predominantly black urban areas." Katharine Q. Seelye, *In Heroin Crisis, White Families Seek*

the crisis has obtained key legislative reforms.[74] After recognizing that years of "just say no" policies resulted in a lack of accurate information concerning safe drug use, advocates have increasingly pushed to educate drug users on how to mitigate the risk of overdose.[75] This education focuses on best practices such as injecting in the presence of other people and obtaining drugs from a consistent, trusted source.[76]

Enabling such reforms is a shift in public perceptions of addiction and how it should be addressed.[77] Increased drug-usage rates[78] now make it far more likely that an individual has been affected by addiction, either through personal experience or through the experience of someone they know. These experiences may make addiction seem more relatable and less deserving of punishment.[79] Set within the broader context of a bipartisan, nationwide shift toward criminal justice reform,[80] general perception is starting to trend toward viewing the opioid crisis as a "public health problem and not just a criminal problem."[81]

Gentler War on Drugs, N.Y. TIMES (Oct. 30, 2015), https://nyti.ms/1KKw5zt [https://perma.cc/H456-KMVM].

74. LASALLE, *supra* note 4, at 6. Typical reforms include increasing access to overdose reversal agents such as naloxone and enacting "Good Samaritan" laws, which provide limited criminal immunity to individuals seeking help when witnessing an overdose. *Id.*

75. HARM REDUCTION COAL., GETTING OFF RIGHT: A SAFETY MANUAL FOR INJECTION DRUG USERS 1 (2020), https://harmreduction.org/issues/safer-drug-use/injection-safety-manual [https://perma.cc/VXU5-ZETY].

76. *See id.* at 4, 67 (suggesting that "[h]aving another person around . . . can be a safety net" and recommending "purchas[ing] your drugs from a regular source").

77. A poll conducted in 2014 showed that two-thirds of Americans believe the government should focus more on treatment than on obtaining prosecutions. *America's New Drug Policy Landscape*, PEW RSCH. CTR. (Apr. 2, 2014), https://www.people-press.org/2014/04/02/americas-new-drug-policy-landscape [https://perma.cc/3SJC-LFC5].

78. *See, e.g.*, SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., KEY SUBSTANCE USE AND MENTAL HEALTH INDICATORS IN THE UNITED STATES: RESULTS FROM THE 2018 NATIONAL SURVEY ON DRUG USE AND HEALTH 1 (2019), https://www.samhsa.gov/data/sites/default/files/cbhsq-reports/NSDUHNationalFindingsReport2018/NSDUHNationalFindingsReport2018.pdf [https://perma.cc/Y2UR-CPQ3] (estimating that nearly one out of every five people at least twelve years of age used an illicit drug in 2018, a higher percentage than recorded in 2015 and 2016); Elizabeth D. Kantor, Colin D. Rehm, Jennifer S. Haas, Andrew T. Chan & Edward L. Giovannucci, *Trends in Prescription Drug Use Among Adults in the United States From 1999-2012*, 314 J. AM. MED. ASS'N 1818, 1825 (2015) (finding that U.S. prescription drug use "increased from 51% in 1999-2000 to 59% in 2011-2012").

79. Neill, *supra* note 58, at 388.

80. *See* Beletsky, *supra* note 55, at 867 (describing various bipartisan shifts away from harsh punitive measures and toward sentencing reform and penalty reductions for certain drugs).

81. Jon Schuppe, *Obama Pushes for More Treatment for Opioid Addiction*, NBC NEWS (Mar. 29, 2016, 4:18 PM), https://www.nbcnews.com/storyline/americas-heroin-epidemic/obama-pushes-more-treatment-opioid-addiction-n547441 [https://perma.cc/ZD5Y-9ARS] (quoting President

C. The Revitalized Use of DIH Laws

Despite this shift, the criminal justice system still plays an outsized role in responding to the opioid crisis. To combat overdose deaths, many officials have returned to the tools of law enforcement and prosecution.[82] Several prosecutors actively seek assistance in deploying these DIH laws, training law enforcement officers to "[t]reat an overdose scene as a homicide scene from the beginning" of a death investigation.[83] Law enforcement officers and legislators are increasingly vocal about their intent to use DIH statutes as a way to deter drug trafficking and use,[84] with various prosecutors stating they do not care if the defendant is themselves an addict, or even if the defendant did not sell drugs to the deceased.[85] Though many of these laws also state their purpose is to prevent overdose deaths,[86] no empirical evidence suggests that increased prosecution or a heightened threat of prosecution leads to a reduction in the death rate.[87] In fact,

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Barack Obama's remarks at the National Rx Drug Abuse and Heroin Summit in March 2016). Also, likely instigating this shift is the changing demographics of addicts, summarized by epidemiologist Dr. Daniel Ciccarone: "We had a white epidemic; we changed our tune." Dan Vergano, *This Was the Decade Drug Overdoses Killed Nearly Half A Million Americans*, BUZZFEED NEWS (Dec. 6, 2019, 12:14 PM), https://www.buzzfeednews.com/article/danvergano/opioid-overdose-decade-war-on-drugs [https://perma.cc/MS32-MB54].

82. Neil, *supra* note 23, at 26. Prosecutor Damon Tyner describes the decision to resurrect the "underutilized" law that "kind of fell off the radar as a tool" as a necessary step "at this current stage of the battle." Joe Hernandez, *Atlantic County Ramps up Drug-Induced Homicide Prosecutions*, WHYY (June 11, 2018), https://whyy.org/articles/atlantic-county-ramps-up-drug-induced-homicide-prosecutions [https://perma.cc/V2BH-JV9N].

83. Patricia Daugherty & Nick Stachula, Drug-Related Homicides: Investigative and Prosecutorial Strategies at the National RX Drug Abuse & Heroin Summit 23 (Apr. 19, 2017), https://naloxonestudy.org/resources/Drug-Related_Homicides_Investigative_and_Prosecutorial_Strategies.pdf [https://perma.cc/BK8D-9RYB].

84. *See* Peck, *supra* note 3 (quoting Madison County State's Attorney Tom Gibbons as saying, "We intend to absolutely make an example of these people in public . . . . I want to give them the fear of becoming the soulless people addicts become").

85. *See* Stephanie Grady, *"It's Been Used More and More," But is Wisconsin's Len Bias Law an Effective Deterrent to Opioid Abuse?*, FOX6 MILWAUKEE (Nov. 21, 2016, 9:51 PM), https://fox6now.com/2016/11/21/its-been-used-more-and-more-but-is-wisconsins-len-bias-law-an-effective-deterrent-to-opioid-abuse [https://perma.cc/7JW6-2SZJ] (quoting Sheboygan County District Attorney Joe DeCecco as saying, "A person died, so it doesn't matter to me whether the person who delivered it is a fellow junkie, is a friend, didn't sell it but actually gave it to them").

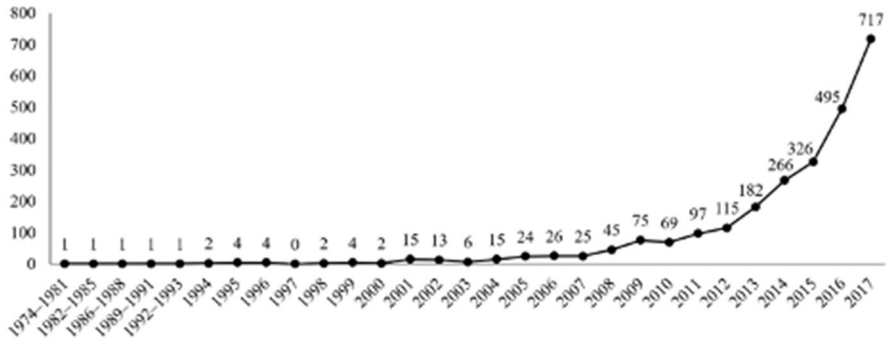
86. *See* N.C. GEN. STAT. § 14-18.4 (2019) ("[D]eaths due to the opioid epidemic are devastating families and communities . . . . Therefore, the General Assembly enacts this law to encourage effective intervention by the criminal justice system . . . .").

87. *See* LASALLE, *supra* note 4, at 21, 23–24, 26 (detailing rising overdose rates in states with many DIH prosecutions). Conversely, countries that have embraced harm-reduction initiatives and decriminalization have seen declining deaths and addiction rates. Shefali Luthra, *How*

DIH laws may have the opposite effect, dissuading people from seeking medical attention for overdoses.[88] Only two states provide immunity from DIH charges for a person seeking medical assistance for an overdose;[89] in every other state with a DIH law, a person may be placed in the untenable position of letting a friend die, or risking prosecution for homicide.

Although specific data on the number of prosecutions under these statutes is largely unavailable, analyses of online media trends—harnessed using big data techniques common to the health sector—demonstrate a significant increase in DIH prosecutions since 2010.[90] Nationwide, news articles about individuals charged with DIH increased from 363 in 2011 to 1,178 in 2016, an increase of over 300 percent.[91]

FIGURE 1. NATIONWIDE DIH CHARGES BROUGHT FROM 1974–2017.[92]



This rise in prosecutions is even more apparent when examined at a state-by-state level. An investigative news report in Wisconsin

Germany Averted an Opioid Crisis, KAISER HEALTH NEWS (Nov. 11, 2019), https://khn.org/MTAwODU0MA [https://perma.cc/2BFF-Z7FX].

88. LASALLE, *supra* note 4, at 3.

89. *Id.* at 40 (Vermont and Delaware).

90. See Beletsky, *supra* note 55, at 871–73, for a detailed overview of the data collection methodology employed to track media mentions of DIH prosecutions. Professor Leo Beletsky acknowledges that while media collection techniques are not optimal, they are being "used with increasing frequency and precision" in the health care sector. *Id.* at 872. Additionally, a comparison of Pennsylvania cases captured by the media database with that state's court records suggested that even more cases were being brought than was reflected by the media coverage. *Id.* at 874–75.

91. LASALLE, *supra* note 4, at 2.

92. This data was sourced from various online news sources compiled by Health in Justice Action Lab and was last updated on September 18, 2019. *Drug-Induced Homicide*, *supra* note 13.

revealed that while more than 500 people were charged with DIH between 2000 and 2016, more than half of those charges were filed in the last four years of that range alone.[93] Per court documents, Pennsylvania DIH charges steadily increased from 15 cases charged per year to 205 cases charged per year between 2013 and 2017.[94] Meanwhile, New Jersey, which enacted a strict liability DIH law in 1987, has seen spikes at the county level.[95] Between 1988 and 2016, the Atlantic County Prosecutor's Office charged only 16 DIH offenses; in 2018, the office had already brought 13 charges by June.[96]

This increase in prosecutions is facilitated by the strict liability nature of most DIH laws. Some states, such as New Jersey, explicitly do not require proof of mens rea with respect to the death,[97] while other states, such as Pennsylvania, imply it, requiring only proof of mens rea toward the drug distribution and none toward the resulting death.[98] Other states, such as Florida, fold their DIH provision into a felony murder rule, listing drug distribution as one of many predicate felonies imposing liability for an accidental homicide.[99] With this minimal mens rea requirement in place, a prosecutor seeking a homicide charge only needs to prove the defendant had intent to deliver drugs. The prosecutor can prove this intent even if the defendant did not purchase or sell the drugs, and even if the defendant had no intent to kill. So far, these laws have been viewed as constitutional. Part II explains why that is so, despite their potential inconsistencies with due process.

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93. Bryan Polcyn, *High-Level Drug Dealers Rarely Charged with Drug-Related Homicides as Wisconsin Death Toll Reaches 10K*, FOX6 MILWAUKEE (Feb. 10, 2017), https://www.fox6now.com/news/high-level-drug-dealers-rarely-charged-with-drug-related-homicides-as-wisconsin-death-toll-reaches-10k [https://perma.cc/2FKC-X873] (detailing the spike in Wisconsin DIH prosecutions).

94. *Drug Delivery Resulting in Death Citations at Five-Year High*, UNIFIED JUD. SYS. PA. (Mar. 9, 2018), http://www.pacourts.us/news-and-statistics/news?Article=959 [https://perma.cc/7P6U-M8CP].

95. LASALLE, *supra* note 4, at 32.

96. Hernandez, *supra* note 82.

97. *See, e.g.*, N.J. STAT. ANN. § 2C:35-9 (West 2016) ("Any person who manufactures, distributes or dispenses . . . any . . . controlled dangerous substance . . . is strictly liable for a death which results from the injection, inhalation or ingestion of that substance . . . .").

98. *See, e.g.*, 18 PA. CONS. STAT. § 2506(a) (2015) ("A person commits a felony of the first degree if the person intentionally . . . dispenses, delivers . . . or distributes any controlled substance . . . and another person dies as a result of using the substance."). The Supreme Judicial Court of Massachusetts recently noted that "at least eighteen States" have enacted strict liability DIH laws. Commonwealth v. Carrillo, 131 N.E.3d 812, 827 n.9 (Mass. 2019).

99. *E.g.*, FLA. STAT. ANN. § 782.04(1)(a)(3)(4) (West 2017).

II. MENS REA AND DUE PROCESS: A LEGAL BACKGROUND

The legitimacy of DIH statutes depends in large part on the answer to an oft-raised question: Is there a due process mens rea guarantee? The Due Process Clauses of the Fifth and Fourteenth Amendments are frequently read as being grounded in the notion of fundamental fairness.[100] That guarantee of fairness is violated if a practice "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."[101]

If mens rea is, in fact, so rooted in our tradition as to be fundamental, DIH statutes' presumption of constitutionality does not seem to accord with the spirit of due process. Furthermore, even if there is no explicit mens rea guarantee in the Constitution itself, are DIH laws antithetical to our "deepest notions of what is fair and right and just"?[102] In attempting to address these challenges, this Part examines the development of mens rea as a fundamental part of American law, describes the jurisprudence surrounding public welfare offenses, and attempts to reconcile mens rea's not quite—but almost—constitutional status.

A. The Foundational Nature of Mens Rea in Criminal Jurisprudence

The centrality of mens rea in criminal law developed early in English jurisprudence. While the early medieval English regime tended toward liability without wrongful intent, by the fourteenth century the focus shifted toward subjective blameworthiness and considerations of the accused's mental state.[103] The twin influences of Roman law, with its notions of *dolus* and *culpa*, and canonical law, with its concepts of moral guilt and sin, heavily steered criminal law toward a focus on culpability and moral wrongdoing.[104] The maxim "*actus non*

100. *See* Malinski v. New York, 324 U.S. 401, 416–17 (1945) ("[R]eview of that guaranty of [due process] inescapably [requires] this Court . . . to ascertain whether [the proceedings] offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses.").

101. Snyder v. Massachusetts, 291 U.S. 97, 105 (1934).

102. Solesbee v. Balkcom, 339 U.S. 9, 16 (1960) (Frankfurter, J., dissenting), *abrogated by* Ford v. Wainwright, 477 U.S. 399 (1986).

103. Francis Bowes Sayre, *Mens Rea*, 45 HARV. L. REV. 974, 978–80 (1932) [hereinafter Sayre, *Mens Rea*].

104. *Id.* at 983. *Dolus* refers to an intentional violation of the law, whereas *culpa* refers to a negligent violation of the law, demonstrating the Roman legal focus upon mental state. H.D.J. Bodenstein, *Phases in the Development of Criminal Mens Rea*, 36 S. AFR. L.J. 323, 324 (1919). Henry Bracton, a highly influential thirteenth-century English cleric and jurist, drew heavily from canonical sources such as Saint Augustine to determine that "a crime is not committed unless the

facit reum nisi mens sit rea"—an act does not make one guilty unless one's mind is guilty—became ingrained in the common-law tradition, as reflected in the writings of jurists such as Sir Francis Bacon and Edward Coke.[105] By the mid-eighteenth century, William Blackstone's broad statement that a "vicious will" is necessary for an act to constitute a crime was universally accepted.[106] Following this principle, judges at common law interpreted crimes as requiring not only a prescribed act or omission, but also a prescribed state of mind.[107] Accordingly, mens rea became accepted as a "sacred principle of criminal jurisprudence."[108]

As mens rea developed for the general body of criminal law, its emergence became an essential factor for "true crimes"[109] in general and for homicide in particular, "gradual[ly] freeing from criminal responsibility . . . those who killed without guilty intent."[110] The interests of the individual, "demand[ing] maximum liberty and freedom from interference," were of such importance that the system was concerned with preventing potential injustices.[111] It was considered reprehensible "[t]o inflict substantial punishment upon one who [was] morally entirely innocent."[112] Coupled with the logic that unintentional acts were not considered as menacing to society as intentional acts were, the individual interests at stake in the case of "true crimes" were

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intention to injure exists." Martin R. Gardner, *The Mens Rea Enigma: Observations on the Role of Motive in the Criminal Law Past and Present*, 1993 UTAH L. REV. 635, 655 (quoting 2 HENRY DE BRACTON, BRACTON ON THE LAWS AND CUSTOMS OF ENGLAND 384 (Samuel E. Thorne trans., 1968)); *see also id.* at 659 (reading Bracton "as embracing the notion that both bad motive and intentional acts are essential for criminal liability").

105. *See* Sayre, *Mens Rea*, *supra* note 103, at 988, 993 ("[I]t was universally accepted law that an evil intent was as necessary for felony as the act itself."); LAFAVE, *supra* note 37, at 313–14 ("[I]n more recent times (i.e., since about 1600), the judges have generally defined common law crimes in terms which require, in addition to prescribed action or omission, some prescribed bad state of mind . . . .").

106. Morissette v. United States, 342 U.S. 246, 251 (1952) (quoting BLACKSTONE, *supra* note 1, at 21).

107. LAFAVE, *supra* note 37, at 313–14.

108. Sayre, *Mens Rea*, *supra* note 103, at 974 n.2 (quoting Duncan v. State, 26 Tenn. (7 Hum.) 148, 150 (1846)).

109. This Note uses the term "true crime" in the same way as scholar Francis Bowes Sayre in *Public Welfare Offenses*, referring to certain crimes, such as murder and theft, that necessitate a showing of intent. Sayre, *Public Welfare*, *supra* note 42, at 80. Sayre argued that extending the public welfare doctrine to true crimes "would sap the vitality of the criminal law." *See id.* at 56, 84 ("[*M*]*ens rea* is as vitally necessary for true crime as understanding is necessary for goodness.").

110. Sayre, *Mens Rea*, *supra* note 103, at 995.

111. Sayre, *Public Welfare*, *supra* note 42, at 68.

112. *Id.* at 56.

so significant they demanded the prerequisite of "evil intent" in order to be justifiably punished.[113]

Even after most American jurisdictions abolished common-law crimes, they still imported mens rea into their criminal statutes, further enshrining its importance in criminal law.[114] Though definitions of mens rea have varied, the modern trend describes it as the mental state necessary to commit a defined element of an offense.[115] Thus, mens rea has become so ingrained in the American system that it "is as universal and persistent . . . as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil."[116] Yet, despite this consistent focus on mens rea as a necessary predicate for punishment, a large body of strict liability offenses emerged.

B. Strict Liability Crimes

Criminal law is, in theory, hostile to strict liability crimes.[117] The departure from the traditional mens rea requirement is frequently criticized as irreconcilable with fundamental standards of culpability.[118] Yet, despite these critiques, a vast body of strict liability offenses exists

113. *Id.* at 68.

114. LAFAVE, *supra* note 37, at 314; *see also* Felton v. United States, 96 U.S. 699, 703 (1877) ("All punitive legislation contemplates some relation between guilt and punishment. To inflict the latter where the former does not exist would shock the sense of justice of every one.").

115. This definition of mens rea is sometimes referred to as the narrower or "elemental" approach. JOSHUA DRESSLER, CRIMINAL LAW: CASES AND MATERIALS 169 (7th ed. 2016). The broader "culpability" approach views criminal acts as requiring a morally culpable state of mind, considering an individual guilty if they committed a socially harmful act with *any* morally blameworthy state of mind. *Id.* The Model Penal Code ("MPC") wholeheartedly embraces the elemental approach, MODEL PENAL CODE § 2.02 cmt. 1, at 229–31 (AM. L. INST. 1962), requiring specific culpability in order to issue condemnation, a concept its drafters considered "too fundamental to be compromised," *id.* § 2.05 cmt. 1, at 283.

116. Morissette v. United States, 342 U.S. 246, 250–51 (1952).

117. Kennedy, *supra* note 51, at 88; *see* United States v. U.S. Gypsum Co., 438 U.S. 422, 437–38 (1978) (explaining that strict liability offenses have a "generally disfavored status").

118. Wasserstrom, *supra* note 42, at 734; *see generally id.* (providing an overview of the voluminous scholarship criticizing strict liability and cataloguing various arguments for and against the doctrine). Critics of the doctrine argue that imposing criminal punishment on someone who did not intend to produce the result of their conduct does not serve at least two of the primary justifications of criminal law: deterrence and rehabilitation. *Id.* at 734. Conversely, proponents argue that the existence of strict liability offenses influences people to act with greater caution when engaging in certain activities or keeps people from engaging in them entirely. *Id.* at 737. These proponents also point to the vast number of strict liability offenses, reasoning that even if they *should* be condemned, their sheer scope shows that they decidedly are not. *Id.* at 741.

in federal and state law.[119] To fully appreciate the tension present in strict liability criminal law—and the innate issues DIH statutes implicate—it is necessary to examine the conflicting ways the Supreme Court has approached strict liability offenses. This Section provides the historical context necessary to understand how DIH laws are justified, cataloging the emergence of the public welfare exception as well as the Court's attempt to cabin that very doctrine, and addressing the continued presence of felony murder.

1. *The Development of the Public Welfare Exception*. Despite the recognized importance of mens rea, the progressively complex social order emerging out of the Industrial Revolution prompted exceptions to its absolute requirement.[120] The complications and growth from industrialization—including traffic, congestion, and the wider distribution of goods—created a pressing need for a vast regulatory scheme; this scheme necessitated the creation of minor offenses that could only be enforced effectively by disregarding state of mind.[121] Criminal justice shifted its emphasis from protecting the individual to preserving the public welfare, increasingly using criminal law to enforce regulations by prohibiting acts that were not necessarily morally blameworthy, but that, if left unchecked, would pose a threat to the greater good.[122]

These public welfare laws—criminalizing such conduct as selling intoxicants or impure food—required no proof that a defendant had any intent to commit the offense.[123] The offenses predominately imposed low-level fines as a form of criminal sanction; incarceration, if mandated, was typically for durations under a year.[124] The lax criminal

119. *See generally* Darryl K. Brown, *Criminal Law Reform and the Persistence of Strict Liability*, 62 DUKE L.J. 285 (2012) (cataloging the persistence of strict liability offenses in state courts).

120. *See* Sayre, *Public Welfare*, *supra* note 42, at 67 (describing the gradual use of strict liability offenses to enforce the additional regulation required for a more complex society).

121. *See Morissette*, 342 U.S. at 254–55 ("Such dangers have engendered increasingly numerous and detailed regulations . . . . Lawmakers . . . sought to make such regulations more effective by invoking criminal sanctions to be applied by the familiar technique of criminal prosecutions and convictions."); Sayre, *Public Welfare*, *supra* note 42, at 68–69 ("[T]oday the crowded conditions of life require social regulation to a degree never before attempted.").

122. Sayre, *Public Welfare*, *supra* note 42, at 68.

123. *Id.* at 70 n.54.

124. *See, e.g.*, Ronald F. Wright & Paul Huck, *Counting Cases About Milk, Our "Most Nearly Perfect" Food, 1860–1940*, 36 LAW & SOC'Y REV. 51, 87 (2002) (surveying historical convictions for the sale of adulterated milk and finding that "[f]ines were the overwhelming choice of sanctions in the criminal cases." They "ranged from $10 to $500, with $25 as the most common

punishment and the lack of stigma carried by a lower charge tempered the departure from the mens rea requirement.[125] One justification for upholding strict liability crimes was that since these regulatory offenses were not truly punished in the same manner as "infamous crimes," the absence of mens rea was permissible.[126] Though some influential commentators have argued that any crime punishable by a felony conviction or lengthy imprisonment requires mens rea and cannot be considered a public welfare offense,[127] courts have declined to draw a firm boundary around the exact limits of the doctrine.[128]

2. *Modern Strict Liability Doctrine*. The Model Penal Code ("MPC")[129] takes a direct approach, declaring "a frontal attack on absolute or strict liability . . . whenever the offense carries the possibility of criminal conviction."[130] However, the constitutional

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amount"); *see also* MASS. STATE BD. OF HEALTH, LUNACY & CHARITY, FOURTH ANNUAL REPORT 35 (1883) ("Whoever kills . . . for the purpose of sale, any calf less than four weeks old . . . shall be punished by imprisonment . . . not exceeding six months, or by fine not exceeding two hundred dollars . . . .").

125. *See Morissette*, 342 U.S. at 256 ("[P]enalties commonly are relatively small, and conviction does no grave damage to an offender's reputation.").

126. Staples v. United States, 511 U.S. 600, 617 (1994) (quoting Tenement House Dep't v. McDevitt, 215 N.Y. 160, 168 (1915)).

127. *E.g.*, Sayre, *Public Welfare*, *supra* note 42, at 72.

128. The Court once hinted at a boundary in Staples v. United States:

> Close adherence to [precedent] might suggest that punishing a violation as a felony is simply incompatible with the theory of the public welfare offense. In this view, absent a clear statement from Congress that *mens rea* is not required, we should not apply the public welfare offense rationale to interpret any statute defining a felony offense as dispensing with *mens rea*.

511 U.S. at 618–19. However, the Court immediately followed the above with a *but see* citation to *United States v. Balint*. *Id.* at 618 (citing United States v. Balint, 258 U.S. 250 (1922)). In *Balint*, the Court upheld a strict liability offense under the Narcotics Act, which the Court characterized as "a taxing act with the incidental purpose of minimizing the spread of addiction to the use of poisonous and demoralizing drugs." 258 U.S. at 253–54. A violation of the Narcotics Act was punishable by a maximum five-year prison sentence, a fine of up to $2,000, or both. Act of Dec. 17, 1914, ch. 1, sec. 9, 38 Stat. 785, 789.

129. The MPC, first published by the American Law Institute in 1962, was developed "to provide a reasoned, integrated body of material that will be useful in [a] legislative effort" to reexamine criminal codes. Herbert Wechsler, *The American Law Institute: Some Observations on Its Model Penal Code*, 42 A.B.A. J. 321, 321 (1956); Herbert Wechsler, *Symposium on the Model Penal Code Foreword*, 63 COLUM. L. REV. 589, 589 (1963).

130. MODEL PENAL CODE § 2.05 cmt. 1, at 282 (AM. L. INST. 1962). The MPC only allows strict liability for crimes that are described as "violations" rather than "offenses," and which carry no greater punishment than a fine or penalty. *Id.* at 283, cmt. 2, at 291. Such violations include: "Polluting Streams," "Possessing a Machine Gun," and "Shooting Domesticated Pigeons." *Id.* at cmt. 1, at 286, 288.

doctrine around strict liability is decidedly less clear, muddied by the Supreme Court's inconsistent treatment of the mens rea requirement.

The Court disregarded due process concerns with multiple public welfare offenses in the early twentieth century. It acknowledged that dispensing with conventional mens rea requirements created the "possible injustice of subjecting an innocent" to criminal penalties, but ultimately concluded that it was permissible in the interest of the public good.[131] The Court seemed to rationalize its concern about any possible injustices by placing its trust in prosecutorial discretion, relying on their "conscience and circumspection" to protect the innocent.[132] That trust apparently did not last long, however, as later decisions suggested that punishment without culpability could raise constitutional concerns.

In *Morissette v. United States*,[133] the Court recognized public welfare offenses as permissible but warned that the judiciary should not extend the "impairment[s]" of these strict liability cases to common-law crimes:[134] specifically, that they should not remove due process protections such as the presumption of innocence.[135] The Court seemed heavily influenced by the nature of the crime at issue in *Morissette*—theft, one of the "earliest offenses known to the law."[136] Accordingly, the crime had such deep common-law roots that it was only natural for the judiciary to read traditional mens rea presumptions into the statute, despite no explicit direction from the legislature.[137] The Court took *Morissette*'s preoccupation with mens rea even further in *Lambert v. California*,[138] striking down a state statute as facially

131. *Balint*, 258 U.S. at 254; United States v. Dotterweich, 320 U.S. 277, 281 (1943); *see* Kennedy, *supra* note 51, at 90 (stating the Court "framed the issue as a simple tradeoff between public danger and potential innocence").

132. *Dotterweich*, 320 U.S. at 285 (quoting Nash v. United States, 229 U.S. 373, 378 (1913)); *see also id.* ("In such matters the good sense of prosecutors . . . must be trusted."). Notably, the dissent referred to this "blind resort" to prosecutorial discretion as "precisely what our constitutional system sought to avoid." *Id.* at 292 (Murphy, J., dissenting).

133. Morissette v. United States, 342 U.S. 246 (1952).

134. *Id.* at 262–63.

135. *Id.* at 275.

136. *See id.* at 260–61 (noting that, historically, state courts "have consistently retained the requirement of intent in larceny-type offenses").

137. *See id.* at 252 ("Even if their [statutory] enactments were silent on the subject, [state] courts assumed that the omission did not signify disapproval of the principle but merely recognized that intent was *so inherent in the idea of the offense* that it required no statutory affirmation." (emphasis added)).

138. Lambert v. California, 355 U.S. 225 (1957).

violative of due process.[139] In doing so, it indicated that punishment without culpability might raise constitutional concerns. Though some scholars predicted *Lambert* might finally elevate mens rea to constitutional status,[140] the case has remained an anomaly, rarely followed by lower courts.[141] Despite the pronouncements in *Morissette* and *Lambert*, the Court continued to uphold strict liability criminal offenses.[142] The Court, however, again signaled an implicit mens rea requirement in subsequent cases, most notably *Staples v. United States*,[143] which is frequently relied upon by state courts.[144] Following the principles laid out in *Morissette*, the Court overturned criminal convictions by interpreting various federal statutes as requiring mens rea—including offenses that were arguably traditional public welfare laws.[145]

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139. *Id.* at 229–30; *see* Louis D. Bilionis, *Process, the Constitution, and Substantive Criminal Law*, 96 MICH. L. REV. 1269, 1269 (1998) (describing *Lambert* as the closest the Court has ever come "to constitutionalizing a mens rea requirement as fundamental to the just imposition of a criminal sanction").

140. *See* Kennedy, *supra* note 51, at 92 (describing *Lambert* as a flirtation with the idea that sufficient mens rea "was not just a statutory presumption grounded in common law tradition but a matter of due process grounded in the Constitution itself" but noting "[t]hese flirtations amounted to nothing"); Richard Singer & Douglas Husak, *Of Innocence and Innocents: The Supreme Court and* Mens Rea *Since Herbert Packer*, 2 BUFF. CRIM. L. REV. 861, 866 (1999) (describing *Lambert* and the Court's decision in *Robinson v. California*, 370 U.S. 660 (1962), as giving "rise to expectations that the Warren Court was prepared to read requirements of blame and guilt into the Constitution," expectations which were quickly dashed).

141. *See* Cynthia Alkon, *The Lost Promise of* Lambert v. California, 49 STETSON L. REV. 267, 278–79 (2020) (surveying federal and state cases where the defendant cited to *Lambert*, and finding that the defendant only prevailed on their claims in 3.5 percent and 1.6 percent of the cases, respectively).

142. *See, e.g.*, United States v. Freed, 401 U.S. 601, 609–10 (1971) (upholding a public welfare offense regulating the sale of grenades).

143. Staples v. United States, 511 U.S. 600 (1994).

144. *Id.* at 605. Though *Staples* focused on the interpretation of a federal statute and is thus not binding authority in state courts, "its widespread use by state courts suggest[s] that [it] struck a chord that is deeply fundamental to our criminal jurisprudence, even if not constitutional." Kennedy, *supra* note 51, at 121.

145. *See* United States v. X-Citement Video, 513 U.S. 64, 71–72 (1994) (reading mens rea into a statute prohibiting the possession and distribution of child pornography); Ratzlaf v. United States, 510 U.S. 135, 149 (1994) (reading mens rea into a statute prohibiting the structuring of cash transactions), *superseded by statute*, Riegle Community Development and Regulatory Improvement Act of 1994 § 411, Pub. L. No. 103-325, 108 Stat. 2160, 2253 (codified as amended at 31 U.S.C. §§ 5322(a), (b), 5324(c) (1994)); Liparota v. United States, 471 U.S. 419, 433–34 (1985) (reading mens rea into a statute regulating the sale of food stamps). Scholars suggest "[t]he significance of these cases is difficult to overstate," noting that, while not abolishing strict liability, they "extended *Morissette*'s central concern with ruling out punishment without culpability to all federal crimes, even public welfare offenses." Stephen F. Smith, *"Innocence" and the Guilty Mind*, 69 HASTINGS L.J. 1609, 1623 (2018) (emphasis omitted).

While *Morissette* and its progeny do not prohibit a legislature from enacting a strict liability crime, they suggest that a legislature's ability to do so has constitutional limits.[146] What exactly those limits are, though, is less clear. The Court has so far declined to delineate a constitutional border around strict liability offenses.[147] However, it appears that the ability of a legislature to remove mens rea from an offense depends upon a two-part analysis. First, a court considers if the statute qualifies as a public welfare offense, examining the severity of the penalty imposed, the stigma likely to arise from a conviction, and the type of conduct or item being regulated.[148] If the items regulated are inherently dangerous, then a sharper penalty can be imposed in the absence of mens rea,[149] though an item's inherent danger "does not necessarily suggest . . . that it is not also entirely innocent."[150] Second, if the crime bears serious penalties, imposes severe stigma, and does not regulate sufficiently dangerous items, then due process seems to require that a mens rea element be read into the statute.[151] Furthermore, if the crime has a deep common-law history, then a court should strongly presume that the offense's traditional mens rea applies.[152]

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146. *See* Lambert v. California, 355 U.S. 225, 228 (1957) ("There is wide latitude in the lawmakers to declare an offense and to exclude elements of knowledge and diligence from its definition . . . . On the other hand, due process places some limits on [the police power's] exercise."); *cf.* Patterson v. New York, 432 U.S. 197, 210 (1977) (stating that while a legislature has the ability to define the elements of an offense, "there are obviously constitutional limits beyond which the states may not go in this regard").

147. *See Staples*, 511 U.S. at 618, 620 ("We need not adopt such a definitive rule of construction . . . . [I]f Congress had intended to make outlaws of gun owners who were wholly ignorant of the offending characteristics of their weapons . . . it would have spoken more clearly to that effect.").

148. *Id.* at 607, 616–18.

149. *See* United States v. Freed, 401 U.S. 601, 609 (1971) (upholding a ten-year sentence under a strict liability statute regulating the sale of grenades as justified in the "interest of public safety").

150. *See Staples*, 511 U.S. at 611 (distinguishing the gun at issue from the hand grenade in *Freed*, stating "[e]ven [some] dangerous items can . . . be so commonplace and generally available that we would not consider them to alert individuals to the likelihood of strict regulation").

151. *Id.* at 611, 617–18. Notably, the Court read in a requirement of *knowledge* into each statute, not just negligence or recklessness, thus implying that mens rea requirement "often requires considerably more than minimal culpability." Stephen F. Smith, *Proportional Mens Rea*, 46 AM. CRIM. L. REV. 127, 137 (2009) [hereinafter Smith, *Proportional Mens Rea*] (emphasis omitted).

152. *See* Morissette v. United States, 342 U.S. 246, 263 (1952) (stating that "where Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken").

3. *Felony Murder and Other Strict Liability Homicides*. Further complicating the issue is a long line of precedent upholding the constitutionality of felony murder. Felony murder, though harshly criticized as "an unsightly wart on the skin of the criminal law,"[153] has nonetheless remained a fixture in the American legal system.[154] The rule imposes liability for homicide based "on the culpability required for the underlying felony," not for any culpability toward the resulting death.[155] Like many DIH statutes, where liability for homicide attaches from the act of delivering drugs, felony murder operates as a form of strict liability. The MPC explains the rule as making sense only if one considers mens rea as requiring "a general criminal disposition" rather than a specific mental state toward each element of the offense.[156] Felony murder is predicated on the concept that anyone who commits a felony is a "bad person with a bad state of mind . . . [who] has caused a bad result"; therefore, there should be no concern that the homicidal result was far different or worse than the result the perpetrator actually intended.[157] As the theory goes, such crimes should be punished as murders because the commission of the felony itself "expresses a commitment to particularly reprehensible values."[158]

Though Part III discusses how felony murder cannot coherently justify DIH statutes, this Note will not fully outline the arguments for and against felony murder, which have been extensively catalogued in other works.[159] Despite the vociferous critiques of felony murder,

153. H.L. Packer, *Criminal Code Revision*, 23 U. TORONTO L.J. 1, 4 (1973).

154. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 31.06(A), at 557 (4th ed. 2006). Though felony murder was present at common law, it has since been abrogated in the United Kingdom. Nelson E. Roth & Scott E. Sundby, *The Felony-Murder Rule: A Doctrine at Constitutional Crossroads*, 70 CORNELL L. REV. 446, 448 n.12 (1985). Some states have abolished felony murder via statute or judicial decree or have limited the doctrine in other ways. *Id.* at 446 nn.6–8. Recently, California amended their felony murder rule "to ensure that murder liability is not imposed on a person who . . . did not act with the intent to kill." Act of Sept. 30, 2018, ch. 1015, 2018 Cal. Legis. Serv. ch. 1015 (West).

155. MODEL PENAL CODE § 210.2 cmt. 6 (AM. L. INST. 1962).

156. *Id.*

157. LAFAVE, *supra* note 37, at 1010.

158. *See* Guyora Binder, *The Culpability of Felony Murder*, 83 NOTRE DAME L. REV. 965, 967 (2008) [hereinafter Binder, *The Culpability of Felony Murder*] (providing "the long-missing principled defense of the felony murder doctrine").

159. *E.g.*, *id.* at 966 n.3. Professors Nelson Roth and Scott Sundby's frequently cited critique is particularly illuminating. *See generally* Roth & Sundby, *supra* note 154 (arguing that the felony murder rule may violate due process and the Eighth Amendment). They argue, for instance, that a prosecutor charging a defendant with homicide without a culpable mental state improperly shifts the burden of proof from the prosecutor, creating a presumption of guilt rather than one of innocence. *Id.* at 469–71.

courts tend to defer heavily to the power of the legislature to create these offenses, viewing the vitality of the felony murder rule as a "strong indicat[ion] of states' power to impose strict criminal liability."[160] In this way, the felony murder rule self-perpetuates. Its constitutionality is used to uphold strict liability offenses,[161] which then are used as evidence to support the validity of felony murder.

C. Mens Rea's Semi-Constitutional Status

The continued presence of strict liability in criminal law conflicts with the Supreme Court's own pronouncement that "the existence of a mens rea is the rule of, rather than the exception to the principles of Anglo-American criminal jurisprudence."[162] Though repeatedly recognizing mens rea as a fundamental principle of justice, the Court's "sanction[ed] . . . erosion" of that very principle through strict liability and felony murder creates uncertainty.[163] This lack of clarity surrounding the doctrinal role of mens rea is exemplified by Professor Herbert Packer's famous quip: "Mens rea is an important requirement, but it is not a constitutional requirement, except sometimes."[164]

It is important to note that the *Morissette* and *Staples* line of cases primarily focused on statutory interpretation and did not take up any direct constitutional questions. Yet, given the strong echoes of due process in these opinions,[165] one wonders if constitutional avoidance played a large role.[166] In each case, the Court was faced with multiple plausible interpretations of a statute, including one interpretation that could, by the Court's own guidelines,[167] be unconstitutional. Rather than reaching the due process question or fully probing the limits to

160. State v. Maldonado, 645 A.2d 1165, 1171 (N.J. 1994); *see* Lockett v. Ohio, 438 U.S. 568, 602 (1978) ("That States have authority . . . to enact felony-murder statutes is beyond constitutional challenge.").

161. *See Maldonado*, 645 A.2d at 1174 (relying on "the implicit validation of the felony-murder rule itself" to uphold a DIH statute).

162. Dennis v. United States, 341 U.S. 494, 500 (1951).

163. Packer, *Mens Rea*, *supra* note 48, at 152.

164. *Id.* at 107 (emphasis omitted).

165. *E.g.*, *supra* notes 116, 140, 144 and accompanying text.

166. The modern version of the avoidance canon dictates that if a plausible interpretation of a statute raises "constitutional doubts," the reviewing court must select a different interpretation, thus avoiding the constitutional issue. Eric S. Fish, *Constitutional Avoidance as Interpretation and as Remedy*, 114 MICH. L. REV. 1275, 1282 (2016). To clarify, "the court need not find that the avoided reading is actually unconstitutional, the court must only find that there is a good chance of it being unconstitutional." *Id.*

167. *Supra* notes 134–35, 145 and accompanying text.

which these statutes could go, the Court simply sidestepped the issue each time by reading mens rea into the statute.[168] If these cases did rely on the avoidance canon, even if only implicitly, it suggests they can be considered quasi-constitutional rulings. Simply put, if there was no interpretation to avoid that would deprive a defendant of due process, there would be no plausible constitutional objections to these types of statutes. Given this pattern of avoidance, the Court has not persuasively justified its own position that strict liability is nearly always constitutional. It has instead repeatedly signaled that there must be *some* limit to strict liability crimes,[169] perhaps dictated by a long common-law tradition and the concept of due process.[170]

In the wake of these flirtations with a constitutional mens rea requirement, scholars have struggled to articulate a cogent principle that explains mens rea's not quite, but almost, constitutional status. Professor Joe Kennedy contends that mens rea was never fully enshrined as a due process concern because the Court "was loath to categorically rule that such ends could never justify the means,"[171] instead granting legislatures wide latitude to criminalize offenses as they thought necessary to protect the public welfare. But despite the Court's willingness to defer to legislative judgment, there remains a consistent concern that laws "clearly designed for the very bad may end up being successfully used against the possibly good."[172] Other scholars take similar positions, positing that as the Court is no longer willing to trust solely in the good faith of prosecutors,[173] it instead selectively requires mens rea as a way to protect innocents from criminal liability.[174]

Though using different analytical frameworks, these scholars all agree that the Court imposes a mens rea requirement when it is concerned that the defendant in front of them is not *sufficiently* blameworthy.[175] Rather than elevating mens rea to constitutional

168. *Supra* note 145 and accompanying text. In one of these cases, the Court explicitly engaged in constitutional avoidance, but did so to avoid reaching a First Amendment issue. United States v. X-Citement Video, 513 U.S. 64, 69, 73 (1994).

169. *Supra* note 146 and accompanying text.

170. *E.g., supra* note 137 and accompanying text.

171. Kennedy, *supra* note 51, at 125.

172. *Id.*

173. John Shepard Wiley Jr., *Not Guilty by Reason of Blamelessness: Culpability in Federal Criminal Interpretation*, 85 VA. L. REV. 1021, 1024 (1999).

174. Singer & Husak, *supra* note 140, at 862.

175. This form of innocence protection manifests for Kennedy as a judicial preoccupation with character. *See* Kennedy, *supra* note 51, at 86 ("*Staples* . . . seems to resonate most when

status, the Court uses it as a final safety valve to prevent punishing those who society does not view as truly culpable. To justify the existence of felony murder and the jurisprudence around strict liability offenses, however, these scholars view the mens rea requirement as only carving out a space for the completely innocent. If the offender is engaging in inherently dangerous or criminal behavior, or if the intentional conduct covered by the statute could be criminalized, then the statute is constitutional.[176]

This distinction, while useful, does not fully explain the tension in the doctrine. The Court's own jurisprudence suggests the mens rea requirement is tethered to more than just a desire to protect the completely innocent. Rather, it also indicates a preoccupation with *proportional* innocence. The *Staples* line of cases hints at a deeper concern with accurately tailoring punishment to blame.[177] In these cases, the Court did not just read mens rea into each statute; it also stated that the penalties were so severe as to require *knowledge* rather than just recklessness or negligence,[178] which are more traditionally used as defaults in the absence of explicit mens rea requirements.[179] Similarly, when determining what qualified as a permissible public welfare offense, the Court analyzed both the severity of the punishment and the dangerousness of the activity[180]—comparing the proportionality of the sanction to the blameworthiness of the offense.

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people of good character are prosecuted under statutes designed for the very bad."). Professor John Wiley frames the issue as a rule of mandatory culpability. Wiley, *supra* note 173, at 1022 ("This method of construction gives new form to an old and simple ideal: We do not convict blameless people."). Professor Alan Michaels reconciles this as a principle of constitutional innocence. *See* Michaels, *supra* note 37, at 834 (stating that constitutional innocence means strict liability offenses are only constitutional "when, but only when, the intentional conduct covered by the statute could be made criminal by the legislature").

176. *See* Kennedy, *supra* note 51, at 122 ("*Staples* will be used to read in additional mens rea requirements only for those who are *completely innocent*, not simply partially innocent of some additional crime or enhancement." (emphasis added)); Michaels, *supra* note 37, at 879 ("Some level of culpability is supplied by the actor's choice to engage in the voluntary act covered by the statute.").

177. *See* Smith, *Proportional Mens Rea*, *supra* note 151, at 137 ("Proportionality, in short, has been smuggled into the mens rea analysis . . . through the back door.").

178. *See* Wiley, *supra* note 173, at 1112 ("The Court apparently has adopted the 'knowledge' standard as the default, rather than the option of 'recklessness,' or 'negligence.'").

179. MODEL PENAL CODE § 2.02 cmt. 5 (AM. L. INST. 1962); Dannye Holley, *The Influence of the Model Penal Code's Culpability Provisions on State Legislatures: A Study of Lost Opportunities, Including Abolishing the Mistake of Fact Doctrine*, 27 SW. U. L. REV. 229, 243–44 (1998) (detailing how the states that have adopted a default culpability have primarily chosen either recklessness or negligence).

180. Staples v. United States, 511 U.S. 600, 616–18 (1994).

Professor Stephen Smith helps explain this tension.[181] Innocence also exists, Smith argues, "when a prohibited act, though blameworthy, is insufficiently blameworthy to deserve the penalties authorized by the statute under which the offender is prosecuted."[182] Smith refers to this as a "culpability gap": the gap between the higher level of culpability intended by the legislature and the lower level manifested in the offender's actions.[183] The question is not just whether the offender committed any criminal act. It is also whether that act makes them "sufficiently culpable" to deserve the defined punishment.[184]

The culpability gap is further illuminated when applied to strict liability homicide offenses—specifically, DIH laws. The Court has explained that for a certain class of common-law crimes, particularly homicide, "heightened culpability has been thought to merit special attention."[185] The standard escalating structure of homicide offenses correlates more culpable mental states with increasing levels of punishment, creating a system of "proportional punishment for blameworthy acts."[186] Strict liability DIH laws, then, do not harmonize with homicide's traditional structure of proportional punishment.

If one accepts the justifications for strict liability offenses, it seems a legislature can criminalize any conduct without requiring mens rea as long as the statute can rationally be said to protect public safety. The only seeming outer boundary is the rule that criminal law "does not offend fundamental notions of justice."[187] But imposing a lengthy sentence and homicide liability on someone who lacked the intent to kill seems intuitively to do just that. It is in light of this disconnect—this culpability gap—that DIH statutes must be reexamined.

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181. Smith, *Proportional Mens Rea*, *supra* note 151, at 136.

182. *Id.*

183. *Id.*

184. *Id.* at 141 (emphasis omitted).

185. *See* United States v. Bailey, 444 U.S. 394, 405 (1980) (suggesting the distinction between degrees of homicide, which ascribes higher levels of fault for higher levels of intent, implies that certain crimes require a closer examination of culpability); *see also* Sayre, *Mens Rea*, *supra* note 103, at 995 (emphasizing the importance of culpability for "true crimes" such as homicide).

186. Smith, *Proportional Mens Rea*, *supra* note 151, at 133–34.

187. State v. Maldonado, 645 A.2d 1165, 1174 (N.J. 1994); *cf.* Patterson v. New York, 432 U.S. 197, 210 (1977) (finding that "there are obviously constitutional limits beyond which the [s]tates may not go" in creating criminal offenses).

III. MENS REA CONCERNS WITH DIH STATUTES

DIH statutes can perhaps be understood as either public welfare offenses, ostensibly regulating dangers to the public, or as felony murder analogs, imposing liability for accidental death during the commission of a felony. Under either framing, these statutes raise constitutional concerns. This Part first examines how DIH statutes fit within the concept of a culpability gap, considering how past challenges to these statutes support this view. It then looks at the specific concerns with both the public welfare and felony murder constructions, using New Jersey and Florida's DIH statutes as examples.

A. DIH Statutes and the Culpability Gap

The majority of offenders prosecuted under these DIH laws do not fit the model of "complete innocence." Undeniably, most defendants charged under these statutes are engaged in some form of illegal conduct—possessing or distributing unlawful drugs. If one accepts the views of Kennedy and others, the fact that these defendants voluntarily engaged in any sort of illegal conduct makes DIH laws presumptively constitutional.

But this view lacks context when applied to DIH statutes, overlooking that, for many of the individuals prosecuted by these laws,[188] these are crimes caused by addiction. Rather than possessing "a moral failing or character flaw," these individuals suffer from a chronic illness.[189] Often an addict's "behavior is driven by a compulsive craving for the drug," making drug use far less voluntary than criminal policy suggests.[190] Drug-war policies have long been predicated on the stereotype that drug dealers are morally blameworthy individuals choosing to take advantage of addicts.[191] As our understanding of

188. *Supra* notes 31–35 and accompanying text.

189. *See* U.S. DEP'T OF HEALTH & HUM. SERVS., FACING ADDICTION IN AMERICA: THE SURGEON GENERAL'S REPORT ON ALCOHOL, DRUGS, AND HEALTH 2-1 (2016), https://addiction.surgeongeneral.gov/sites/default/files/surgeon-generals-report.pdf [https://perma.cc/V7EK-4F8Q] ("[S]evere substance use disorders . . . are now understood to be chronic illnesses characterized by clinically significant impairments in health, social function, and voluntary control over substance use.").

190. Alan I. Leshner, *Science-Based Views of Drug Addiction and Its Treatment*, 282 J. AM. MED. ASS'N 1314, 1314 (1999); *see also id.* ("While addiction traditionally has been thought of as simply using a lot of drugs or as just physical dependence on a drug, advances in both science and clinical practice have revealed that what matters most in addiction is often an uncontrollable compulsion to seek and use drugs.").

191. *See, e.g.*, Neil, *supra* note 23, at 28 (discussing DIH as a tool to combat "drug dealers who take advantage of those who have become addicted to opioids").

addiction evolves, however, this stereotype proves to be misleading. Many of those who sell drugs are not stereotypical drug kingpins, but addicts themselves.[192] Drug sharing, or pooling money and sending one person out to buy drugs for multiple people, is common.[193] The defendants prosecuted under these laws are guilty of *some* illegal conduct, but are being punished for homicide—conduct of an entirely different type and degree.[194]

Even accepting there are some individuals targeted under these statutes that may fit a more traditional conception of culpability does not alleviate this discomfort. It is possible to imagine the defendant the legislature was targeting when enacting these statutes: an immoral drug dealer peddling their wares with depraved indifference to any resulting loss of life. Yet there is a tangible difference in blameworthiness between an individual who knowingly distributes heroin tainted with fentanyl,[195] and a woman who gives her husband some of her legally prescribed medication to help him sleep.[196] As strict liability crimes, DIH laws consider both individuals equally worthy of the same level of punishment. A gap exists here "between legal and moral blaming,"[197]

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192. *See* Kathryn Casteel, *A Crackdown on Drug Dealers Is Also a Crackdown on Drug Users*, FIVETHIRTYEIGHT (Apr. 5, 2018, 6:00 AM), https://53eig.ht/2JeBxCY [https://perma.cc/624Z-KGTE] ("Brokers are almost always users who buy drugs from dealers for their friends or other users and often get a cut of the heroin in exchange, which allows them to sustain their own habits.").

193. Meghan D. Morris, Anna Bates, Erin Andrew, Judith Hahn, Kimberly Page & Lisa Maher, *More Than Just Someone To Inject Drugs with: Injecting Within Primary Injection Partnerships*, 156 DRUG & ALCOHOL DEPENDENCE 275, 275 (2015) ("Injection drug use is a highly social activity. Drug procurement processes often necessitate resource pooling, and peer networks provide an important resource for securing drugs and connecting with dealers.").

194. *See* DOUGLAS HUSAK, OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW 52 (2007) ("Unless persons are culpable for a state of affairs—at least negligent—no censure *for* that state of affairs is deserved.").

195. Press Release, U.S. Dep't of Just., Off. of the U.S. Att'y, E. Dist. of North Carolina, Raleigh Man Receives Concurrent Life Sentences for Heroin Overdose Death and Conspiracy (Apr. 29, 2020) [hereinafter U.S. Att'y E. Dist. of N.C. Press Release], https://www.justice.gov/usao-ednc/pr/raleigh-man-receives-concurrent-life-sentences-heroin-overdose-death-and-conspiracy [https://perma.cc/5VT2-6Y6Q]. Notably, the prosecutor discussed the defendant's blameworthiness in mens rea terms, stating he was "fully aware" of the danger of the drugs he was distributing, and "[h]e knew that his customers were overdosing," but showed "zero regard for [his] community." *Id.* That language suggests a mental state of recklessness or depraved indifference, a far higher level of mens rea than the statute actually requires. *See* 21 U.S.C. § 841(b)(1)(C) (2018) (requiring no mens rea as to the death resulting element).

196. *Minnesota Woman Pleads Guilty in Methadone Death*, CBS MINN. (Aug. 19, 2014, 6:18 AM), http://cbsloc.al/1rRVe3E [https://perma.cc/HX35-ELYR].

197. Sanford H. Kadish, *Excusing Crime*, 75 CALIF. L. REV. 257, 269 (1987).

one which becomes more discomfiting as the chasm between the moral blameworthiness and the imposed punishment widens.

The culpability gap view explains why some past challenges to DIH statutes have not raised due process concerns but instead raised claims of cruel and unusual punishment.[198] More frequently, challenges to these statutes focused on other claims such as vagueness, lack of notice, causal remoteness of the conduct to the death, or intervening cause issues.[199] Though many claims have been unsuccessful,[200] some convictions were overturned, often when there was insufficient evidence to prove the defendant directly caused the death.[201] These cases can be seen as another attempt to close the culpability gap—trying to more directly connect blameworthy conduct to the charged crime.[202] Though the few due process claims brought under these statutes are usually quickly dispatched,[203] it is worth considering if a DIH prosecution could create such a disconnect between culpability and punishment that it would raise constitutional concerns.[204]

198. *E.g.*, State v. Maldonado, 645 A.2d 1165, 1175–77 (N.J. 1994).

199. LASALLE, *supra* note 4, at 9.

200. *E.g.*, Jackson v. State, 292 So. 3d 1284, 1286 (Fla. Dist. Ct. App. 2020); People v. Nere, 115 N.E.3d 205, 214–15 (Ill. 2018).

201. *E.g.*, Burrage v. United States, 571 U.S. 204, 219 (2014); People v. Coots, 968 N.E.2d 1151, 1162 (Ill. App. Ct. 2012).

202. *See* HUSAK, *supra* note 194, at 53 ("[T]ests of proximate causation often serve to mitigate the harshness of doctrines in the criminal law that dispense with culpability—like the felony murder rule . . . . They function[] as a surrogate for culpability.").

203. *See Burrage*, 571 U.S. at 208 (granting certiorari on issues of causation and foreseeability). Although petitioner argued that (1) the severity of the penalty placed the offense outside the realm of acceptable public welfare offenses and (2) that the statute required mens rea as to the resulting death to avoid violating due process, Petitioner's Opening Brief at 26, 28–29, *Burrage*, 571 U.S. 204 (No. 12-7515), the Court reversed the defendant's conviction solely on causation grounds, *Burrage*, 571 U.S. at 218–19. Other courts have also dismissed due process challenges. *See, e.g.*, *Maldonado*, 645 A.2d at 1170–73 (rejecting the defendant's due process argument by accepting the statute as a permissible public welfare offense, despite the severity of the penalty).

204. A district court case suggests that there may be room for due process claims to be raised. The Middle District of Florida, reviewing a conviction under the state possession statute discussed *infra* Part III.C, cited *Lambert* and applied the tripartite *Staples* analysis to invalidate the statute as facially violative of due process. Shelton v. Sec'y, Dep't of Corr., 802 F. Supp. 2d 1289, 1300–06 (M.D. Fla. 2011), *rev'd*, 691 F.3d 1348 (11th Cir. 2012). The Eleventh Circuit reversed, reasoning that the Supreme Court precedent did not provide clear due process holdings, and deferred to the Florida Supreme Court's interpretation of the statute. *Shelton*, 691 F.3d at 1349.

B. The Issues with a Public Welfare DIH Model

These due process concerns are even more apparent when treating DIH statutes as public welfare offenses. Per the jurisprudence, a public welfare offense should only be justified if the punishment is low, the stigma is light, or if the conduct being regulated is inherently dangerous.[205] Through this lens, it is a struggle to justify DIH laws. This Section considers how DIH laws fare under these factors, looking to a specific state statute as an illustration.

1. *Punishment, Stigma, and Danger.* It is unclear exactly how much punishment is permissible in the absence of mens rea. The Supreme Court has rejected penalties of ten years'[206] and three years' imprisonment[207] as too harsh, but has also upheld a penalty of five years.[208] Lower federal courts have taken an even stronger stance, finding that two years' imprisonment was unconstitutional.[209] Although it is difficult to draw a sharp line and declare that two, or three, or five years may be consistent with due process, it is apparent that penalties exceeding fifteen years raise serious constitutional concerns.[210]

In contrast, the majority of DIH laws far exceed any sentence considered permissible under a traditional public welfare analysis, imposing severe punishments ranging from ten years' imprisonment to the death penalty.[211] These sentences, imposed in the absence of mens rea, appear potentially "too severe to pass constitutional muster."[212] Additionally, DIH convictions impose indisputably heavy stigmas. Nearly all jurisdictions classify these laws as felonies, often elevating

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205. *Supra* notes 148–51 and accompanying text.

206. Staples v. United States, 511 U.S. 600, 616–18 (1994).

207. United States v. U.S. Gypsum Co., 438 U.S. 422, 442 n.18 (1978).

208. United States v. Balint, 58 U.S. 250, 254 (1922); *supra* note 128.

209. United States v. Wulff, 758 F.2d 1121, 1125 (6th Cir. 1985). *But see* United States v. Engler, 806 F.2d 425, 431–35 (3d Cir. 1986) (upholding a two-year conviction under the same statute at issue in *United States v. Wulff*, but acknowledging "that the analysis takes place on a very slippery slope").

210. *See* United States v. Heller, 579 F.2d 990, 994 (6th Cir. 1978) (stating that if Congress attempted to create a strict liability crime that carried a penalty of twenty years' imprisonment, "the Constitution would be offended"); Shelton v. Sec'y, Dep't of Corr., 802 F. Supp. 2d 1289, 1301 (M.D. Fla. 2011) ("[T]he Court has not located[] any precedent applying federal law to sustain a penalty of fifteen years, thirty years, and/or life imprisonment for a strict liability offense."), *rev'd*, 691 F.3d 1348 (11th Cir. 2012).

211. *Supra* notes 16–18 and accompanying text.

212. *Shelton*, 802 F. Supp. 2d at 1302; *see also id.* ("Sentences of fifteen years, thirty years, and life imprisonment are not by any measure 'relatively small.'" (quoting *Wulff*, 758 F.2d at 1125)).

them to the level of second- or first-degree murder.[213] Labeling a defendant as a felon causes "irreparable damage" to their reputation, especially when combined with a "proclamation that [they are] so vile [they] must be separated from society for . . . years."[214]

DIH statutes' presumptive constitutionality, then, depends on the premise that those prosecuted under them are engaging in inherently dangerous conduct and that these laws are rational measures taken to ensure safety.[215] This view takes into account the fact that "[d]rug distribution puts the entire society at risk."[216] Undoubtedly, to some degree, "drug crimes undermine the basic fabric of our social and legal institutions," and perhaps "none of these offenses can be fairly characterized as victimless."[217] Even in the absence of an intent to cause death, distributing and using drugs, at the very least, creates a risk of harm. Thus, states arguably should have broad discretion to impose whatever measures necessary to protect the public from opioids, even if this may cause unfair or unjust results.[218]

Although this argument has merit, it lacks a limiting principle. A vast range of conduct can conceivably be described as harmful to the public. Intentional murder is harmful to public welfare, as is rape, or burglary, or arson. All of these offenses are at least as morally blameworthy as drug distribution, if not more so. Yet our criminal system predominately requires a finding of specific intent in order to impose criminal sanctions. Additionally, this argument overlooks the futility and inefficacy of DIH laws, which do not successfully save lives, deter drug use, or solve the very problems they purport to address.[219]

2. *A Public Welfare Example: New Jersey*. New Jersey's DIH statute is illustrative. New Jersey imposes first-degree strict liability for any death resulting from the distribution of controlled substances,

213. *Supra* notes 16–18 and accompanying text; LASALLE, *supra* note 4, app. A.

214. *Shelton*, 802 F. Supp. 2d at 1302; *see also* Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 L. & CONTEMP. PROBS. 401, 424 (1958) ("[A] criminal conviction carries with it an ineradicable connotation of moral condemnation and personal guilt.").

215. *Supra* notes 139–42 and accompanying text.

216. State v. Maldonado, 645 A.2d 1165, 1174 (N.J. 1994).

217. W. Cary Edwards, *An Overview of the Comprehensive Drug Reform Act of 1987*, 13 SETON HALL LEGIS. J. 13, 17 (1989).

218. *See Maldonado*, 645 A.2d at 1172 ("[T]he conduct sought to be deterred—illegal drug manufacture and drug distribution—is also widely regarded as constituting the most substantial threat to public safety that now exists.").

219. *Infra* Part IV.A.

imposing a ten- to twenty-year term of imprisonment.[220] Mens rea is required for the distribution only.[221] The statute's placement in the criminal code, listed under "Offenses Against Public Order, Health and Decency,"[222] suggests this DIH law was enacted as a regulatory, public welfare offense. Given the severity of the criminal sanction, however, New Jersey courts have instead analogized it to felony murder.[223]

New Jersey courts are seemingly unbothered by this cognitive dissonance. Finding that "whatever injustice results from strict liability is more than counterbalanced by benefit to the public," New Jersey courts evaluating DIH charges have claimed that "the Constitution places a *lesser* burden . . . to justify strict liability for serious criminal offenses than for regulatory offenses."[224] Mens rea is not required toward the resulting death, the courts claim, because "moral culpability . . . is inextricably embedded in the drug death statute."[225]

The penalty is too high and the associated stigma too great to satisfactorily categorize New Jersey's law as a valid public welfare offense. Yet, New Jersey takes the logical justifications for public welfare offenses—administrative convenience, easing the path to prosecution by dispensing with proof of intent—and applies them to a serious criminal offense, claiming that ultimately, the legislature's "rational conclusion that the safety of the public requires such draconian measures is enough."[226] The law presumes that the mere act of delivering drugs is sufficiently immoral and dangerous to justify imposing the most severe form of liability for homicide. But given who is actually being prosecuted under these laws and given how ineffective DIH statutes are at protecting the public,[227] New Jersey's justifications ring hollow.

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220. N.J. STAT. ANN. § 2C:35-9 (West 2016) ("Any person who manufactures, distributes or dispenses . . . any . . . controlled dangerous substance . . . is strictly liable for a death which results from the injection, inhalation or ingestion of that substance . . . ."); *id.* § 2C:43-6(1).

221. *See Maldonado*, 645 A.2d at 1170.

222. Chapter 35, "Controlled Dangerous Substances," is located within Title 2C, Subtitle 2, Part 5, entitled "Offenses Against Public Order, Health, and Decency."

223. *Maldonado*, 645 A.2d at 1170 ("Criminal liability [here] . . . is similar to liability for felony murder.").

224. *Id.* at 1171–72 (emphasis added).

225. *Id.* at 1174.

226. *Id.* at 1172.

227. *Infra* Part IV.A.

C. Felony Murder and DIH Laws

If DIH statutes cannot be logically justified as public welfare offenses, they might be better understood as felony murder analogs. The problems with felony murder—already "rationally indefensible"[228]—are sharply apparent when examined in the DIH context, particularly considering the extreme ends to which Florida has gone.

1. *Felony Murder and DIH Laws Are Conceptually Distinct*. Though the continued existence of felony murder implies that DIH laws are valid, they are two fundamentally different concepts. Scholars arguing for a principled interpretation of the felony murder rule contend that it should be limited to inherently dangerous felonies such as "[r]ape, robbery, arson, kidnapping, and murder (of a different victim)," and should exclude drug distribution felonies, which impose comparatively less risk and do so "with the apparent consent of the victim."[229] Many states have, in fact, specifically limited their felony

228. Sanford H. Kadish, *Supreme Court Review, Foreword: The Criminal Law and the Luck of the Draw*, 84 J. CRIM. L. & CRIMINOLOGY 679, 681 (1994).

229. Binder, *The Culpability of Felony Murder*, *supra* note 158, at 1045–46. For purposes of this Note, this Section limits its analysis to the felony murder conception articulated by Professors David Crump and Guyora Binder, among others. Crump and Binder limit felony murder liability to situations of moral desert, as "the rule's most important purpose is enhancing the connection between moral blameworthiness and the imposition of criminal liability." David Crump, *Reconsidering the Felony Murder Rule in Light of Modern Criticisms: Doesn't the Conclusion Depend on the Particular Rule at Issue?*, 32 HARV. J.L. & PUB. POL'Y 1155, 1161–62 (2009). Binder argues that modern criticism of felony murder stems in part from a misconception of the rule "as strict liability for accidental deaths occurring in the context of felonies," when the historical understanding of the rule was one that "deservedly imposed [liability], according to defensible criteria of culpability." Guyora Binder, *The Origins of American Felony Murder Rules*, 57 STAN. L. REV. 59, 186 (2004). In line with this concept, most states limit their felony murder rule, either by restricting the rule to an enumerated list of violent or inherently dangerous predicate felonies, or through judicial decisions that have narrowed the application of the doctrine. Roth & Sundby, *supra* note 154, at 446 nn.6–8.

There are, however, states that have more expansive lists of predicate felonies, not limited only to violent ones, and states that have no specific enumerated predicate felonies at all, presumably imposing liability for death resulting during the commission of *any* felony. *See* John O'Herron, *Felony Murder Without a Felony Limitation: Predicate Felonies and Practical Concerns in the States*, 46 No. 4 CRIM. L. BULL. ART. 4 (2010) (documenting each state's approach to felony murder and predicate felonies). Some scholars have pointed out the innate issues with the more expansive applications, arguing that "an application of the felony murder doctrine in the case of an accidental death during a non-dangerous felony would result in elevating a harmless intent to one of murder," and noting that imposing liability in this way "ends up over-punishing the felon." *Id.* These expansive statutes might very well raise their own due process issues, particularly as the modern era of overcriminalization has created felonies that were never considered at common law. *See* HUSAK, *supra* note 194, at 40–41 (describing, among other new crimes, the creation of

murder laws to those general categories.[230] While felony murder ostensibly punishes individuals for "callously impos[ing] risks of death in order to achieve additional serious wrongs,"[231] DIH laws unavoidably target addicts, persons struggling with a "chronic, relapsing disorder in which compulsive drug-seeking and drug-taking behavior persists despite serious negative consequences."[232] While the dangers of using drugs are undeniable, there is a tangible difference in the moral blameworthiness of the classic examples of felony murder—the bank robber who unintentionally shoots a clerk, the rapist who unintentionally kills their victim mid-assault[233]—and the moral blameworthiness of two addicts sharing heroin.

2. *An Extreme Felony Murder Example: Florida*. These tangible differences become even more apparent when examining how far Florida has stretched the doctrine. Florida's DIH law is interpreted by its courts as a form of felony murder, albeit an "unusual" version,[234] as the defendant does not need to intend that death result, have knowledge of the overdose, or be present when the death occurs.[235] If a death results from the unlawful distribution of a controlled substance, the distributor is liable for first-degree murder, subject to a mandatory minimum sentence of life in prison, and potentially subject to the death penalty.[236]

Complicating things, Florida has separately established that distributing unlawful drugs does not require knowledge of the "illicit nature of the controlled substance."[237] According to this construction,

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new ancillary offenses that have "n[o] common-law analogues"). Though it is beyond the scope of this Note, many of the arguments asserted here could also apply to these expansive felony murder statutes.

230. *See* HUSAK, *supra* note 194, at 51 (noting that in "many states," felony-murder rules are "restricted to a small number of specifically enumerated felonies—robbery, sexual assault, arson, burglary, kidnapping, or criminal escape").

231. Binder, *The Culpability of Felony Murder*, *supra* note 158, at 966.

232. Jordi Camí & Magí Farré, *Mechanisms of Disease: Drug Addiction*, 349 NEW ENG. J. MED. 975, 975 (2003).

233. Binder, *The Culpability of Felony Murder*, *supra* note 158, at 966.

234. *E.g.*, Pena v. State, 829 So. 2d 289, 294 (Fla. Dist. Ct. App. 2002). Florida defines first-degree murder as either "premeditated," as caused in the perpetration of an enumerated felony, or as drug-induced homicide. FLA. STAT. ANN. § 782.04(1)(a)(1)–(3) (West 2017 & Supp. 2020).

235. *Pena*, 829 So. 2d at 294.

236. §§ 775.082(1)(a), 782.04(1)(a)(3).

237. *Id.* § 893.101(2)–(3); *see* State v. Adkins, 96 So. 3d 412, 416 (Fla. 2012) ("The statute thus expressly eliminates knowledge of the illicit nature of the controlled substance as an element of controlled substance offenses . . . . The statute does not eliminate the element of knowledge of

a defendant could distribute a substance that they did not know was heroin and then be liable for first-degree murder if a death resulted from the ingestion of that heroin.[238]

Further complicating this DIH provision is the fact that Florida, alone among all states, has an *attempted* felony murder provision.[239] Setting aside the fundamental illogic of removing mens rea from the crime of attempt,[240] this allows prosecution for attempted DIH. Simply put, if a person delivered drugs to another, without even knowing they were drugs, and the other person experienced a non-fatal overdose, the person who delivered the substance could be liable for attempted felony murder. Though this charge does not yet appear to have been brought in the DIH context, there is little stopping a prosecutor from doing so.[241]

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the presence of the substance . . . ."). A defendant can raise their lack of knowledge as an affirmative defense to any relevant controlled substance offense. *Id.* § 893.101(2). However, if the defendant raises this affirmative defense, the jury will be instructed that there is a "permissive presumption that the possessor knew of the illicit nature of the substance." § 893.101(3). Notably, this shifts the burden of proof from the prosecutor to the defendant, requiring the defendant to disprove this fact beyond a reasonable doubt. *See* John F. Stinneford, *Punishment Without Culpability*, 102 J. CRIM. L. & CRIMINOLOGY 653, 710, 710 n.336 (2012) (stating that legislatures can do this "by reclassifying elements closely associated with culpability, including mens rea, as affirmative defenses," and pointing out that Florida's strict liability drug statute does exactly that).

238. Consider this hypothetical situation: Michael asks his friend, Charles, to do him a favor and deliver a bag to his sister, Amy. Charles agrees and brings the bag to Amy; he looks inside the bag on the way and sees a package containing a substance he does not recognize. The package contains heroin, which Amy consumes, causing a fatal overdose. Despite no intent to harm Amy or knowledge of the illicit nature of the substance, Charles has just committed felony DIH. It is hard to imagine that this extreme application of Florida's law would not be at least susceptible to a due process challenge.

239. *See* State v. Sanders, 827 S.E.2d 214, 218 n.8 (W. Va. 2019) ("[O]nly the State of Florida has codified the crime of attempted felony-murder . . . ." (citing FLA. STAT. ANN. § 782.051)). Section 782.051 provides, in part: "Any person who perpetrates or attempts to perpetrate any felony . . . and who commits, aids, or abets an intentional act that is not an essential element of the felony and that could, but does not, cause the death of another commits a felony of the first degree."

240. *See* Amlotte v. State, 456 So. 2d 448, 450 (Fla. 1984) (Overton, J., dissenting) (pointing out that this "create[s] a crime which necessitates the finding of an intent to commit a crime which requires no proof of intent"), *cited with approval in* State v. Gray, 654 So. 2d 552, 553 (Fla. 1995) ("[T]he crime of attempted felony murder is logically impossible."), *superseded by statute*, § 782.051.

241. The attempted felony murder provision also requires the defendant "commit[], aid[], or abet[] an intentional act that is not an essential element of the felony and that could, but does not, cause the death of another." § 782.051(2). To return to the previous hypothetical, *supra* note 238, imagine that after Charles found the substance, he encouraged Amy to try it, and helped her ingest it. Amy overdosed, but survived. Even if unwitting Charles did not know what the substance was when he helped Amy consume it, he is now liable for attempted DIH, a first-degree

These hypotheticals seem, and are, extreme. Current jurisprudence, however, does not preclude them. Despite the contrasting messages sent by an innocent-protecting Court, the body of precedent functionally validating strict liability homicides makes it unlikely that DIH statutes could be facially invalidated as unconstitutional. But this dubious insulation from constitutional attacks does not resolve or justify their inconsistencies with due process. Resolving these issues, then, falls to the legislature.

IV. A CALL FOR LEGISLATIVE REFORM

A legislature currently has wide discretion to enact strict liability DIH statutes; this does not mean that it *should* enact them. Even if one agrees with the doctrinal precedent that there may be no mens rea guarantee in the Constitution, this does not eliminate the possibility that DIH laws are used in ways that are repugnant to our foundational concepts of justice. Considering the structural protections our system provides for the accused, these laws, while perhaps not unconstitutional, can be considered anti-constitutional. In any event, calling DIH laws constitutional is not the same as calling them just, or even rational.

This Part examines the irrationality of DIH laws, positing that in addition to the constitutional concerns they raise, these laws are unnecessary and ineffective. It then proposes various ways that state legislatures can attempt to mitigate the flawed policy and fundamental injustice of these laws.

A. Policy Considerations

Unsurprisingly, many see DIH laws as an essential tool to mitigate the overdose crisis, one justified by the extent of the crisis and the moral blameworthiness of those involved.[242] This justification, however, would be more compelling if DIH laws were actually effective in protecting the public welfare. Instead, they contravene more recently enacted laws that better reflect current priorities and societal values.

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felony. If Charles truly had no knowledge of the type of substance, a conviction here also seems like it could be a due process violation.

242. *See* Neil, *supra* note 23, at 28 (stating DIH statutes may not be a "silver bullet to the public health crisis this nation faces," but are a useful tool to focus on the "drug dealers who take advantage of those who have become addicted to opioids").

1. *DIH Statutes Are Not Life-Saving Measures*. Contrary to the premise that DIH laws are necessary to save lives, DIH laws are likely to contravene life-saving initiatives and instead "aggravate the problems they purport to address."[243] In the past few years, many states and law enforcement departments have poured extensive resources into harm-reduction initiatives, such as expanding access to naloxone to prevent overdose deaths[244] or enacting Good Samaritan laws to provide limited criminal immunity for individuals reporting an overdose.[245]

DIH laws are fundamentally at "cross-purposes with these important efforts."[246] Some state prosecutors have even targeted the use of these safety measures, treating signs of naloxone use at an overdose scene as evidence that a homicide may have occurred.[247] Rather than saving lives, stigmatizing drug addicts as murderers makes it less likely that they will come forward for treatment, rehabilitation, or life-saving assistance. Additionally, the majority of Good Samaritan laws only offer protection from lower possession offenses, not other charges such as DIH.[248] Studies have shown that "overdose bystanders are known to delay or refrain from calling 911" due to "[f]ear of police involvement" and that most drug users, and many law enforcement officers, are not even aware that these Good Samaritan laws exist.[249] Conversely, DIH prosecutions are widely publicized.[250] The

243. Brief of the Committee for Public Counsel Services and the Health in Justice Action Lab at Northeastern University School of Law, et al. as Amici Curiae Supporting the Defendant at 34, Commonwealth v. Carrillo, 131 N.E.3d 812 (2019) (No. SJC-12617) [hereinafter *Carrillo* Amicus Brief].

244. *Drug Overdose Immunity and Good Samaritan Laws*, NAT'L CONF. ST. LEGISLATURES (June 2017), http://www.ncsl.org/research/civil-and-criminal-justice/drug-overdose-immunity-good-samaritan-laws.aspx [https://perma.cc/F854-MRYY].

245. *Good Samaritan Overdose Prevention Laws*, PRESCRIPTION DRUG ABUSE POL'Y SYS., http://pdaps.org/datasets/good-samaritan-overdose-laws-1501695153 [https://perma.cc/JAD2-WMXP] (reporting laws valid at least through July 1, 2018).

246. *Carrillo* Amicus Brief, *supra* note 243, at 34.

247. *See* Daugherty & Stachula, *supra* note 83, at 31 ("Look for evidence of [Naloxone] use at the crime scene. This may be evidence that your victim was with someone prior to their death.").

248. DRUG POL'Y ALL., 911 GOOD SAMARITAN LAWS: PREVENTING OVERDOSE DEATHS, SAVING LIVES 1 (Feb. 2016), https://www.drugpolicy.org/sites/default/files/DPA_Fact%20Sheet_911%20Good%20Samaritan%20Laws_%28Feb.%202016%29.pdf [https://perma.cc/2GHG-69VV].

249. Amanda D. Latimore & Rachel S. Bergstein, *"Caught with a Body" Yet Protected by Law? Calling 911 for Opioid Overdose in the Context of the Good Samaritan Law*, 50 INT'L J. DRUG POL'Y 82, 82 (2017).

250. *Supra* notes 90–91 and accompanying text.

increasingly publicized use of DIH laws may cause drug users to use alone or deter people from seeking help in an emergency, increasing their risk of death from overdose.[251]

2. *DIH Statutes Do Not Effectively Incapacitate or Deter.* Nor do these laws effectively mitigate the opioid crisis. DIH laws tend to only imprison low-level dealers or users, not larger drug suppliers.[252] Some lawmakers argue that imprisoning lower-level users may successfully work to dismantle large supply chains, as "drug kingpins could not operate profitably absent a steady demand for controlled dangerous substances."[253] History has shown, however, that incarcerating lower-level users does nothing to stop the actual supply of opioids from continuing to flow to those who want them.[254] DIH laws thus attempt to reduce supply but do nothing to address the problem of demand.

Additionally, these laws are not likely to deter drug use. In theory, the existence of these DIH laws may not only deter people from distributing drugs, but might also "keep[] a relatively large class of persons from engaging in certain kinds of activity," such as using drugs, in the first place.[255] However, not only is it debatable exactly how much of a deterrent effect these laws may have on someone who is dedicated to criminal drug trafficking,[256] but these arguments also overlook that a defining feature of addiction is "compulsive drug seeking and use," notwithstanding "well-known and severe negative consequences."[257] In

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251. *See* Travis Lupick, *If They Die of an Overdose, Drug Users Have a Last Request*, YES! MAG. (Aug. 31, 2018), https://www.yesmagazine.org/democracy/2018/08/31/if-they-die-of-an-overdose-drug-users-have-a-last-request [https://perma.cc/LH9M-HTE2] ("In public health messaging, the first thing that's said is, 'Don't use alone.' . . . But in this context, it can mean that if I go and score some drugs, and then I share those drugs with you . . . that relationship is targeted in prosecutions." (quoting Leo Beletsky)).

252. *See* LASALLE, *supra* note 4, at 42 (stating that due to the requirement of proving causation, "charges become more difficult the higher up the distribution chain one goes").

253. Edwards, *supra* note 217, at 13; *see also id.* at 14 ("[A]n appropriately stern sanction must be imposed upon drug users, without whom the dealers and profiteers would have neither a market nor a reason to exist.").

254. *See* Beletsky, *supra* note 55, at 849 ("By narrowly defining the 'opioid epidemic' as a purely supply-driven phenomenon, decision-makers overlooked proven prevention and response tools. These missteps led the crisis to morph from bad to worse." (footnote omitted)).

255. Wasserstrom, *supra* note 42, at 736–37.

256. *See* Grady, *supra* note 85 (quoting Waukesha County District Attorney Sue Opper: "I would say the drug dealers don't care (because) they're motivated by greed;" and Milwaukee County District Attorney John Chishom: "The deterrence in and of itself does not change the behavior as long as the incentive is too great").

257. Alan I. Leshner, *Addiction Is a Brain Disease, and It Matters*, 278 SCI. 45, 45 (1997); *see also Carrillo* Amicus Brief, *supra* note 243, at 45 ("[T]hese prosecutions lack a deterrent effect,

fact, no empirical evidence supports that harsher enforcement has any correlation to a reduction in drug activity,[258] and further, there is reason to suspect that "drug enforcement activities actually lead to *increases* in violent crime."[259]

For proponents of DIH laws, sacrificing mens rea requirements and historical notions of fairness may be a necessary sacrifice for the public good. But considering these laws have limited deterrent effect, do not reduce the rate of overdose deaths, and contravene other legislative initiatives enacted to protect the public, justifying their utility is difficult. Perhaps the only valid rationale for DIH laws is retributive—to punish those whose actions, however indirectly, lead to death. When applied to the Jarret McCaslands of the world, this seems like nothing more than punishing an addict for the fact of their addiction.[260]

B. Legislative Solutions

As discussed above, though there are serious due process concerns with DIH laws, it would be difficult to effectively challenge them in court. If any change to these DIH statutes is to occur, it must be part of a legislative initiative. Rather than relying on retributive impulses

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particularly against people suffering from addiction. There is a broad consensus among scholars and policy analysts that the threat of legal sanction does not deter drug dealing or drug use, even when the threatened punishments are increased.").

258. Daniel Stein, *Pew Analysis Finds No Relationship Between Drug Imprisonment and Drug Problems*, PEW TRS. (June 19, 2017), https://www.pewtrusts.org/en/research-and-analysis/speeches-and-testimony/2017/06/pew-analysis-finds-no-relationship-between-drug-imprisonment-and-drug-problems [https://perma.cc/V48Q-MB3L].

259. *Carrillo* Amicus Brief, *supra* note 243, at 47 (emphasis added); *see also id.* ("So long as demand for illegal drugs exists, attempts to constrict the drug supply by incarcerating traffickers will continue to lead to the 'replacement effect,' whereby individuals or organizations quickly fill the void created by enforcement activities.").

260. Jarret's case is illustrative. It was not clear what Flavia's exact cause of death was, nor who, if anyone, had given her the heroin. *Supra* notes 9–11 and accompanying text. It was only clear that she was using while with Jarret, a fellow addict—a circumstance apparently sufficient to sentence him to life in prison without parole. *Supra* note 12 and accompanying text.

As previously discussed, prosecutors have used DIH laws broadly, often charging a person, usually a fellow addict, who happened to be with the victim when they died. *Supra* notes 32–33 and accompanying text. Though to the Author's knowledge no one has directly challenged these laws as status crimes, it is important to remember that the Supreme Court has declared that criminalizing addiction is unconstitutional. *See* Robinson v. California, 370 U.S. 660, 667 (1962) (stating that "narcotic addiction is an illness" and holding "that a state law which imprisons a person thus afflicted as a criminal . . . inflicts a cruel and unusual punishment in violation of the Fourteenth Amendment"). In the wake of increased DIH prosecutions, some have suggested that it is worth exploring litigation that "reviv[es] this line of constitutional argument." Beletsky, *supra* note 55, at 856–58.

and ineffective drug-war policies, state legislatures should look at alternate ways to prevent overdose deaths without sacrificing fundamental criminal justice principles.[261] This Section outlines three ways a legislature could resolve the due process issues DIH laws implicate.

1. *Repeal DIH Statutes*. As DIH laws contravene their own purpose, fail to mitigate the opioid crisis, and run counter to our foundations of criminal justice, the most principled legislative response is to repeal them entirely. The tide of criminal justice is slowly moving toward reform, and DIH laws should be no exception. Legislatures can and should invalidate these strict liability homicides as inconsistent with the basic principles of our criminal justice system.

States may resist repealing these laws, clinging to the justifications outlined above. For the truly culpable, however, alternatives are available. States with DIH laws also have extensive drug possession and trafficking offenses that more directly target the actual socially harmful conduct that is occurring.[262] In the most extreme circumstances, states can still attempt to prosecute overdose deaths as negligent or reckless homicides,[263] theories of liability that necessarily require the state to prove the mental state and culpability of the individual to achieve a conviction.

2. *Include a Higher Mens Rea Component.* Similarly, if legislatures are unwilling to fully repeal DIH statutes, they can amend them to better align with due process principles. For one, legislatures could severely reduce the homicide liability and penalty, transforming them into more classic representations of public welfare offenses. This approach would remove the homicide classification entirely,

261. These proposed solutions are primarily aimed at state legislatures. Although there is a federal DIH law in the form of a "death results" provision in the CSA, the current stall on legislative activity emerging from the federal government makes it unlikely that Congress would be the first mover on amending any such legislation. *See* Carl Hulse, *Amid Rancor in House, It's Quiet in the Halls of the Senate. Too Quiet.*, N.Y. TIMES (Dec. 7, 2019), https://nyti.ms/2OXC2X0 [https://perma.cc/RC7X-9VPC] (discussing descriptions of the current U.S. Senate as a "legislative graveyard").

262. For example, a defendant who recently received a life sentence for DIH also received a concurrent life sentence for Conspiracy to Distribute and Possess with the Intent to Distribute, thirty years for Possession with the Intent to Distribute a Quantity of Heroin, and ten years for Possession of a Firearm by a Felon. U.S. Att'y E. Dist. of N.C. Press Release, *supra* note 195.

263. Neil, *supra* note 23, at 27.

categorizing them instead as minor criminal offenses imposing a fine but no prison term.

Alternatively, these statutes could retain their homicide classifications but require a mens rea element of criminal negligence or recklessness toward the resulting death. Under a recklessness standard, there would not be a "per se rule that the distribution of heroin alone, without more, suffices to support a verdict;" instead, the law would require a fact-specific inquiry into each case to determine if the defendant's conduct created a "high degree of likelihood that substantial harm [would] result."[264] Treating drug-overdose offenses in this way, closer to how some states treat vehicular manslaughter,[265] would offer a path to prosecution for the truly culpable offender while mitigating many due process concerns currently implicated by DIH statutes.

3. *Specifically Target Large-Scale Distributors*. A final approach is to amend DIH statutes in a way that specifically addresses the type of conduct these laws purport to address—namely, large-scale drug dealing. DIH statutes could be amended for use only when certain aggravating factors were present, such as "if the victim were an unwitting user of the illegal substance; if there were multiple deaths involved with one batch of drugs [or] if the dealer were a high-level distributor."[266] States could modify the drug-distribution element of the offense, requiring that a large amount of the drug be distributed before DIH liability attaches.

In theory, some of the policy concerns about the way these laws are prosecuted could be alleviated by focusing on upper-level traffickers rather than charging fellow addicts sharing drugs. Some states have already begun taking this approach. In response to

264. Commonwealth v. Carrillo, 131 N.E.3d 812, 819, 826, 828 n.10 (Mass. 2019); *see id.* at 825–26 (detailing various factors to consider, such as if the defendant knew the heroin was laced with fentanyl, if the defendant personally injected the deceased, or if the defendant observed the victim overdose and failed to call for help).

265. For example, New Jersey imposes strict liability on any death resulting from intoxicated operation of a vehicle as a third-degree crime. N.J. STAT. ANN. § 2C:11-5.3 (West Supp. 2019). The crime can be elevated to second-degree homicide only if the driver was found to be reckless. *Id.* § 2C:11-5. Notably, the strict liability version still carries a minimum prison term of between three and five years, *id.*, still far above the traditional public welfare offense level.

266. John H. Tucker, *Angela Halliday Was a Junkie. Does that Make Her a Murderer?*, RIVERFRONT TIMES (Aug. 4, 2011) http://www.riverfronttimes.com/2011-08-04/news/angela-halliday-heroin-overdose-drug-induced-homicide-ben-berkenbile [https://perma.cc/FEJ5-CMUZ] (reporting the positions of U.S. Attorney for Eastern Missouri Richard Callahan).

criticisms, Mississippi recently modified a proposed DIH law to require that the defendant be charged with the transfer of at least two grams of opioids in order to be liable for DIH.[267] Similarly, Delaware's current statute requires the underlying drug deal to involve at least five grams in order to be liable for the homicide charge.[268]

These modifications, however, would do little to mitigate the overall concerns with these laws. These statutes are not likely to deter illicit conduct or to reduce the demand for opioids. Nor do these modifications mitigate the ultimate due process issues. Regardless of the volume of drugs required to prosecute someone under a DIH law, these statutes still impose homicide liability without any requisite proof of mens rea. Thus, they remain anathema to foundational concepts of justice.

CONCLUSION

Jarret McCasland will likely remain in prison for the rest of his life. In June 2019, the Louisiana Supreme Court denied his application to reconsider his untimely appeal—the appeal, filed in May 2017, was received three minutes late.[269] It is possible that the court, which said it would have heard the case on the merits were it timely filed,[270] would have concluded that Jarret was denied due process, that sentencing him to life in prison for a crime he did not intend to commit was an egregious miscarriage of justice. It is possible, but unlikely. Relief for Jarret and others like him will likely not come from the courts. Without strong action from legislatures, DIH statutes will remain in effect and will, if the current trend continues, be utilized with increasing fervor.

The Constitution may not explicitly guarantee a mens rea requirement to preserve due process, but the history of our jurisprudence demonstrates that for some crimes, narrowing the gap between culpability and punishment is imperative to achieve a just result. Imposing the most severe sanction the law allows and depriving

267. Michelle Liu, *"Parker's Law" Would Put Drug Dealers Behind Bars for Overdose Deaths*, MISS. TODAY (Feb. 4, 2019), https://mississippitoday.org/2019/02/04/parkers-law-would-charge-dealers-friends-for-drug-overdose-deaths [https://perma.cc/85QA-7SJQ].

268. DEL. CODE ANN. tit. 16, § 4752B (2017); *id.* § 4751C (LEXIS through 82 Del. Laws, ch. 281).

269. Joe Gyan Jr., *In Unique Murder Case, Louisiana Court Won't Hear Denham Springs Man's Untimely Appeal*, ADVOCATE (June 17, 2019, 5:00 PM), https://www.theadvocate.com/baton_rouge/news/courts/article_2e239c5a-9145-11e9-945b-0bdf87c1dc81.html [https://perma.cc/67FD-SKQD]. Jarret's appellate attorney "blamed the late filing on a computer glitch." *Id.*

270. *Id.*

an individual of liberty requires care and deliberation, not a mechanical finding of guilt based on unfortunate circumstances. Removing a mens rea requirement for homicide liability removes the anchor of fairness from our criminal justice system. It has been debated whether the allowance of strict liability crimes is compatible with what the accepted values of society are, or whether the allowance of these crimes is incompatible with what accepted values *should* be.[271] This Note asserts that DIH laws do not accord with our societal values, and calls on legislatures to repeal them before more damage is done.

271. Wasserstrom, *supra* note 42, at 741.