

LIMITING INTENT AND LIMITING JUSTICE: DIH LAWS IN THE
U.S. COMPARED TO SWEDISH DRUG POLICY

by

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Limiting Intent and Limiting Justice: DIH Laws in the U.S. Compared
to Swedish Drug Policy

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The primary focus of this research is a comparative analysis between U.S. and Swedish drug policy, looking at the ways in which their political trends, laws, and emphasis on the prosecutor mirror one another, and how current trends in the U.S. can be predictive of Swedish drug policy. Drug induced homicide (DIH) laws in the U.S. charge defendants with homicide if they cause an overdose death to another without having to prove an intent to kill. DIH laws purported goals are to target drug traffickers and reduce overdose deaths but instead they have resulted in increased targeting towards and the imprisonment of the common user. While Sweden does not have DIH laws like those in the U.S., the political unity behind a drug free society and the prosecutorial trends in Sweden indicate a shift towards targeting the user to stop drug trafficking and reduce drug use. Sweden can use the reported ineffectiveness of DIH laws in the U.S. as warning signals for the path it appears to be going down.

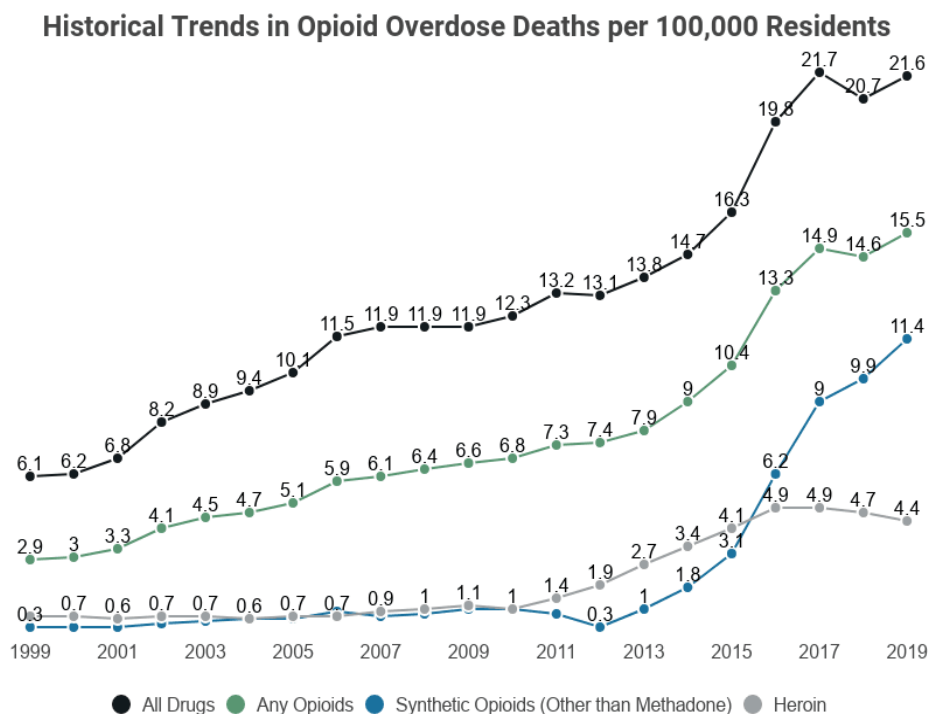
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- The laws of four states (Delaware, Mississippi, Rhode Island, and Vermont) make a good faith effort to promptly seek, provide, or obtain emergency medical or law enforcement assistance for another person who is experiencing an overdose an affirmative defense to their DIH/DDRDL law. In the case of Vermont, the crimes eligible for protection under the Good Samaritan fatal overdose prevention law include the state’s DIH/DDRDL provision.

Figure 1: ¹

Figure 2:²

¹ *Good Samaritan Fatal Overdose Prevention and Drug-Induced Homicide: Summary of State Laws*, LEGISLATIVE ANALYSIS AND PUBLIC POLICY ASSC. (Aug. 2023), at 14, <https://legislativeanalysis.org/wp-content/uploads/2023/08/Good-Sam-Fatal-Overdose-Prev-and-Drug-Induced-Homicide-Summary-of-State-Laws.pdf>.

² *Drug Overdose Death Rates*, NAT’L CENTER FOR DRUG ABUSE STATISTICS, <https://drugabusestatistics.org/drug-overdose-deaths/#:~:text=The%20national%20OD%20rate%20is,the%20national%20average%20death%20rate.>

Figure 3:³

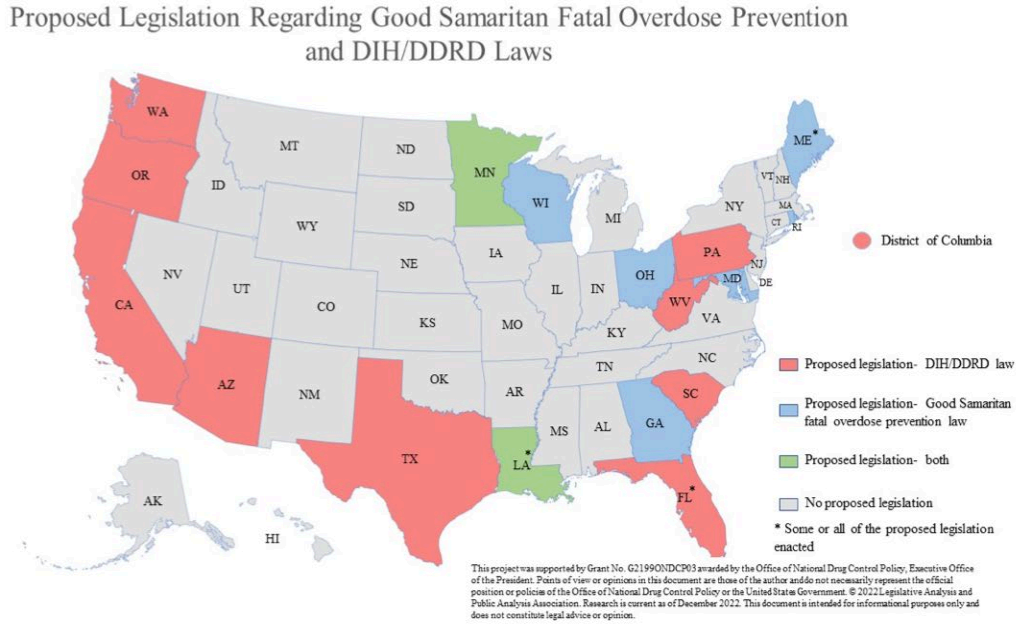
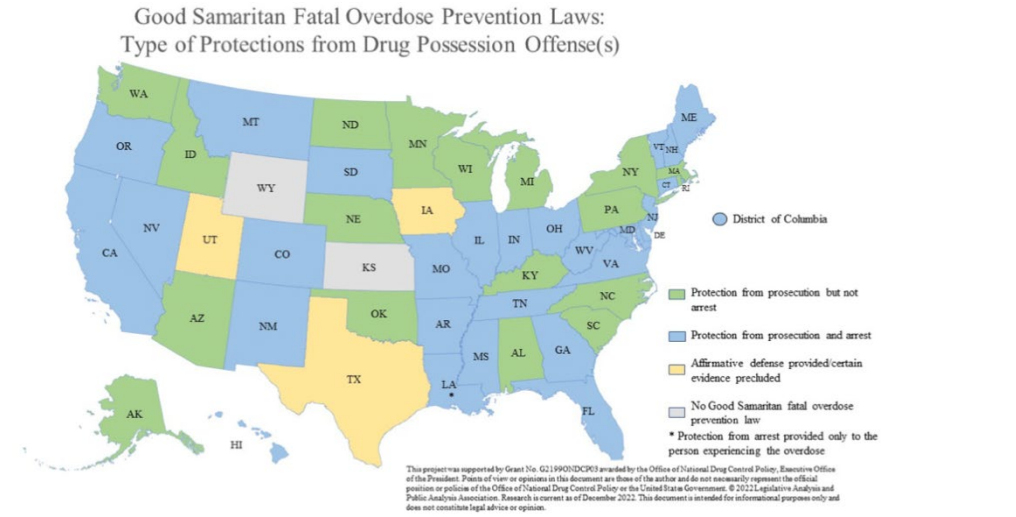


Figure 4:⁴



³ *Good Samaritan Fatal Overdose Prevention and Drug-Induced Homicide: Summary of State Laws*, LEGISLATIVE ANALYSIS AND PUBLIC POLICY ASSC. (Aug. 2023), at 15, <https://legislativeanalysis.org/wp-content/uploads/2023/08/Good-Sam-Fatal-Overdose-Prev-and-Drug-Induced-Homicide-Summary-of-State-Laws.pdf>.

⁴ *Id.*

Figure 5:⁵

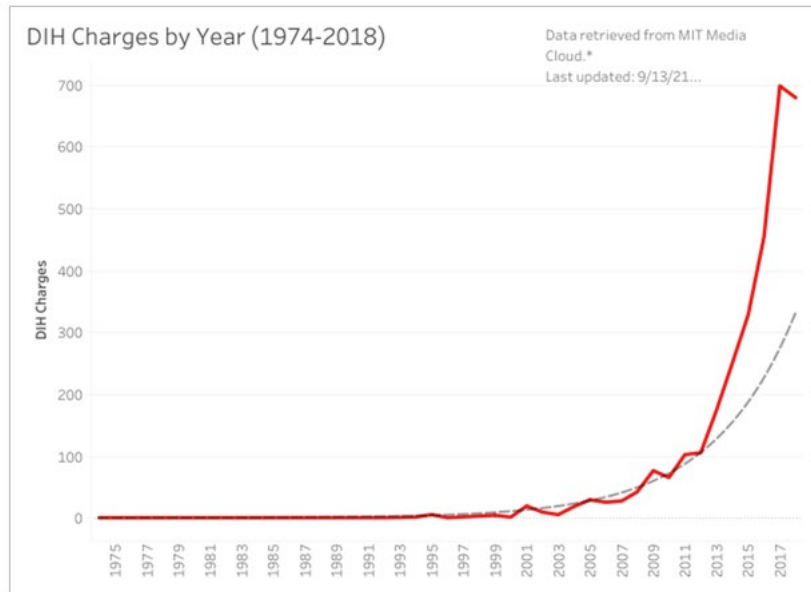
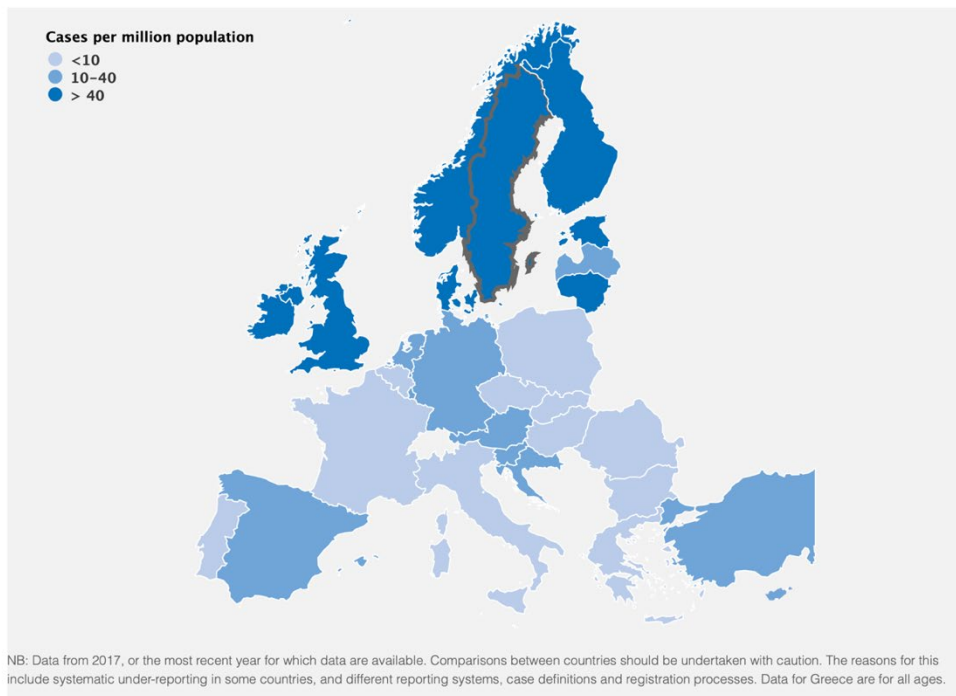


Figure 6:⁶

Drug-induced mortality rates among adults (15-64 years)



⁵ Leo Beletsky, et. al., *Drug Induced Panic*, INQUEST (Apr. 14, 2022), <https://inquest.org/drug-induced-panic/>.

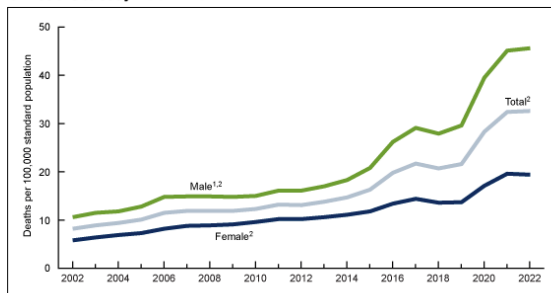
⁶ *Sweden, Drug Country Report*, European Monitoring Centre for Drugs and Drug Addiction 13, https://www.emcdda.europa.eu/publications/country-drug-reports/2019/sweden_en (June 6, 2019)

Figure 7:⁷



Figure 8:⁸

Figure 1. Age-adjusted rate of drug overdose deaths, by sex: United States, 2002–2022



¹Rate significantly higher than for females for all years $p < 0.05$.

²Significant increasing trend from 2002 to 2022, with different rates of change over time, $p < 0.05$.

NOTES: Drug overdose deaths were identified using *International Classification of Diseases, 10th Revision* underlying cause-of-death codes X40–X44, X60–X64, X85, and Y10–Y14. Age-adjusted death rates were calculated using the direct method and the 2000 U.S. standard population. The number of drug overdose deaths in 2022 was 107,941. [Access data table for Figure 1](#)

SOURCE: National Center for Health Statistics, National Vital Statistics System, mortality data file.

⁷ *Id.*

⁸Merianne R. Spencer, et al., *Drug Overdose Deaths in the United States, 2002–2022*, NATIONAL CENTER FOR HEALTH STATISTICS, <https://www.cdc.gov/nchs/products/databriefs/db491.htm#:~:text=The%20age%2Dadjusted%20rate%20of,t hose%20age%2035%20and%20older> (Mar. 2024).

I. Contextualizing U.S. and Swedish Drug Policy

As drug use has increased in both Sweden and the U.S., so has punishment and control. Both the U.S. and Sweden have drug policy models that focus on creating drug free societies using prosecution and harsher sentencing to combat drug use and overdose deaths, and both see increases in both overdose deaths and spending to combat drug distribution and use. Focusing on one emerging and increasing legal trend in the U.S., drug induced homicide (DIH) laws, compared to the Swedish drug schemes as a whole allows for understanding of future trends in Swedish law. It also allows analysis of how laws similar to DIH could be mirrored in Sweden based on institutional legal framework and policy goals. Considering the rapid rise of overdose deaths in both countries, it is important to analyze the effectiveness of current and potential future policy practices to both shape and reform drug policy.⁹

One of the recent resurgences in U.S. drug policy is the use of DIH laws.¹⁰ In broad terms, these are laws in which a person is charged with homicide when they deliver, give, or distribute controlled substances to another that results in the death of that other person, regardless of their intent to commit homicide.¹¹ DIH laws are present on both the federal and state level and have seen a recent resurgence in response to a rise in overdose deaths.¹² DIH laws represent an ever-tightening legal model similar to what Sweden has trended towards in recent decades.

⁹ See *infra* Part IV, Section E.

¹⁰ See *infra* Part II, Section A, Subsection 3.

¹¹ See *infra* notes 9-13.

¹² See *infra* Part II, Section A, Subsection 3.

Research Question

How do patterns of drug prosecution in the U.S. and Sweden compare, and what does a revitalization of DIH laws in the U.S. indicate about future Swedish drug policy and potential policy reform?

Thesis Statement

Enforcing policies like DIH that rely on harsher sentences, less need for actual intent towards part of the offense (in this case, homicide), and greater political pressure on prosecutors to enforce public health goals which focus not around rehabilitation but instead on “drug free” societies does not effectively combat overdose deaths or target drug traffickers, and ultimately puts the burden on the user. The development of the Swedish drug model in its unified approach to a drug free society indicates creation of stricter offenses like DIH, which put the burden on one drug user for their impact on other users, instead of targeting the larger system. This method, whether it is meant directly or indirectly, so far in the U.S. has been largely ineffective in effectuating its goals. Sweden can use the results of DIH in the U.S. as warning signs to move away from harsher sentencing and towards allowing for waiver of prosecutions, centering less of its focus and resources on a drug free society, and avoid passing laws for crimes that limit necessary intent like DIH.

This work will first look at the evolution of drug policy in the U.S., and then Sweden. It will compare the similarities in the two countries in relation to: their laws; their goals and political climates; the pressure placed on, and discretion given to prosecutors; the sentencing for drug related crimes and their effect on deterring drug use and minimizing the rates of overdose deaths; and the overall drug related spending in each country. This work will end with potential policy roads for Sweden and how they are informed by DIH laws in the U.S.

II. U.S. and Swedish Drug Policy

A. United States Drug Policy

1. Origins of DIH

In the U.S. in the 1970s and 1980s, increasingly severe drug policy models were enacted.¹³ The legal schemes that laid a foundation for DIH laws originate from the Controlled Substance Act (CSA) of 1970.¹⁴ President Nixon signed the Controlled Substance Act, which increased maximum penalties for drug offenses, with, as he stated, the goal being to “drive drug traffickers and drug pushers off the streets of America.”¹⁵ The CSA was amended by the Anti-Drug Abuse Act to include DIH, specifically 21 U.S.C. §841(b), which provides a penalty of a minimum of twenty years to life for anyone who manufactured, distributed, or dispensed a controlled substance that results in death or serious bodily injury.¹⁶ The CSA defines “distribute” as including “to deliver,” meaning “the actual, constructive, or attempted transfer of a controlled substance . . . whether or not there exists an agency relationship.”¹⁷ Whether or not there exists an agency relationship is broadly defined, and the delivery of the drug is considered within this liability.¹⁸ DIH itself is the heightening of these sentences when an overdose occurs because of the interaction. For example, if a person is found to distribute, dispense, or possess a kilogram or more of heroin, they receive a sentence of ten to life in prison, whereas if death results they

¹³ Alyssa Mallgrave, *Article: Purely Local Tragedies: How Prosecuting Drug-Induced Homicide In Federal Court Exacerbates The Overdose Crisis*, 13 DREXEL L. REV. 233, 242 (2020).

¹⁴ *Id.*

¹⁵ Jackson Tarricone, *Richard Nixon and the Origins of the War on Drugs*, THE BOSTON POL. REV. (Sep. 10, 2020), <https://www.bostonpoliticalreview.org/post/richard-nixon-and-the-origins-of-the-war-on-drugs>.

¹⁶ Drug Policy Alliance, *An Overdose Death is Not Murder: Why Drug-Induced Homicide Laws Are Counterproductive and Inhumane*, DRUG POLICY ALLIANCE (2009), https://drugpolicy.org/wp-content/uploads/2023/05/Overdose_Death_Is_Not_Murder_Report.pdfOverdose.; 21 U.S.C. § 841.

¹⁷ Alyssa Mallgrave, *supra* note 13, at 258.

¹⁸ Hailey Varner, *Chasing the Deadly Dragon: How the Opioid Crisis is Impacting the Enforcement of Drug-Induced Homicide Statutes*, UNIV. OF ILL. L. R. 1799, 1808-1809 (2019).

receive a sentence of twenty to life in prison.¹⁹ Following passage of the CSA, the Anti-Drug Abuse Act of 1986 provided a mandatory minimum for specific quantities of controlled substances.²⁰ The Anti-Drug Abuse Act, which followed in 1986, contained minimum penalties for offenders with a “death results” enhancement, thus DIH was born and integrated into the CSA.²¹

While DIH started as a purported means to target those that distribute drugs, it has evolved as a tool to combat overdose deaths. The Anti-Drug Abuse Act of 1986, which created the death result language that formed the basis for DIH, was a result not of activities of high-level drug traffickers, but of famous basketball star Len Bias’ death.²² Len Bias was found to have died from a cardiac arrest and had cocaine in his system, and public outcry and fear ensued.²³ Congressional members, with the midterm approaching, used this to push for harsher drug laws. Massachusetts Representative Thomas O’Neill realized “how powerful an anti-drug campaign would be,”²⁴ and the Anti-Drug Abuse Act was passed a few weeks before the midterms, without hearing any testimony from legal or medical experts.²⁵ Instead, “[l]awmakers were compelled by Len Bias’s story, which was ‘on the minds of many people on Capitol Hill’ and ‘cited repeatedly by lawmakers as a key element in setting off the House’s antidrug crusade.’”²⁶ While the driving force behind the Anti-Drug Abuse Act came from an overdose death, talk on the floor centered around high-level trafficking. During discussion of the Anti-Drug Abuse Act, Representative Ed Markey explained that he “‘acknowledge[s] that there are

¹⁹ *Id.*

²⁰ *Id.* at 1810.

²¹ Alyssa Mallgrave, *Article: Purely Local Tragedies: How Prosecuting Drug-Induced Homicide In Federal Court Exacerbates The Overdose Crisis*, 13 DREXEL L. REV. 233, 243 (2020).

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

differing degrees of culpability in the drug world,’ so it [the Anti-Drug Abuse Act] establishes ‘separate penalties for . . . the biggest traffickers.’”²⁷ Senator Robert Byrd echoed this, saying that severe penalties being enacted here “should be reserved for ‘the kingpins—the masterminds who are really running these operations.’”²⁸ The purported legislative intent, to use the CSA and the Anti-Drug Abuse Act to target major drug traffickers and hold them accountable for the deaths that resulted, was clear. This also modeled the purported goals of Nixon with the CSA to drive drug traffickers out of the U.S.²⁹ However, it is also clear that these laws had their roots in public outcry over overdose deaths. DIH laws were not used often in the first 15 to 20 years of their passage, but as overdose deaths have risen, DIH prosecution has risen in reaction, mirroring its statutory roots as a reactionary measure to an overdose deaths as it was in the Anti-Drug Abuse Act.³⁰ This framing of DIH laws as means to target drug traffickers, with origins in combatting overdose deaths and targeting the effects on the user would influence how DIH law played out in the coming years as a means of targeting overdose deaths with the outward focus purporting to be on targeting traffickers. Similarly influential to the implementing of DIH laws was the court’s interpretation of the required intent needed to convict.

2. Legal Scheme of DIH

U.S. Supreme Court rulings have made clear the limited intent required for DIH, and the importance of demonstrating what drugs were in the decedents system at the time of death. In the Supreme Court case *Burrage*, the Court found that but-for cause is required under the federal

²⁷ *Id.* at 244.

²⁸ *Id.*

²⁹ Jackson Tarricone, *Richard Nixon and the Origins of the War on Drugs*, THE BOSTON POL. REV. (Sep. 10, 2020), <https://www.bostonpoliticalreview.org/post/richard-nixon-and-the-origins-of-the-war-on-drugs>.

³⁰ See *infra* Part II, Section A, Subsection 3; Drug Policy Alliance, *An Overdose Death is Not Murder: Why Drug-Induced Homicide Laws Are Counterproductive and Inhumane*, DRUG POLICY ALLIANCE (2009), https://drugpolicy.org/wp-content/uploads/2023/05/Overdose_Death_Is_Not_Murder_Report.pdf Overdose.

DIH statutes.³¹ Therefore, if the drug that is sold, distributed, etc. is the sole cause of the decedent's death, then causation is proven. Conviction rests entirely on the cause of death, and there is no requirement to show the person intended to cause the death of another in order to convict the person of a DIH crime under federal law.³² The Supreme Court in *Banka* sought to address the question of whether the language "death results" from the Anti-Drug Abuse Act could include an instance where the substance was a contributing cause instead of the sole cause.³³ The Court held that, "at least where use of the drug distributed by the defendant is not an independently sufficient cause of the victim's death or serious bodily injury, a defendant cannot be liable under the penalty enhancement provision ... unless such use is a but-for cause of the death or injury."³⁴ It all rests on whether the drug was in the decedents system, and whether it was the sole cause of the death. This federal scheme of limited intent is often similarly implemented on a state level.

States have varying approaches to DIH that mirror or are similar to the federal laws. (See Figure 1). States often place DIH laws within the schemes of depraved heart murder or involuntary manslaughter.³⁵ Some, like Florida, fold DIH into their felony murder rule.³⁶ In Michigan, it doesn't matter that the person to whom drugs were delivered is the person who died, it only matters that a delivery occurred and a death of any person resulted.³⁷ In *People v. Plunkett*, a Michigan Supreme Court case, a defendant was convicted of DIH because he gave

³¹ Valena E. Beety et. al., *Drug Induced Homicide: Challenges and Strategies in Criminal Defense*, 70 S.C. L. REV. 707, 722 (Spring 2019).

³² *Id.* at 725.

³³ Hailey Varner, *Chasing the Deadly Dragon: How the Opioid Crisis is Impacting the Enforcement of Drug-Induced Homicide Statutes*, UNIV. OF ILL. L. R. 1799, 1813-1814 (2019).

³⁴ *Id.* at 1814.

³⁵ Kaitlin S. Phillips, Note, *From Overdose To Crime Scene: The Incompatibility Of Drug-Induced Homicide Statutes With Due Process*, 70 DUKE L.J. 659, 674 (2020).

³⁶ *Id.*

³⁷ Millie Joy Humphrey, *Article: Dead On Arrival: Illinois' Drug-Induced Homicide Statute*, 14 W. MICH. COOLEY J. PRAC. & CLINICAL L. 277, 304 (Spring 2012).

his friend a ride to a drug deal and paid for drugs that his friend later gave to someone else who he was not aware was going to use the drugs, and that person died of an overdose.³⁸ These laws, though they differ, show the common thread of an intent towards the drug distribution for conviction and not the intent to cause the death of another. The national trend has been to limit intent for homicide and focus only on intent to distribute drugs without also considering the relationship between the two parties in the process of distribution.

Some court interpretation on a state level has left more room for leniency towards offenders who were using the drugs alongside the decedent. The New Jersey Supreme Court in *State v. Morrison* stated that for there to be liability for DIH, the key question was "whether defendant distributed the heroin to [the decedent] or whether both jointly possessed the heroin at the time defendant purchased the drug from the street dealer."³⁹ Therefore, if both people jointly possessed it then this would be a sufficient defense to a charge of DIH.⁴⁰ The factors considered for this analysis included: whether the relationship of the parties was commercial or personal, the conduct of the parties, the degree of control exercised by one party over another, whether the parties purchased together, the quantity of drug, and whether one party had sole possession of the substance for a significant length of time.⁴¹ This gives room for the common user and not the high-level drug trafficker and dealer to avoid prosecution from statutes that are meant to target these high-level traffickers and dealers. In contrast, the Ninth Circuit has stated that when one person acquires a drug and physically transfers possession he has operated as a line of transfer to the other users and the users are not "truly equal partners."⁴² This means that a person can be

³⁸ *Id.*

³⁹ Valena E. Beety et. al., *Drug Induced Homicide: Challenges and Strategies in Criminal Defense*, 70 S.C. L. REV. 707, 714 (Spring 2019).

⁴⁰ *Id.*

⁴¹ *Id.* at 715.

⁴² Hailey Varner, *Chasing the Deadly Dragon: How the Opioid Crisis is Impacting the Enforcement of Drug-Induced Homicide Statutes*, UNIV. OF ILL. L. R. 1799, 185-1816 (2019).

guilty of a DIH simply by transferring a drug they had in their possession to another party and the relationship or nature of the transaction is irrelevant. While the *Morrison* defense is a powerful tool to effectuate goals of DIH, which are to target high-level dealers, this is not a consistent doctrine in the U.S. and most states rely on strict enforcement with limited to no defenses, which has continued to be the case as DIH laws have begun to be used with more frequency in the last 15 to 20 years.

3. Resurgence of DIH

Whether state or federal law is in play, there has been a significant rise in the use of DIH laws. While DIH laws were originally created in the 1980s with the Anti-Drug Abuse Act, the use of DIH laws was minimal until recent years.⁴³ (See Figure 5). This can be attributed largely to a significant rise in overdose deaths.⁴⁴ (See Figure 2). From 2014 to 2018 overdose deaths increased from 45,055 to 67,367, much of this attributed to opioids like fentanyl.⁴⁵ Additionally, between 1999 and 2011 oxycodone consumption increased almost 500 percent.⁴⁶ This increase mirrors increased news coverage nationwide about individuals charged with DIH, which rose from 363 in 2011 to 1178 in 2016—a 300 percent increase.⁴⁷ Between 2017 and 2019, 338 people were convicted of or plead guilty to DIH in federal court, a 57 percent increase from prior years.⁴⁸ From 2011 to 2016, the mentions of DIH prosecution including fentanyl specifically

⁴³ Drug Policy Alliance, *An Overdose Death is Not Murder: Why Drug-Induced Homicide Laws Are Counterproductive and Inhumane*, DRUG POLICY ALLIANCE (2009), https://drugpolicy.org/wp-content/uploads/2023/05/Overdose_Death_Is_Not_Murder_Report.pdf Overdose.

⁴⁴ *Id.*

⁴⁵ Kaitlin S. Phillips, Note, *From Overdose To Crime Scene: The Incompatibility Of Drug-Induced Homicide Statutes With Due Process*, 70 DUKE L.J. 659, 670 (2020).

⁴⁶ *Id.*

⁴⁷ *Id.* at 673.

⁴⁸ Alyssa Mallgrave, Article: *Purely Local Tragedies: How Prosecuting Drug-Induced Homicide In Federal Court Exacerbates The Overdose Crisis*, 13 DREXEL L. REV. 233, 238 (2020).

increased 141 percent.⁴⁹ For many states, as the opioid epidemic has increased, public officials have begun to use DIH as a tool to combat opioid use.⁵⁰ DIH laws often are, at least at the federal level, meant to target drug “kingpins,” with the logic being that if these people are arrested, opioid dealing will decrease and thus deaths will decrease.⁵¹ But many prosecutors and public officials see the use of DIH as a support system to the public health response and a tool to combatting overdose deaths.⁵² As a result, DIH laws have evolved not only as a means to target “kingpins” and high-level dealers as is the intent of the Anti-Drug Abuse Act, but also as a tool to combat overdose deaths.

Drug policy in general in the U.S. has followed a similar trend as DIH in its targeting of the user to reduce deaths.⁵³ In the 2022 strategic plan from the Department of Justice (DOJ), two of their main strategies to combat drug use were to take down drug trafficking organizations and reduce death by drugs.⁵⁴ DOJ stated it would target drug traffickers from an international to local distribution network level.⁵⁵ The local distribution network language arguably leaves room for the enforcement of charges of DIH against low level dealers and other users. The strategy also includes that, “[a]s part of our effort to address the opioid epidemic, we will focus our attention on the diversion of pharmaceutical controlled substances to illegitimate consumers.”⁵⁶ Drug prosecution then not only works to combat high-level drug traffickers but is being used as a

⁴⁹ Drug Policy Alliance, *An Overdose Death is Not Murder: Why Drug-Induced Homicide Laws Are Counterproductive and Inhumane*, DRUG POLICY ALLIANCE (2009), https://drugpolicy.org/wp-content/uploads/2023/05/Overdose_Death_Is_Not_Murder_Report.pdfOverdose.

⁵⁰Kaitlin S. Phillips, Note, *From Overdose To Crime Scene: The Incompatibility Of Drug-Induced Homicide Statutes With Due Process*, 70 DUKE L.J. 659, 662-663 (2020).

⁵¹ *Id.* at 663-664.

⁵² *Id.* at 670-672; Taleed El-Sabwa, et. al., *Drug Induced Homicide Laws and False Beliefs About Distributors: Three Myths That Are Leaving Prosecutors Misinformed*, 60 AM. CRIM. L. REV. 1381, 1385 (Fall 2023).

⁵³ *Objective 2.5: Combat Drug Trafficking and Prevent Overdose Deaths*, U.S. Dept. of Just. (last visited Mar. 25, 2024), <https://www.justice.gov/doj/doj-strategic-plan/objective-25-combat-drug-trafficking-and-prevent-overdose-deaths>.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

means to combat overdose deaths by “illegitimate consumers.”⁵⁷ This manifests in prosecuting users and low-level dealers alongside high-level traffickers, which is further exacerbated by DIH.

Drug policy in the U.S. centers around using prosecution as a means of targeting overdose deaths and reducing drug trafficking. In general, the goal appears to be to reduce overdose deaths by removing drugs from society. This goes hand in hand with the resurgence of DIH laws, which are being used to punish those that contribute to overdose deaths in the hopes of deterring drug use. But the resulting impacts of DIH laws, as seen later in Section III, may not be as effectively combatting overdose deaths or targeting high-level traffickers as it aims to be.

B. Swedish Drug Policy

Drug policy in Scandinavian countries closely mirrors the U.S. in many ways.⁵⁸ The “powerful moralistic temperance movements”⁵⁹ of many Scandinavian countries with the “American drug policy that came to dominate the international scene”⁶⁰ has resulted in strong similarities. The Swedish approach is aggressive, commonly referred to as moving towards a “drug free” Sweden.⁶¹ Sweden’s approach of complete restriction over legalization has resulted in penal control increases since the 1960s.⁶² The number of police officers working on drug crimes has doubled since the 1990s.⁶³ The trends in Swedish drug policy can be better understood by looking at a general evolution of drug policy from the 1960s to the modern day,

⁵⁷ *Id.*

⁵⁸ Hanns von Hofer, *Punishment and Crime in Scandinavia: 1750-2006*, 40 *CRIME & JUST.* 33, 95 (2011).

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ Per Ole Träskman, *Drug Control and Drug Offenses in the Nordic Countries: A Criminal Political Failure too Often Interpreted as a Success*, *J. OF SCANDINAVIAN STUD. IN CRIMINOLOGY AND CRIME PREVENTION* 236, 239 (2004).

⁶² Henrik Tham, *Swedish Drug Policy and the Vision of a Good Society*, 6 *J. OF SCANDINAVIAN STUD. IN CRIMINOLOGY AND CRIME PREVENTION* 57 (2005).

⁶³ *Id.* at 58.

including its impact on the prosecutorial service, and analyzing the specific language of the Narcotics Drug Act.

1. Origins and Evolution of Swedish Drug Policy

Sweden has seen a consistent, increased focus on and harsher policy towards drug use since the 1960s. In January 1966, the Narcotic Drug Committee was created.⁶⁴ The committee put out a report that focused on legal aspects of control and this report was the basis for the Narcotics Drug Act of 1968.⁶⁵ “The [Narcotics Drug Act] made the transfer, unlawful manufacture, acquisition, and possession of drugs a punishable offence and lays down penalties for drug-related crime.”⁶⁶ In December 1968, the National Police Commission and the regional chiefs of police in Sweden met and agreed that “the efforts of the Swedish police against illicit traffic in drugs should be given the highest priority. The Swedish Government was notified of the decision and given information regarding developments in illicit drug traffic.”⁶⁷ Swedish law enforcement became the primary mechanism for combatting drug use, with powerful laws behind it and more to come.

Swedish law became more focused on the user into the 1970s and 1980s. In 1969, the Swedish government approved a ten-point program to combat drug use, which included increasing maximum punishment and trying to promote Swedish legal schemes on an international level.⁶⁸ As Sweden moved into the 1970s and 1980s, Swedish drug policy modeled itself heavily on the work of Nils Bejerot, whose primary focus was on a drug free society.⁶⁹

⁶⁴ U.N. Office on Drugs and Crime, *Sweden’s Successful Drug Policy: A Review of the Evidence*, 9 (Feb. 2007), https://www.unodc.org/pdf/research/Swedish_drug_control.pdf.

⁶⁵ *Id.* at 10.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.* at 10-11.

⁶⁹ *Id.* at 12.

Bejerot also thought that Sweden should have a strict drug policy and that it had to target drug users because users were an irreplaceable part of the chain, unlike drug dealers, and so they were the chokepoint for creating a drug free society.⁷⁰ He believed Sweden needed to focus on three goals:

(i) to increase prevention and treatment activities as well as to criminalize not only drug trafficking but also drug use (ii) to target cannabis use as the first drug in the chain towards drug abuse (based on the ‘gateway’/‘stepping stone’ hypotheses); and (iii) to create a national consensus on drug policies across party lines, supported by civil society pressure groups.⁷¹

Bejerot shifted the narrative to focusing on the drug user and creating a drug free society by punishing this same user. At same time Bejerot was becoming popular, there was an increase in heroin use throughout the 1970s, only raising national pressure for stricter drug enforcement that became a politically unified front by the 1990s and 2000s.⁷²

Alongside the thinking of Bejerot, much of this shift in Swedish law can be attributed to a changing political culture in Sweden. In the 1970s, drug policy became an increasingly central position.⁷³

Because of the strong focus on narcotic drugs—and thus no longer on the alcohol and drug question as a single integrated issue as it had been viewed during the 1970s, the Conservatives gained momentum. Since the Conservatives faced no real competition on the law-and-order question, the Center-Liberals invited the Conservatives to take the hegemonic position over the political right wing. As a consequence, the Center-Liberals lost the political strength to support not only the withering temperance movements but also the other social groups who were fighting the symbolic crusade described above.⁷⁴

⁷⁰ *Id.* at 13.

⁷¹ *Id.*

⁷² *Id.*

⁷³ Lief Lenke & Boereje Olsson, *Swedish Drug Policy in the 21st Century: A Policy Model Gone Astray*, 582 THE ANNALS OF THE AMERICAN ACAD. OF POL. AND SOC. SCI. 64, 67 (Jul., 2002).

⁷⁴ *Id.*

As the political parties became more homogenous on the issue of drug use and conservative ideas around drug use gained momentum, so did stricter enforcement of drug policy that focused primarily on the user.

The Drug Narcotics Act was amended in 1973, and the maximum penalty for serious offenses was raised to 10 years. A parliamentary bill was introduced in 1978 aiming to eliminate all drug use, reading “[d]rug abuse can never be accepted as part of our culture.”⁷⁵ The bill was approved by Parliament, and Parliament stated that, “the basis for the struggle must be that society cannot accept any other use of narcotic drugs than what is medically motivated. All other use is abuse and must forcefully be opposed.”⁷⁶ It had become clear that Parliament had adopted Bejerot’s way of thinking, and the focus was on creating a drug free society by targeting users. The passage of this bill would lead to stricter limits on discretion of prosecutors as a mean to forcefully oppose drug use.

The prosecutors and their discretion plays an important role in the Swedish drug scheme, and the decision to prosecute is a complicated matter. Chapter 20, Section 6 of the Swedish Code of Judicial Procedure (SCJP) states that "unless otherwise prescribed, prosecutors must prosecute offenses falling within the domain of public prosecution."⁷⁷ “This is generally understood to mean that the prosecutor is obliged to initiate proceedings whenever he or she—on objective grounds—believes that an indictment will lead to a conviction.”⁷⁸ In Sweden, there is no system of plea bargaining, but a prosecutor may end a preliminary investigation without taking a case to

⁷⁵ U.N. Office on Drugs and Crime, *Sweden’s Successful Drug Policy: A Review of the Evidence*, 13 (Feb. 2007), https://www.unodc.org/pdf/research/Swedish_drug_control.pdf

⁷⁶ *Id.*

⁷⁷ Rättegångsbalken [RB] [Code of Judicial Prudence] 20:6 (Swed.) https://www.government.se/contentassets/a1be9e99a5c64d1bb93a96ce5d517e9c/the-swedish-code-of-judicial-procedure-ds-1998_65.pdf

⁷⁸ Petter Asp, *Article: The Prosecutor in Swedish Law*, 41 *Crime & Just.* 141, 147-148 (2012).

trial by issuing a penal order or waiving prosecution.⁷⁹ In Chapter 20, Section 7 of SCJP included special waiver rules on prosecution.⁸⁰

The general requirement for a waiver of prosecution is that such a measure would not disregard any compelling public or private interest. If that precondition is fulfilled, a waiver is allowed if the presumed punishment will be modest or if the person will be subject to other punishment or certain other measures.⁸¹

This allows Swedish prosecutors to waive charges either entirely or conditionally when there is not compelling public or private interest.⁸² However, because of the changing political nature in Sweden, prosecutors have been directed to not drop drug offenses, limiting the discretion of prosecutors to be able to drop smaller offenses. Initially drug use was treated as a lighter offense, and often prosecutors would drop charges when the amount of drugs was small, however:

From 1972 onwards, prosecutors could waive charges for possession of amounts equaling up to one week's use. Nevertheless, drug abuse continued unabatedly which, possibly, led to changed attitudes within society. Very soon, some thought society had a duty to intervene against individual abusers whose lives were in acute danger and to take more vigorous action against all forms of drug trafficking.⁸³

This attitude was reflected in directives given to prosecutors. Whereas before prosecutors often dropped charges where possession was up to one week's use, in 1980, new directives were given that prosecutors should not waive charged unless "the amount possessed for personal use was so small that it could not be subdivided, that is, at most one dose of cannabis or one dose of central nervous system stimulants."⁸⁴ Charges that involve heroine, morphine, opium, or cocaine were

⁷⁹ *Id.* at 148.

⁸⁰ Rättegångsbalken [RB] [Code of Judicial Prudence] 20:7 (Swed.)
https://www.government.se/contentassets/a1be9e99a5c64d1bb93a96ce5d517e9c/the-swedish-code-of-judicial-procedure-ds-1998_65.pdf

⁸¹ Per Ole Träskman, *Drug Control and Drug offenses in the Nordic Counties: A Criminal Political Failure Too Often Interpreted as a Success*, 5 J. OF SCANDINAVIAN STUD. IN CRIMINOLOGY AND CRIME PREVENTION 236, 238 (2004).

⁸² Erik Luna & Marianne Wade, *Prosecutorial Power: A Transnational Symposium: Prosecutors and Judges*, 67 WASH & LEE L. REV. 1413, 1445 (Fall 2010).

⁸³ U.N. Office on Drugs and Crime, *Sweden's Successful Drug Policy: A Review of the Evidence*, 13 (Feb. 2007), https://www.unodc.org/pdf/research/Swedish_drug_control.pdf

⁸⁴ *Id.*

directed to never be waived at all.⁸⁵ Following this, in 1981, maximum prison sentences for non-serious offenses were raised from two to three years.⁸⁶ In 1988, drug abuse itself became a punishable crime via fine, which Swedish government officials believed would prevent drug use through personal punishment.⁸⁷ In 1993, drug use became an imprisonable offence.⁸⁸ Drug prosecution was ramped up with prosecutors having less discretion to drop charges, and this was met with higher sentences and stricter offenses, which would continue to be supported in years to come.

The theory of a drug free society continued into the next decade. The 1998 Drug Commission continued to enforce the idea of a drug free society and purportedly found no “arguments or facts to suggest that a policy of lowering society’s guard against drug abuse and drug trafficking would do anything to improve matters for individual abusers or for society as a whole.”⁸⁹ Pushback towards criminalizing drug abuse was not seriously considered by the political powers at large, and the commission saw a focus instead on diverting resources to prison and “intensification of its measures to combat drug abuse.”⁹⁰ The Swedish government had become unified for the most part on the notion of combatting drug use through harsher enforcement.

By the 1990s, the government had solidified an approach that went about enforcing a drug free society by focusing primarily on the drug user. In a 1997 communication, the “Swedish government ha[d] declared in an official account to the Parliament, that this superior and visionary goal (‘a drug free society’) can be subdivided to three measurable units: reducing new

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.* at 16.

⁸⁸ *Id.* at 17.

⁸⁹ *Id.*

⁹⁰ *Id.* at 18.

recruitment into drug abuse, inducing more drug abusers to stop using drugs, and reducing the supply of drugs.”⁹¹ This focus on reduction of drug use and stopping the supply of drugs via the user not through treatment but through punishment mirrors the U.S. approach.

In April 2008, a new National Action Plan of Drugs was unanimously endorsed by Parliament, in which all parties agreed to keep focusing on a drug free society by both targeting supply and demand.⁹² The narrative continued to be the same, emphasizing that “[n]arcotic drugs should never be allowed to threaten the health, the quality of life, and the security of the individual nor the general welfare or the development of democracy. The goal is a society free of drugs.”⁹³ Consistently since the 1960s, Sweden had seen an ever-restrictive policy of combatting drugs by eliminating drugs and doing so by penalizing the user.

A general timeline of the shift from the late sixties to the late eighties can be found below:⁹⁴

Year	Action
1968	Narcotics Drug Act adopted.
1969	Maximum sentence raised to 4 years for serious drug offenses.
1969	Maximum sentence raised to 6 years for serious drug offenses.
1972	Maximum sentence raised to 10 years for serious drug offenses.

⁹¹ Per Ole Träskman, *Drug Control and Drug Offenses in the Nordic Countries: A Criminal Political Failure Too Often Interpreted as a Success*, 5 J. OF SCANDINAVIAN STUD. IN CRIMINOLOGY AND CRIME PREVENTION 236, 239 (2004).

⁹² U.N. Office on Drugs and Crime, *Sweden’s Successful Drug Policy: A Review of the Evidence*, 20 (Feb. 2007), https://www.unodc.org/pdf/research/Swedish_drug_control.pdf

⁹³ *Id.*

⁹⁴ U.N. Office on Drugs and Crime, *Sweden’s Successful Drug Policy: A Review of the Evidence*, 17 (Feb. 2007), https://www.unodc.org/pdf/research/Swedish_drug_control.pdf

1980	Directives given to prosecutors discouraging waiving charges of certain drug offenses unless they are for possession of indivisible amounts of certain drugs. All prosecution of certain substances like opioids restricted from waiving.
1981	Maximum sentence for non-serious offenses raised to from 2 to 3 years.
1985	Prison term for minor drug offenses raised to 8 months.
1988	Drug abuse itself becomes a punishable crime.

2. *Narcotics Drug Act*

While Sweden has moved towards an increasingly harsher enforcement of drug policy, it does have some leeway in deciding how to punish people Under §1 of the Narcotics Drug Act, a person commits a crime hen that person:

1. hands over narcotics, 2. produces narcotics intended for abuse, 3. acquires narcotics for the purpose of transfer ... 5. possesses, uses, or takes another position with narcotics.”⁹⁵ However, under §2, if one of the above-mentioned crimes in “the nature and quantity of narcotics and other circumstances is considered minor, minor drug offenses are sentenced to a fine or imprisonment for a maximum of six months.”⁹⁶

This means that while there is less ability on the prosecutors’ end to not charge, there is still some allowance within the judiciary to determine the nature of the offenses and minimize sentences in order to separate the common user from the drug trafficker. Overall, the trajectory of Swedish drug law has been to give less discretion to prosecutors to waive offenses and push

⁹⁵ Narkotikastrafflag (1968:64) (Swed.), https://www.riksdagen.se/sv/dokument-och-lagar/dokument/svensk-forfattningssamling/narkotikastrafflag-196864_sfs-1968-64/.

⁹⁶ *Id.*

the narrative that the path to a good society is a drug free society, which starts with combatting the user via punishment.

The Swedish legal scheme around drug use has progressively moved to a model that in many ways mirrors the U.S. system, which also relies on heavy enforcement, comparatively harsh sentencing, political goals of creating drug free societies, and reliance on prosecutorial services to implement the goals of a drug free society. Sweden has remained distinct from the U.S. in its unified front to drug policy, its reduction of sentencing for minor offenses, and its limited discretion to prosecutors. To understand what DIH laws might predict for Swedish policy in the future, this paper seeks to understand the current implications and effectiveness of DIH laws in the U.S.

III. DIH Results and Impacts in the US

U.S. DIH policy as currently implemented has rendered results that often frustrate the purported goals of DIH to target high-level drug traffickers and reduce overdose deaths. Much of this can be attributed to the legal structures in the U.S. and how these laws disproportionality impact different communities. The results of DIH show up most prominently in its relation to plea bargaining, the discrepancy between who is meant to be charged and who is charged, the divide between urban and rural prosecution, and its effect on Good Samaritan laws.

A. Challenges in Charging and Plea Bargains

DIH laws, both on a federal and state level, often rest on showing that a person died specifically because of the drug that was given to them. As this is difficult to prove, prosecutors must often either rely on scientific evidence from a toxicologist or medical examiner or the plea bargaining system if they have little evidence.⁹⁷ At the federal level, prosecutors do not have to show intent to murder, but only intent to distribute, so the prosecution itself comes down to the distribution of the drug. But because the defendant is not accountable if any other drug is found in the decedents system, (but-for in *Burrage*) the coroner, pathologist, or toxicologist who determines what drugs are in the decedents system plays a critical role in proving intent.⁹⁸ When it is harder to get this scientific evidence (See Part III, Section C), prosecutors often have to use DIH laws as a plea bargaining tool to get people to agree to lesser offenses.⁹⁹ The legal question of but-for cause rarely actually makes it to litigation, as high sentencing stakes mean that just the threat of DIH often leads to a plea bargain.¹⁰⁰ This means that DIH, which is meant to combat

⁹⁷ Valena E. Beety, *Prosecuting Opioid Use Punishing Rurality*, 79 OHIO STATE L. REV., at 2 & 19.

⁹⁸ *Id.*

⁹⁹ *Id.* at 3.

¹⁰⁰ *Drug Induced Homicide Prosecutions*, FAIR & JUST PROSECUTION 1, 7 (2022)

<https://fairandjustprosecution.org/wp-content/uploads/2022/07/FJP-Drug-Induced-Homicide-Brief.pdf>.

overdose deaths and target high-level traffickers is instead being used as a tool to get people to plead to lesser offenses.

B. Who is Charged

In the use of DIH laws, it falls to the prosecutor to prove the defendant caused the death of another person.¹⁰¹ While the purported goal of these laws is to target “kingpins” and high-level drug traffickers, because the distinction between the seller and the common user is often difficult, it falls to the prosecutor to decide how the use DIH laws to apprehend the intended persons.¹⁰² Because the distinction between distributor and user is difficult to make, this discretion often ends up with prosecutors charging the common user, and not the actual dealer.¹⁰³ “Nationally, a study of media reports of drug-induced homicide prosecutions between 2000 and 2016 revealed that half of those charged were social contacts of the deceased, not traditional ‘dealers,’ and those who were deemed ‘dealers’ were at the very bottom of the trafficking chain.”¹⁰⁴ Further endorsing the social contacts theory, another study found that “[h]alf of people charged with drug-induced homicide are friends or acquaintances of the deceased, sharing the drug themselves.”¹⁰⁵ While the general approach to DIH laws is to target dealers, this is not who is prosecuted for these crimes. It then falls to the prosecutor to enforce these public interest goals, but, as often seen, these statutes end up prosecuting the user, not the dealer.¹⁰⁶ This is

¹⁰¹ Hailey Varner, *Chasing the Deadly Dragon: How the Opioid Crisis is Impacting the Enforcement of Drug-Induced Homicide Statutes*, UNIV. OF ILL. L. R. 1799, 1823 (2019).

¹⁰² Drug Policy Alliance, *An Overdose Death is Not Murder: Why Drug-Induced Homicide Laws Are Counterproductive and Inhumane*, DRUG POLICY ALLIANCE (2009), https://drugpolicy.org/wp-content/uploads/2023/05/Overdose_Death_Is_Not_Murder_Report.pdfOverdose/

¹⁰³ Hailey Varner, *supra* note 101, at 1819.

¹⁰⁴ Drug Policy Alliance, *supra* note 102.

¹⁰⁵ Leo Beletsky, *Americas Favorite Antidote: Drug-Induced Homicide in the Age of the Overdose Crisis*, 19 UTAH L. REV. 833, 839 (2019); *see also* Valena Beety et al., *The Drug-Induced Homicide Defense Toolkit 2* (Ohio State Pub. Law, Working Paper No. 467, 2018) [hereinafter *Drug-Induced Homicide Defense Toolkit*], https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3265510 [<https://perma.cc/4VB3-C5TY>] (living document).

¹⁰⁶ Hailey Varner, *supra* note 101, at 1819.

further exacerbated with the limited tools that prosecutors have to properly charge DIH laws that often show up most predominantly in rural communities.

C. Rural and Urban Divide

Prosecutors needing to rely so heavily on scientific evidence to show the drug is the only one in the decedent's system and prove but-for cause creates discrepancies in the rural and urban divide. Often coroners in rural areas do not have the capacity to do full toxicology reports necessary to prove but-for cause required by *Burrage* and many state laws, so prosecutors must rely on plea bargains instead due to a lack of evidence.¹⁰⁷ Medical examiner systems with trained professionals are usually in cities, while coroners, who are often elected and frequently untrained, are generally found in rural communities.¹⁰⁸ Coroners are often overwhelmed by the amount of overdose deaths that they are faced with and are put in difficult situations of scientifically documenting deaths and doing full toxicologist reports without the necessary resources.¹⁰⁹ Often left without clear toxicology reports necessary for the *Burrage* test or similar but-for causation requirements, the death certificate by county coroners that indicate homicide rather than accidents are frequent substitutes for prosecutors in rural counties.¹¹⁰ This results in two things: 1) prosecutors develop a pattern of using often unreliable evidence to convict a defendant of a DIH,¹¹¹ and 2) prosecutors often meet with a defendant pre-arraignment to work out a deal using the threat of a homicide charge to get defendants to plead to lesser offenses because there is a lack of scientific evidence.¹¹² Once again, the lack of intent needed leads to an

¹⁰⁷ Valena E. Beety, *Prosecuting Opioid Use Punishing Rurality*, 79 OHIO STATE L. REV., at 2-3 & 19 .

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ Alyssa Mallgrave, *Article: Purely Local Tragedies: How Prosecuting Drug-Induced Homicide In Federal Court Exacerbates The Overdose Crisis*, 13 DREXEL L. REV. 233, 244 (2020).

¹¹¹ Valena E. Beety, *supra* note 108, at 12.

¹¹² *Id.*

application of DIH laws that results not in targeting high-level dealers, but users in rural communities disproportionately.

D. Good Samaritan Laws

Good Samaritan laws limit criminal immunity for those that report an overdose to law enforcement and emergency services.¹¹³ New Mexico was the first state to pass an overdose Good Samaritan law, and since then forty states and the District of Columbia have passed similar statutes.¹¹⁴ (See Figures 1, 3, 4). As of 2021, only three states—Delaware, Rhode Island, and Vermont—provide immunity from DIH charges for those seeking assistance with an overdose.¹¹⁵ This means where you call is everything.¹¹⁶ This risk based on where the conduct occurs makes many unwilling to call for fear of getting in trouble, especially when considering the relative publicization of these laws’ existence, which is minimal, compared to the large publicization DIH laws.¹¹⁷ The medical community has noted that DIH laws could reduce the likelihood of calling 911, and medical providers along with advocacy groups have expressed concern about the insufficiency of Good Samaritan laws in contrast DIH laws.¹¹⁸ One incarcerated individual, when asked about the potential effect of DIH laws dissuading people from calling 911, said, “[h]onestly, I think it would be worse. Because less people wouldn’t want to call it in if someone

¹¹³ Kaitlin S. Phillips, Note, *From Overdose To Crime Scene: The Incompatibility Of Drug-Induced Homicide Statutes With Due Process*, 70 DUKE L.J. 659, 698 (2020).

¹¹⁴ Jennie Miller, *Article: Save A Friend's Life Or Risk Your Freedom: The Dilemma Too Many People Face When Witnessing An Overdose*, 34 J. Civ. Rts. & Econ. Dev. 351, 374.

¹¹⁵ *Good Samaritan Fatal Overdose Prevention and Drug-Induced Homicide: Summary of State Laws*, LEGISLATIVE ANALYSIS AND PUBLIC POLICY ASSC. (Aug. 2023), at 5, <https://legislativeanalysis.org/wp-content/uploads/2023/08/Good-Sam-Fatal-Overdose-Prev-and-Drug-Induced-Homicide-Summary-of-State-Laws.pdf>.

¹¹⁶ Jennie Miller, *supra* note 114, at 357.

¹¹⁷ Valena E. Beety et. al., *Drug Induced Homicide: Challenges and Strategies in Criminal Defense*, 70 S.C. L. REV. 707, 738 (Spring 2019); Kaitlin S. Phillips, Note, *From Overdose To Crime Scene: The Incompatibility Of Drug-Induced Homicide Statutes With Due Process*, 70 DUKE L.J. 659, 698 (2020).; Valena E. Beety et. all, *supra* note 117, at 737.

¹¹⁸ Peterson M, Rich J et.al., *One Guy Goes to Jail, Two People Are Ready to Take His Spot: Perspectives on Drug-Induced Homicide Laws Among Incarcerated Individuals*, 70 INT. J. DRUG POLICY 47-53 (Aug. 2019).

overdosed because they're afraid of going to jail. So, people are just going to be dying instead of overdosing [non-fatally]."¹¹⁹ This, in combination with the strong publicization of DIH laws, means that many are deterred from helping.¹²⁰ Because DIH often dissuade people from calling 911, they are associated with an increased risk in overdose as people do not receive the lifesaving medical treatment they need.¹²¹ While DIH laws are in part meant to combat overdose deaths, they appear to be doing the opposite, enhancing people's fear of long prison sentences for homicide where they had no intent to cause the death of the other person, and keeping them from calling 911.

E. Implications

While the U.S. has attempted to use DIH to combat drug trafficking and overdose death, the results appear to not align with the goals. Prosecutors, having limited tools, try their best to distinguish the dealer and the user, but the difficulty of this, combined with the limited intent needed for DIH that relies on but-for causation, often results in charging friends and family, using DIH laws as threat for lesser pleas, and discrepancies in charging in rural and urban areas. DIH laws also often undermine laws that are meant to avoid overdose like Good Samaritan laws. DIH laws, because of the limited intent, harsh sentencing, and pressure upon prosecutors to charge people, do not effectuate the goals of combatting drug trafficking by going after high-level traffickers and reducing overdose deaths. These shortfalls can shed light on potential areas where Sweden could run into similar issues.

¹¹⁹ *Id.*

¹²⁰ Valena E. Beety et. al., *supra* note 117, at 723.

¹²¹ *Drug Induced Homicide Prosecutions*, FAIR & JUST PROSECUTION 1, 3 (2022)

<https://fairandjustprosecution.org/wp-content/uploads/2022/07/FJP-Drug-Induced-Homicide-Brief.pdf>.

IV. Comparison of U.S. and Swedish Drug Policy

The U.S. and Sweden mirror each other in results of harsher sentencing, more prosecution, and stricter laws, but differ in their approach to the prosecutor. By looking at the two countries in relation to their laws, their goals, and political climates; the pressure placed on and discretion given to prosecutors; the harsher sentencing used and its effect on deterring the rates of overdose deaths; and the overall drug related spending in each country, the effectiveness of both systems can be better understood, and the implications for Swedish drug policy based on lessons learned from U.S. DIH laws. The comparison implicates a possibility for Sweden to create similar laws to U.S. DIH, which tie harsher sentences and criminal liability to drug offenses to try and deter drug trafficking and drug use.

A. Laws

DIH laws rely on strict liability, and DIH laws, if proven, require strict mandatory minimums of 20 years up to life.¹²² DIH laws on a federal level and in most states do not allow for any reduction of sentencing for small amounts of drugs; it only matters that the person distributed the drugs that resulted in death and that drugs can be proven as the cause of death.¹²³ If the drug that was distributed or given to the decedent by the defendant can be proven to be the but-for cause of the death under *Burrage* and *Banka*, this is all that's needed to charge a person with homicide.¹²⁴

There is no legal scheme in Sweden that directly compares to DIH, as no strict liability offenses are attached to drug crimes. The fact that Sweden has a crime for drug abuse is the

¹²² See *supra* note 16 and accompanying text.

¹²³ See *supra* notes 31-32 and accompanying text.

¹²⁴ See *supra* note 31-34 and accompanying text.

closest to the U.S. in the impact of the laws.¹²⁵ The act itself of using a drug is what makes the user liable, similar to the idea that using and distributing the drug to another is what makes the person liable under DIH when death results even though they did not intend to kill. While Sweden has no judicial ruling like *Burrage* and *Banka* because it has no DIH, the rationale in those cases, which was to focus solely on the act of drug distribution to implicate liability for homicide, is similar to the Swedish focus on drug users and drug abuse to implicate guilt enough for relatively heavy sentencing.¹²⁶ Sweden, in focusing on the drug use to implicate guilt, indicates its willingness to create laws that do put harsher sentences on the user as punishment for the use itself, which could result in something similar to DIH where further crimes are attached to use to try and deter the user through punishment.

Sweden is so focused on the idea of a drug free society and targeting the user to stop the drug chain that laws that trend toward DIH, which have resulted in punishing the user to curtail overdose deaths, are not far off. Sweden has already laid the foundation by making drug abuse illegal, and it would not be a drastic political leap to create laws that punish one user for their effect on another user. But, unlike the U.S., which purports to use DIH as a means to target drug traffickers, the united front in Sweden on targeting the user to stop drug use means that defenses to crimes like DIH would be less likely to appear in Sweden than they do in the U.S.

The U.S. has vast variation in its laws, and one of the best legal defenses appears in New Jersey. If a defendant is charged in New Jersey, a defendant who was a joint user could use the *Morrison* defense, which helps to distinguish the user from the high-level trafficker to better effectuate the purported legislative goals of DIH in targeting high-level dealers.¹²⁷ If Sweden did

¹²⁵ See *supra* note 87 and accompanying text.

¹²⁶ See *supra* notes 87-92 and accompanying text.

¹²⁷ See *supra* notes 39-41 and accompanying text.

create a model similar to that of the U.S., it is unlikely a defense like *Morrison* would occur, as prosecutors have been directed to not drop charges against users, and the political goals of Sweden are to target the user. As such, a joint defense that is meant to distinguish users from high-level trafficker would be less likely to be interpreted as the goal of Parliament and therefore unlikely to create a similar defense.

While the political goals of the two countries differ at least on their face, the focus on targeting the user has resulted in both countries.

B. Goals and Political Climate

The way that the law has evolved in both countries to target overdose deaths and to punish people, not the broader system, is similar. In the U.S., while initially DIH laws were created to combat high-level drug traffickers, the underlying goal, at least on a federal level, was to take drugs out of the U.S. entirely, as stated by Nixon, including targeting the user.¹²⁸ With the Anti-Drug Abuse Act, this was a reactionary measure to an overdose death, although its purported goal was to target high-level traffickers.¹²⁹ The dominant use of DIH to actually target low-level users has clearly played out in the way that DIH laws have resurfaced. DIH laws were not really used the first 15 to 20 years of their existence; its only as overdose deaths from drugs like heroin and other opiates began to rise that DIH saw a resurgence.¹³⁰ The focus of DIH laws has shifted from arguably targeting higher level traffickers to low-level dealers and users. This can be seen in the fact that over half those charged with DIH are family or friends of the deceased, and many prosecuted are low-level dealers.¹³¹

¹²⁸ See *supra* note 15 and accompanying text.

¹²⁹ See *supra* notes 22-26.

¹³⁰ See *supra* Part II, Section A, Subsection 3.

¹³¹ See *supra* Part II, Section B.

Sweden has had a focus on targeting the user more directly than the U.S. in the last 50 years. Through the conservative movement and Nils Bejerot, the focus was, in plain language, not on the trafficker, but on the user.¹³² Targeting the user was seen as the best means of stopping the drug chain, and as more drug use in Sweden occurred, more tightening of and use of the narrative of a drug free Sweden was enforced.¹³³ While the U.S. on its face appears to differ from Sweden in its political goals, the origin of both laws find themselves in the user, in the U.S. as a reactionary measure to overdose deaths of users and in Sweden as a direct connection between stopping the user and stopping the drug supply. Because of this similarity, the laws in the U.S. can be used as a predictive tool to show what harsher enforcement and stricter liability does in combatting overdose deaths when the focus is on the user. The political influence most often finds itself in the limits or non-limits placed on prosecutors in both countries, and the similar results that occur from their different approaches.

C. The Pressure of the Prosecutor and the Means of Discretion

Prosecutors play a key role in both systems. In the U.S., prosecutors have broad discretion when it comes to drug laws, whereas in Sweden they have limited discretion.

Prosecutors' discretion along with the discretion of the judiciary plays a key role in the administration of justice in the U.S.. Prosecutors are given broad discretion in charging DIH laws, and this is not just on the federal level. In Oregon, for example, a spokesperson for the Multnomah County District Attorney said that if a pending DIH bill became law, prosecutors would have both a "legal and ethical discretion" when implementing it.¹³⁴ However, this discretion, mixed with the necessary proof of but-for cause required for DIH, makes this broad

¹³² See *supra* note 70 and accompanying text.

¹³³ See *supra* Part II, Section B.

¹³⁴ HB. 2602, 81st Leg. Assemb. (Or. 2021).

discretion a difficult line to tow. Because but-for causation is so hard to prove, DIH charges rarely actually make it to litigation, as high sentencing stakes mean that just the threat of DIH often leads to a plea bargain.¹³⁵ Prosecutors are given this discretion to go for plea bargains and are often pressured to with limited resources to show but-for cause.¹³⁶ As a result, DIH laws are not being used to target high-level drug traffickers but as an enforcement tool to pressure users and low-level dealers into pleading to lesser offenses.¹³⁷ When prosecutors do charge people, they are also given this discretion, but the difficulty to distinguish a high-level trafficker from a common user or dealer results in prosecutors charging low-level dealers and friends and family of the user.¹³⁸ This does not effectuate either of the purported main goals of DIH. First, it does not target high-level drug traffickers. Second, it doesn't deter users and combat overdose deaths, and the harsh sentences are not affecting the community well, as one prisoner stated, “[o]ne guy goes to jail, two people are ready to take his spot. Not at all. It [DIH] is not going to deter nothing.”¹³⁹ The mechanism of deterrence that is meant to occur through DIH appears to not be effective in this goal.

In the U.S., increasing political pressure due to rising opioid deaths has led to the increased use of discretion to charge DIH laws, and some prosecutors support using DIH in large numbers since the opioid epidemic.¹⁴⁰ Some law enforcement officers and legislators are

¹³⁵ *Drug Induced Homicide Prosecutions*, FAIR & JUST PROSECUTION 1, 7 (2022)

<https://fairandjustprosecution.org/wp-content/uploads/2022/07/FJP-Drug-Induced-Homicide-Brief.pdf>.

¹³⁶ See *supra* notes 97-98 and accompanying text.

¹³⁷ See *supra* notes 100, 102 and accompanying text.

¹³⁸ See *supra* note 97 and accompanying text.

¹³⁹ Peterson M, Rich J et.al., *One Guy Goes to Jail, Two People Are Ready to Take His Spot: Perspectives on Drug-Induced Homicide Laws Among Incarcerated Individuals*, 70 INT. J. DRUG POLICY 47-53 (Aug. 2019).

¹⁴⁰ Kaitlin S. Phillips, Note, *From Overdose To Crime Scene: The Incompatibility Of Drug-Induced Homicide Statutes With Due Process*, 70 DUKE L.J. 659, 670-672 (2020).

; Taleed El-Sabwa, et. al., *Drug Induced Homicide Laws and False Beliefs About Distributors: Three Myths That Are Leaving Prosecutors Misinformed*, 60 AM. CRIM. L. REV. 1381, 1383 (Fall 2023).

becoming more vocal in wanting to use DIH to deter drug use.¹⁴¹ Prosecutors in the U.S. Attorney Office in Connecticut have “voiced their belief that prosecuting overdose deaths to the fullest extent possible constitutes a morally necessary acknowledgment of the value of the life that was lost to overdose.”¹⁴² While this example is not monolithic, it does demonstrate a trend towards using DIH laws to try and curtail drug crises due to an ever-growing public pressure. This lends itself less to the discretion based on scientific evidence and more to attempting to implement public goals of a perceived crises.¹⁴³ This combination of increased support alongside insufficient tools to actually effectuate the purported goals of DIH has led to less charging of high-level traffickers and more charging of friends, family, and low-level dealers, and has not accomplished its other goal, as overdose deaths have not decreased.

Sweden has moved towards a more conservative drug approach in the last decades.¹⁴⁴ While drugs used to be considered a smaller issue and small possession was frequently dropped, it is now considered to be more severe, and we see more and more of law enforcement’s and prosecutors’ time dedicated to drug crimes.¹⁴⁵ For example, the number of police officers working on drug crimes since the 1990s has doubled, and from 1991-2002, the amount spent on prosecution for drug crimes increased from \$3.9 million to \$13 million.¹⁴⁶ Prosecutors are increasingly finding themselves in position where they are enforcing the public policy of the state as overdoses increase and drug supply heighten, with less discretion as to when to let go the small-time user, and much of this has to do with the political pressure put on prosecutors.

¹⁴¹ Kaitlin S. Phillips, *supra* note 140, at 672.

¹⁴² Taleed El-Sabwa, et. al., *supra* note 140, at 1385.

¹⁴³ See *supra* note 97 and accompanying text.

¹⁴⁴ Lief Lenke & Boereje Olsson, Swedish Drug Policy in the 21st Century: A Policy Model Gone Astray, 582 THE ANNALS OF THE AM. ACAD. OF POL. AND SOC. SCI. 64, 67 (July 2002).

¹⁴⁵ Henrik Tham, *Swedish Drug Policy and the Vision of a Good Society*, 6 J. OF SCANDINAVIAN STUD. IN CRIMINOLOGY AND CRIME PREVENTION 58 (2005).

¹⁴⁶ *Id.*; Mats Ramstedt, *What Drug Policies Cost Estimating Drug Policy Expenditures in Sweden, 2002: Work in Progress*, Soc’y for Study of Addiction 330, 337 (2006).

In Sweden, there has been pressure put on the prosecutor to evolve to the model of a drug free Sweden. This has played out in the direction of not waiving offenses and creating laws that outlaw drug abuse in order to target the user.¹⁴⁷ Prosecutors, as of the 1980s, are not allowed to drop small level drug crimes, are directed to only drop for inseparable amounts of certain drugs, and are not allowed to drop at all for drugs like heroin, opiates, or cocaine.¹⁴⁸ Additionally, legal schemes that have made drug abuse itself a crime and came along around the same time that prosecutors were given less discretion to drop charges, has only led to harsher enforcement as less discretion is allowed.

While both countries appear to have opposite approaches, both have a common thread, which is the burden of this increased prosecution and differing levels of discretion falls to the common user. In the U.S., more discretion and more political pressure means charging the common user as it is difficult to distinguish in trying to combat rising drug overdose deaths. In Sweden, less discretion and more political pressure means charging those with even the smallest amount of drugs as a means of trying to effectuate the goals of a drug free Sweden. Both end up putting the pressure on the user to combat overdose deaths. Both systems seem to have heavy political influence that puts pressure on the prosecutors in Sweden to target the user and in the U.S. to target the trafficker, but the levels of discretion in the U.S. mean that prosecutors often end up targeting the user instead. While they have opposite approaches, they both see similar results in who is charged, and neither system seems to be effectively reducing opioid deaths.

¹⁴⁷ See *supra* note 87 and accompanying text.

¹⁴⁸ See *supra* note 84-85 and accompanying text.

D. Harsher Sentencing and Deterrence

Both the U.S. and Sweden have taken an approach to combatting drug use through harsher sentencing, with similar ineffective results as to deterring drug use.

While DIH laws were not used frequently in their inception, they resurfaced as a means to combat the opioid crises in the last 15 to 20 years. The U.S. requires a penalty of 20 years to life for anyone who manufactured, distributed, or dispensed a controlled substance that results in death or serious bodily injury.¹⁴⁹ If death results from a drug sentence, a seller will automatically receive a minimum sentence ten years longer than they would have otherwise received.¹⁵⁰ This harsher sentencing has been used as a tool to threaten in plea bargaining, and while it was not used until recently, it now means that low-level dealers and users face 20 years to life in prison. While this harsher sentence was originally meant to deter high-level traffickers, it is now being felt by the community. However, harsher sentencing does not appear to actually deter drug users.¹⁵¹ In regard to general deterrence, history has shown that incarcerating lower level users does not stop the supply.¹⁵² There is no empirical evidence to show that harsher enforcement has any correlation to reduction in drug activity, as seen in a Pew Research analysis that found no relation between drug imprisonment and drug problems.¹⁵³ Drug enforcement activities have

¹⁴⁹ Drug Policy Alliance, *An Overdose Death is Not Murder: Why Drug-Induced Homicide Laws Are Counterproductive and Inhumane*, DRUG POLICY ALLIANCE (2009), [HTTPS://DRUGPOLICY.ORG/WP-CONTENT/UPLOADS/2023/05/OVERDOSE_DEATH_IS_NOT_MURDER_REPORT.PDF](https://drugpolicy.org/wp-content/uploads/2023/05/overdose_death_is_not_murder_report.pdf)OVERDOSE.

¹⁵⁰ Hailey Varner, *Chasing the Deadly Dragon: How the Opioid Crisis is Impacting the Enforcement of Drug-Induced Homicide Statutes*, UNIV. OF ILL. L. R. 1799, 1811 (2019).

¹⁵¹ Adam B. Weber, *Note: The Courier Conundrum: The High Costs Of Prosecuting Low-Level Drug Couriers And What We Can Do About Them*, 87 FORDHAM L. REV. 1749, 1778.

¹⁵² Kaitlin S. Phillips, *Note, From Overdose To Crime Scene: The Incompatibility Of Drug-Induced Homicide Statutes With Due Process*, 70 DUKE L.J. 659, 699-700 (2020).

¹⁵³ *Id.*

been found to actually lead to increases in violent crimes.¹⁵⁴ Harsh sentences are often ineffective in deterring most low-level drug dealers and users.¹⁵⁵ Regarding specific deterrence, many of those charged are those also struggling with substance use disorders.¹⁵⁶ Because federal laws prevent Medicaid from funding health care in federal and state correction facilities, many people experiencing substance use disorder who are sentenced are offered only abstinence-based programming.¹⁵⁷ One study found that “[p]articularly during the critical first weeks after release—even from mere jail terms—overdoses are staggeringly common, and the risk of death from heroin overdoses jumps as high as 130 times greater than the general public.”¹⁵⁸ If DIH laws are meant to deter those from using drugs or giving drugs to other people, or more generally on a policy level, reducing overdose deaths (as this is the trend of DIH law policy purpose), these laws appear to be insufficient on both levels, in specific and general deterrence.

Sentencing in Sweden for drug laws has gradually increased, as has drug use in Sweden (see Part IV, Section E). The maximum sentence for serious offenses was raised from one to four years in 1968 up to ten years in 1972.¹⁵⁹ Since 1998, more than half of the increase in people in Swedish prison is a result of longer sentences for drug crimes.¹⁶⁰ However, in an evaluation of the criminal justice system measures, the National Council for Crime Prevention of Sweden concluded that “based on available information on trends in drug misuse there are no clear

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ Drug Policy Alliance, *An Overdose Death is Not Murder: Why Drug-Induced Homicide Laws Are Counterproductive and Inhumane*, DRUG POLICY ALLIANCE (2009), [HTTPS://DRUGPOLICY.ORG/WP-CONTENT/UPLOADS/2023/05/OVERDOSE DEATH IS NOT MURDER REPORT.PDF](https://drugpolicy.org/wp-content/uploads/2023/05/Overdose-Death-Is-Not-Murder-Report.pdf)OVERDOSE.

¹⁵⁷ Valena E. Beety et. al., *Drug Induced Homicide: Challenges and Strategies in Criminal Defense*, 70 S.C. L. REV. 707, 736 (Spring 2019).

¹⁵⁸ *Id.* at 737.

¹⁵⁹ Per Ole Tråskman, *Drug Control and Drug Offenses in the Nordic Countries: A Criminal Political Failure too Often Interpreted as a Success*, J. OF SCANDINAVIAN STUD. IN CRIMINOLOGY AND CRIME PREVENTION 236, 242-243(2004).

¹⁶⁰ *Id.* at 250.

indications that criminalization and an increased severity of punishment has had a deterrent effect on the drug habits of young people or that new recruitment to drug misuse has been halted.”¹⁶¹ On the contrary, the Council found that drug experimentation among young people increased throughout the 1990s, a trend which was similar in Sweden to that in other countries.¹⁶² While sentencing has increased and the focus on the user doubled down, deterrence from drug use has not seen a similar result.

For the U.S. and Sweden, both countries have moved towards either reinstating and enforcing or increasing drug sentencing severity as opioid deaths have risen, and yet, neither seems to see effective results in actually deterring drug use, or as seen below, reducing overdose deaths.

E. Overdose Deaths

Overdose deaths have increased in both Sweden and the U.S. over the last decades. Over one million people have died from an overdose in the U.S. since 1999.¹⁶³ Age-adjusted rates of drug overdose deaths increased from 8.2 per 100,000 people in 2002 to 32.6 persons in 2022.¹⁶⁴ (See Figure 8.). According to the National Center for Drug Abuse Statistics, on average, over 96,000 people die from drug overdoses in a year and of these deaths, 67.8 percent of drugs used were opioids.¹⁶⁵ In 2019, the national overdose rate was 21.6 deaths per 100,000 residents, and

¹⁶¹ U.N. Office on Drugs and Crime, *Sweden's Successful Drug Policy: A Review of the Evidence*, 16 (Feb. 2007), https://www.unodc.org/pdf/research/Swedish_drug_control.pdf

¹⁶² *Id.*

¹⁶³ *Drug Overdose Deaths*, CDC, <https://www.cdc.gov/drugoverdose/deaths/index.html> (Aug. 22, 2023).

¹⁶⁴ Merianne R. Spencer, et al., *Drug Overdose Deaths in the United States, 2002-2022*, NATIONAL CENTER FOR HEALTH STATS., <https://www.cdc.gov/nchs/products/databriefs/db491.htm#:~:text=The%20age%2Dadjusted%20rate%20of,those%20age%2035%20and%20older> (Mar. 2024).

¹⁶⁵ *Drug Overdose Death Rates*, NATIONAL CENTER FOR DRUG ABUSE STATISTICS, <https://drugabusestatistics.org/drug-overdose-deaths/#:~:text=The%20national%20OD%20rate%20is,the%20national%20average%20death%20rate>.

among youth 15 to 24 years old, it was 12.6 out of every 100,000.¹⁶⁶ In this group, among men, Black or African American men are the most likely to die from overdose, and among woman, American Indian or Alaska Natives women are the most likely to die from an overdose.¹⁶⁷ Overdose deaths continue to steadily increase in the U.S. alongside harsher enforcement.

In relation to the notion of a “drug free” Sweden, increased use of prosecution does not correlate with decreased overdose deaths. In 2017, 626 drug induced deaths were reported in Sweden, an increase from years previous, and the drug induced mortality rate was 92 deaths per million. (See Figure 6.) As of 2003, Sweden is also reported to have the fastest growing drug related mortality in the EU.¹⁶⁸ As of 2019, it had the second highest amount of drug morality rates in the EU.¹⁶⁹ (See Figure 7.) From 1994 to 2019, there was an increasing number of adults who tested positive for illicit drug use.¹⁷⁰ From 2013 to 2019, there was an increase in the proportion of samples of drug testing that tested positive for cannabis, cocaine, and amphetamine.¹⁷¹ These are all drugs that would not be allowed to be dropped under directives for prosecutors unless for small amounts in the case of cannabis.

Both in the U.S. and in Sweden, there has been a consistent rise in opioid deaths that follows alongside a rise in prosecution and harsher sentencing.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ Henrik Tham, *Swedish Drug Policy and the Vision of a Good Society*, 6 J. OF SCANDINAVIAN STUD. IN CRIMINOLOGY AND CRIME PREVENTION 57, 61 (2005).

¹⁶⁹ *Sweden, Drug Country Report*, European Monitoring Centre for Drugs and Drug Addiction, 29 https://www.emcdda.europa.eu/publications/country-drug-reports/2019/sweden_en (June 6, 2019).

¹⁷⁰ Kristin Feltmann et al., *Increasing Prevalence of Illicit Drug Use Among Employees at Swedish Work Places Over a 25-year Period*, 32 European J. Of Pub. Health 760, <https://academic.oup.com/eurpub/article/32/5/760/6675537>.

¹⁷¹ *Id.*

F. Spending

According to a report from the White House, the proposed 2023 budget supports \$42.5 billion for the National Drug Control Program.¹⁷² In a federal report, they found that based on FY 2022 data, the average cost of housing an incarcerated individual in a Federal Bureau or non-Bureau facility was \$42,672 per year.¹⁷³ Additionally, the Drug Enforcement Administration (DEA) budget went up from \$3,789.132 million in 2021 to a proposed budget of \$3,104.603 million for the proposed 2023 budget.¹⁷⁴ On a local level, Hamilton County, Ohio, for example, reported to spend at least \$750,000 per year on DIH investigation, a rate that almost doubled from 2012 to 2017.¹⁷⁵ These high levels of spending on justice department programs for incarcerations and DIH prosecution do not correlate with lowered rates of drug overdoses.

In Sweden, drug related expenditure has steadily increased. From 1991 to 2002, the estimated drug related expenditure rose from 20.6 million Euros to ~40 million Euros in 2002.¹⁷⁶ Alongside this, from 1991-2002 the amount spent on police increased from 35.6 million to 116 million Euros in 2002, and the amount spend on prosecution increased from 2.9 to 6 million Euros.¹⁷⁷ In 2002 drug related expenditure was estimated to represent 0.2-0.4 percent of total GDP¹⁷⁸ whereas by 2011 it had risen to 0.6 percent.¹⁷⁹ At the same time, drug related deaths

¹⁷² *Federal Drug Control Funding*, THE WHITE HOUSE, 275 https://www.whitehouse.gov/wp-content/uploads/2022/03/ap_20_drug_control_fy2023.pdf.

¹⁷³ Annual Determination of Average Cost of Incarceration Fee (COIF), 88 Fed. Reg. 65405, 65406 (Sept. 22, 2022) <https://www.govinfo.gov/content/pkg/FR-2023-09-22/pdf/2023-20585.pdf>.

¹⁷⁴ *Federal Drug Control Funding*, THE WHITE HOUSE 275, 276 https://www.whitehouse.gov/wp-content/uploads/2022/03/ap_20_drug_control_fy2023.pdf.

¹⁷⁵ DRUG-INDUCED HOMICIDE PROSECUTIONS, FAIR AND JUST PROSECUTIONS, at 7 (2022) <https://fairandjustprosecution.org/wp-content/uploads/2022/07/FJP-Drug-Induced-Homicide-Brief.pdf>.

¹⁷⁶ Mats Ramstedt, *What Drug Policies Cost Estimating Drug Policy Expenditures in Sweden, 2002: Work in Progress*, Soc’y for Study of Addiction 330, 337 (2006).

¹⁷⁷ *Id.*

¹⁷⁸ *Sweden, Drug Country Report*, European Monitoring Centre for Drugs and Drug Addiction, 3 https://www.emcdda.europa.eu/publications/country-drug-reports/2017/sweden_en (June 6, 2017).

¹⁷⁹ *Sweden, Drug Country Report*, European Monitoring Centre for Drugs and Drug Addiction, 3 https://www.emcdda.europa.eu/publications/country-drug-reports/2019/sweden_en (June 6, 2019).

increase from 186 to 391 cases per year from 1991 to 2002.¹⁸⁰ This can be compared to the 626 cases in 2017.¹⁸¹ Both the U.S. and Sweden have seen a rise in spending on drug related issues, and yet neither has seen a lowering of drug use and overdose deaths; instead, they have seen the opposite.

G. Further Defenses

One of the best tools that the United States has to combat overdose death is Good Samaritan laws.¹⁸² However, these laws have been undermined by the DIH schemes, which do not provide safe harbors from DIH prosecutions for those that report overdose deaths to emergency services.¹⁸³ Sweden has no comparable defenses, besides allowing for the charging of minor sentencing, but this does not provide any immunity for reporting overdose deaths to the authorities.

H. Implications

The similarities between the U.S. and Sweden show up in key political models and trends, harsher enforcement, and rise in overdose deaths. But the actual legal schemes in the U.S. and Sweden differ, and the role of and discretion given to the prosecutor varies. However, there is enough similarity to show a predictive ability to look at U.S. drug policy in relation to Swedish drug policy, especially the notion of Sweden's political climate to trend toward creating crimes that implicate one user in their impact on another, similar to DIH laws, and what that can indicate for the future of Swedish drug policy.

¹⁸⁰ Mats Ramstedt, *What Drug Policies Cost Estimating Drug Policy Expenditures in Sweden, 2002: Work in Progress*, Soc'y for Study of Addiction 330, 337 (2006).

¹⁸¹ *Id.*

¹⁸² *See supra* note 118 and accompanying text.

¹⁸³ *See supra* note 115-120 and accompanying text.

V. Where does Sweden Go from Here?

There are three potential paths that Sweden can take in its future approach to drug policy. The first is to keep trending as it is. The second is to lean into the U.S. model. The third is to learn from the U.S. model and adapt the mistakes and success to its own intuitional and political framework.

The first path for Sweden is to keep trending the way it has, focusing on a drug free society by targeting the user, creating harsher enforcement mechanisms, minimizing prosecutorial discretion, and increasing spending. However, the notion of targeting the user to create a drug free society does not appear to work as drug use and overdose deaths have only increased as this model has been more widely accepted.¹⁸⁴ Pressuring prosecutors into not dropping charges also does not appear to reduce drug use and instead just increases prison populations as more than half of the increase in people in Swedish prison is a result of longer sentences for drug crimes since 1998.¹⁸⁵ Harsher and longer sentences are the other reason for an increased prison population, and yet drug use is not actually reduced.¹⁸⁶ Sweden could also increase spending, but this doesn't appear to be correlating to lower drug use either, as spending has been on the rise alongside drug use.¹⁸⁷ The current model of a drug free society does not appear to be working as it is being implemented and on its current trend will likely only see an increase in drug use and overdose.

It may seem tempting for Sweden to double down and shift its legal schemata to that of the US. The U.S. has decided in reaction to higher overdose deaths to target other users as a

¹⁸⁴ See *supra* Part IV, Section E.

¹⁸⁵ Per Ole Träskman, *Drug Control and Drug Offenses in the Nordic Countries: A Criminal Political Failure too Often Interpreted as a Success*, J. OF SCANDINAVIAN STUD. IN CRIMINOLOGY AND CRIME PREVENTION 236, 250 (2004).

¹⁸⁶ See *supra* Part IV, Section E; Träskman, *supra* note 184 at 242-243.

¹⁸⁷ See *supra* Part IV, Section E.

means of deterrence. It sees similar models to that of Sweden of harsher sentencing and goals to remove drugs as a way to combat drug-related issues. Sweden could create strict liability offenses like DIH that have even harsher enforcement, and while they wouldn't likely fit into current Swedish law, something similar tying harsh enforcement to non-intended consequences of drug use could be seen in Sweden and would likely be met with support due to the unified approach to a drug free society. Because DIH laws often end up punishing the other user, similar laws could be soon adopted in Sweden, as Sweden is so focused on targeting the user as a means to reduce drug use, meaning political support could be behind similar laws. The political climate in general in Sweden trends towards allowing these harsher enforcement mechanisms that put the onus on the user to combat drug use, as is indirectly occurring in the U.S., but could directly occur in Sweden as they focus on the user not the high-level trafficker more directly. But DIH laws do not reduce overdose deaths. That is why it is critical for Sweden to look at what is happening with DIH law in the U.S. and steer away from trying to tie personal liability to non-drug offenses without requisite intent for these non-drug offenses to increase punishment and try to deter. While something like DIH may not appear in Sweden, looking at the political and sentencing trends in Sweden in the last decades, similar offenses to deter drug use that ultimately punish the drug user, not the drug traffickers, without needed to show intent due to a judgment against drug use presupposed onto other offenses, are possible. This would not prove effective though, and it is better for Sweden to learn from the impacts of DIH and move towards a middle approach.

Swedish government and legal systems can take DIH implementation and affects as warning signs, while also learning from the more positive tools used to combat DIH. Sweden has gradually increased sentencing for drug crimes. But as seen in the U.S. with these twenty to life

sentences, as a deterrence mechanism, it remain ineffective and overdose deaths are rising.¹⁸⁸ And it's also been seen in Sweden that these harsher sentences aren't deterring drug use, just increasing the prison population. As stated above, since 1998, more than half of the increase in people in Swedish prisons is a result of longer sentences for drug crimes.¹⁸⁹ Reducing sentences, not lengthening them, may be the better solution to be learned from U.S. drug policy, as increasing sentencing is not deterring drug use. Prosecutors in the U.S. arguably have too much discretion in charging and not enough tools, which leads to them to charging low-level dealers and friends and family of the deceased more than the high-level drug traffickers. But Sweden gives almost no discretion to its prosecutor to drop charges for small amounts of drug use, and combined with its laws that outlaw drug abuse, they've seen increased use of prosecutorial services and spending but not decreased rates of use and death.

There is a happy medium, where Sweden brings back discretion for prosecutors to drop some charges, those for small and recreational amounts of drugs, but in a limited way as a means to allow the small-time user off while not giving such broad discretion as is given in U.S. to threaten DIH and harsher punishment as plea bargaining tools. As seen in the U.S., having ultimate discretion to make decisions to charge people with limited resources results not in implementing the goals of DIH to charge the high-level trafficker, but instead in targeting the user. Sweden could also implement defenses like the Good Samaritan defense. Considering Sweden has such a high mortality rate from drugs compared to the rest of the EU, it could be beneficial to create a defense to punishment for those that try and save others from overdose.¹⁹⁰ And while Good Samaritan laws can be an effective tool, it is also important that laws are not created that

¹⁸⁸ See *supra* Part IV, Section D.

¹⁸⁹ Träskman, *supra* note 185 at 250.

¹⁹⁰ See *supra* notes 167-168 and accompanying text.

undermine them, like is done in the U.S., which makes people reluctant to call for fear of punishment.¹⁹¹ While it is unlikely Sweden will completely move from their drug free model, the current method of enforcement is not working. Sweden can learn from the U.S. that harsher sentencing, limited intent crimes, and stricter enforcement only leads to higher overdose deaths, and that moving towards a system that does the opposite will be more effective. Sweden's current path could lead it to a system like DIH, but it has the potential to move the opposite way by reducing sentencing, allowing prosecutors discretion to drop charges for small time users, removing laws that punish users for drug abuse, and creating good defenses to promote reporting overdose that could move Sweden to a healthier drug model.

¹⁹¹ Miller, *supra* note 114.

VI. Conclusion

Putting the blame on the user for the negative implications of drug use is not the answer.

Regarding strict liability and DIH, Professor C.M.V. Clarkson and Dr. Sally Cunningham remark:

This is a case where we might be disposed to acknowledge that responsibility for the tragic results of drug misuse is shared with society, whose policy failures regarding drugs, social exclusion, poverty, and education makes drugs supply into the raging social problem it is. Responsibility for the death of individual actors in this context should not be easily limited to another of its victims.¹⁹²

DIH laws should serve as serious warning signs to Sweden. It is undeniable that Sweden and the U.S. are very different. However, when it comes to drug policy, the two countries in many ways mirror each other and can learn from one another. Sweden, having similar political schemes, trends towards harsher enforcement, and an overall unified political approach that places blame on the user is in a dangerous spot. There is a road open that could be paved towards creating similar enforcement mechanism that tie liability of one user to their impact on others in order to increase sentencing as a means of deterring. Putting responsibility on individual actors, the user, has lead Sweden down a path that has not decreased drug use or overdose deaths and has increased spending and prison populations. Sweden has taken much of the discretion away from the prosecutor and created laws that punish the user for their drug use.

¹⁹² SALLY CUNNINGHAM ET AL., CRIMINAL LIABILITY FOR NON-AGGRESSIVE DEATHS 198 (C.M.V. Clarkson eds., 1st ed. June 30, 2020)

Sweden and the U.S. should both move away from punishing the individual actor to deter drug use, and Sweden should avoid the same mistakes that the U.S. has made with DIH if it wants to see a healthier relationship with drug use in its society.

Bibliography

21 U.S.C. § 841.

Adam B. Weber, Note: The Courier Conundrum: The High Costs Of Prosecuting Low-Level Drug Couriers And What We Can Do About Them, 87 Fordham L. Rev. 1749, 1778.

Alyssa Mallgrave, Article: Purely Local Tragedies: How Prosecuting Drug-Induced Homicide In Federal Court Exacerbates The Overdose Crisis, 13 Drexel L. Rev. 233, 242 (2020).

Annual Determination of Average Cost of Incarceration Fee (COIF), 88 Fed. Reg. 65405, 65406 (Sept. 22, 2022) <https://www.govinfo.gov/content/pkg/FR-2023-09-22/pdf/2023-20585.pdf>.

Drug Induced Homicide Prosecutions, Fair & Just Prosecution 1, 7 (2022) <https://fairandjustprosecution.org/wp-content/uploads/2022/07/FJP-Drug-Induced-Homicide-Brief.pdf>.

Drug Overdose Deaths, CDC, <https://www.cdc.gov/drugoverdose/deaths/index.html> (Aug. 22, 2023).

Drug Overdose Death Rates, Nat'l Center for Drug Abuse Statistics, <https://drugabusestatistics.org/drug-overdose-deaths/#:~:text=The%20national%20OD%20rate%20is,the%20national%20average%20death%20rate.>

Drug Policy Alliance, An Overdose Death is Not Murder: Why Drug-Induced Homicide Laws Are Counterproductive and Inhumane, Drug Policy Alliance (2009), https://drugpolicy.org/wp-content/uploads/2023/05/Overdose_Death_Is_Not_Murder_Report.pdfOverdose.

Erik Luna & Marianne Wade, Prosecutorial Power: A Transnational Symposium: Prosecutors and Judges, 67 WASH & LEE L. REV. 1413, 1445 (Fall 2010).

Federal Drug Control Funding, The White House, 275 https://www.whitehouse.gov/wp-content/uploads/2022/03/ap_20_drug_control_fy2023.pdf.

Good Samaritan Fatal Overdose Prevention and Drug-Induced Homicide: Summary of State Laws, Legislative Analysis and Public Policy Assc. (Aug. 2023), at 5, <https://legislativeanalysis.org/wp-content/uploads/2023/08/Good-Sam-Fatal-Overdose-Prev-and-Drug-Induced-Homicide-Summary-of-State-Laws.pdf>.

Hailey Varner, Chasing the Deadly Dragon: How the Opioid Crisis is Impacting the Enforcement of Drug-Induced

HB. 2602, 81st Leg. Assemb. (Or. 2021).

Homicide Statutes, Univ. of Ill. L. R. 1799, 1808-1809 (2019).

- Hanns von Hofer, Punishment and Crime in Scandinavia: 1750-2006, 40 *Crime & Just.* 33, 95 (2011).
- Henrik Tham, Swedish Drug Policy and the Vision of a Good Society, 6 *J. of Scandinavian Stud. in Criminology and Crime Prevention* 57 (2005).
- Jackson Tarricone, Richard Nixon and the Origins of the War on Drugs, *The Boston Pol. Rev.* (Sep. 10, 2020), <https://www.bostonpoliticalreview.org/post/richard-nixon-and-the-origins-of-the-war-on-drugs>.
- Jennie Miller, Article: Save A Friend's Life Or Risk Your Freedom: The Dilemma Too Many People Face When Witnessing An Overdose, 34 *J. Civ. Rts. & Econ. Dev.* 351, 374.
- Kaitlin S. Phillips, Note, From Overdose To Crime Scene: The Incompatibility Of Drug-Induced Homicide Statutes With Due Process, 70 *Duke L.J.* 659, 674 (2020).
- Kristin Feltmann et al., Increasing Prevalence of Illicit Drug Use Among Employees at Swedish Work Places Over a 25-year Period, 32 *European J. Of Pub. Health* 760, <https://academic.oup.com/eurpub/article/32/5/760/6675537>.
- Leo Beletsky, Americas Favorite Antidote: Drug-Induced Homicide in the Age of the Overdose Crisis, 19 *Utah L. Rev.* 833, 839 (2019); see also Valena Beety et al., *The Drug-Induced Homicide Defense Toolkit 2* (Ohio State Pub. Law, Working Paper No. 467, 2018) [hereinafter *Drug-Induced Homicide Defense Toolkit*], https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3265510 [<https://perma.cc/4VB3-C5TY>] (living document).
- Leo Beletsky, et. al., Drug Induced Panic, *Inquest* (Apr. 14, 2022), <https://inquest.org/drug-induced-panic/>.
- Lief Lenke & Boereje Olsson, Swedish Drug Policy in the 21st Century: A Policy Model Gone Astray, 582 *The Annals of the American Acad. of Pol. and Soc. Sci.* 64, 67 (Jul., 2002).
- Mats Ramstedt, What Drug Policies Cost Estimating Drug Policy Expenditures in Sweden, 2002: Work in Progress, *Soc'y for Study of Addiction* 330, 337 (2006).
- Merianne R. Spencer, et al., Drug Overdose Deaths in the United States, 2002-2022, *Nati'l Center for Health Stats*. <https://www.cdc.gov/nchs/products/databriefs/db491.htm#:~:text=The%20age%2Dadjusted%20rate%20of,those%20age%2035%20and%20older> (Mar. 2024).
- Millie Joy Humphrey, Article: Dead On Arrival: Illinois' Drug-Induced Homicide Statute, 14 *W. Mich. Cooley J. Prac. & Clinical L.* 277, 304 (Spring 2012).
- Narkotikastrafflag (1968:64) (Swed.), https://www.riksdagen.se/sv/dokument-och-lagar/dokument/svensk-forfattningssamling/narkotikastrafflag-196864_sfs-1968-64/.

- Per Ole Träskman, Drug Control and Drug Offenses in the Nordic Countries: A Criminal Political Failure too Often Interpreted as a Success, *J. of Scandinavian Stud. in Criminology and Crime Prevention* 236, 239 (2004).
- Peterson M, Rich J et.al., One Guy Goes to Jail, Two People Are Ready to Take His Spot: Perspectives on Drug-Induced Homicide Laws Among Incarcerated Individuals, *70 Int. J. Drug Policy* 47-53 (Aug. 2019).
- Petter Asp, Article: The Prosecutor in Swedish Law, *41 Crime & Just.* 141, 147-148 (2012).
- Rättegångsbalken [RB] [Code of Judicial Prudence] 20:6 (Swed.)
https://www.government.se/contentassets/a1be9e99a5c64d1bb93a96ce5d517e9c/the-swedish-code-of-judicial-procedure-ds-1998_65.pdf
- Sweden, Drug Country Report, European Monitoring Centre for Drugs and Drug Addiction, 3
https://www.emcdda.europa.eu/publications/country-drug-reports/2017/sweden_en (June 6, 2017).
- Sweden, Drug Country Report, European Monitoring Centre for Drugs and Drug Addiction, 29
https://www.emcdda.europa.eu/publications/country-drug-reports/2019/sweden_en (June 6, 2019).
- Taleed El-Sabwa, et. al., Drug Induced Homicide Laws and False Beliefs About Distributors: Three Myths That Are Leaving Prosecutors Misinformed, *60 Am. Crim. L. Rev.* 1381, 1385 (Fall 2023).
- U.N. Office on Drugs and Crime, Sweden's Successful Drug Policy: A Review of the Evidence, 9 (Feb. 2007), https://www.unodc.org/pdf/research/Swedish_drug_control.pdf.
- Valena E. Beety et. al., Drug Induced Homicide: Challenges and Strategies in Criminal Defense, *70 S.C. L. Rev.* 707, 722 (Spring 2019).
- Valena E. Beety, Prosecuting Opioid Use Punishing Rurality, *79 Ohio State L. Rev.*, at 2 & 19.