



 REPORT CRIMINAL JUSTICE

Death by Dealer

When Addicts Overdose, Should Dealers Be Charged with Murder?

MARCH 22, 2015 – PATRICK RADDEN KEEFE

In January, at a town hall meeting in Maine, the governor of the state, Paul LePage, was discussing the scourge of drug addiction when he made a startling aside. “The traffickers, these aren’t people who take drugs,” LePage observed. Nor, he suggested, are the dealers from Maine. Rather, they come into Maine, from places like Connecticut and New York, to “sell their heroin, then go back home.” The people who are plying the people of Maine with narcotics have names like “D-Money,” “Smoothie” and “Shifty,” LePage continued, before adding, “Incidentally, half the time they impregnate a young white girl before they leave. Which is the real sad thing, because then we have another issue that we have to deal with down the road.”

The racial accusations in LePage’s comments that drew national attention were quickly discounted. LePage himself walked back his pregnancy comment, claiming that he had meant to say out-of-state dealers impregnate young “Maine” women, rather than young “white” women, but because Maine is “essentially 95 percent white,” these amounted to the same thing. And his implication that drug dealers in Maine were people of color also turned out to be wrong—they are mostly white.

But it is worth dwelling on LePage’s gaffe for what it reveals about the way in which we construe questions of agency and victimhood when it comes to drug addiction in this country—and the interplay between those dynamics and issues of race.

Drug Crime, in Black and White

As I detailed in an earlier report in this series, the nation is currently in the throes of an epidemic of opiate addiction. More Americans now die from fatal opiate overdoses than from automobile accidents every year—and the problem is especially pronounced in white suburban, exurban, and rural communities.

One fascinating byproduct of the whiteness of this new crisis has been the emergence of a more humane vocabulary for understanding—and combating—drug addiction. As a headline in the *New York Times* had it, in battling heroin addiction, “White Families Seek Gentler War on Drugs.” When the Obama administration committed, recently, to allocate over \$1 billion in new funding to address opiate addiction, officials referred to the problem as an epidemic, signaling that the acute social problems related to this type of chemical dependence should be regarded first and foremost as a public health crisis, rather than a law enforcement crisis.

The crack boom of the 1980s, which was felt disproportionately in black communities, was also occasionally described as an epidemic. But the semantics were different back then. The current notion that drug users are victims, helpless in the face of a devilishly irresistible intoxicant, was nowhere in evidence when the users were not disproportionately white. In public discourse, so-called “crack babies” were worthy of sympathy because they could not be said to share the blame for their condition. But crack addicts were often reviled in terms that suggested,

implicitly or explicitly, that they bore some moral responsibility for their own predicament. The menacing, out-of-control African American “crack fiend” became a poisonous cultural stereotype. In fact, the racially invidious attitudes toward the role of addiction in white communities and black communities were enshrined in the 1986 Anti Drug Abuse Act, which established mandatory minimum sentences for crack that were one hundred times more severe than the sentences for powdered cocaine. (This disparity was partially remedied by the Fair Sentencing Act of 2010, which brought the ratio from one hundred-to-one down to eighteen-to-one.)

As a new addiction crisis sweeps the country, and as presidential candidates from both parties call for greater compassion and more comprehensive treatment options for addicts, there is another intriguing development that has received little media attention or policy debate: a widespread push for harsher sentences for drug dealers, rather than addicts.

Prosecutors Shift the Blame

As addicts die in increasing numbers due to overdoses related to heroin and prescription opiate use abuse, prosecutors in communities across the country have been looking for new ways to hold people responsible for those deaths. Whether they are reviving old statutes, aggressively interpreting the ambit of existing law, or advancing tough new legislation at the state level, prosecutors in at least a dozen jurisdictions are pursuing charges against the dealers who sell drugs that cause overdoses, and they are looking to hold these dealers responsible not simply for drug sales, but for murder.

The statutes have different names for the crime—“death by dealer,” “drug dealer liability,” “drug delivery resulting in death.” But the thrust of these measures is the same: in a new cultural climate in which we are less inclined to attribute to addicts the full responsibility for their own misfortune, our system of criminal justice searches for a new locus of responsibility—and finds one, in the dealer. “There’s definitely a realization that we don’t have the tools necessary to adequately prosecute those who are killing our kids,” acting Nassau County district attorney Madeline Singas, whose office wrote a “Death by Dealer” bill that has been proposed in New York, told the Associated Press.

In many states, such as Wisconsin or New Jersey, laws that enable these kinds of prosecutions—and carry penalties that are substantially more severe than a standard conviction for drug sales—have been on the books for years, but are now being used much more broadly in overdose cases. (In Wisconsin, for example, 71 people were charged with first-degree “reckless homicide by drug delivery” in 2013, up from 47 in 2012.) Other states, including Illinois, Pennsylvania, Kansas, California, Florida, Kentucky, Ohio, Massachusetts, Michigan, Missouri, Tennessee, Virginia, West Virginia and Washington, have revised existing legislation or passed new so-called “death resulting” or “drug-induced homicide” laws.

In some states, prosecutors have gone even further, seeking manslaughter charges not against the dealers who sold drugs that led to an overdose, but against friends of the deceased, or fellow addicts, for giving or sharing the fatal dose—which is possible, because many statutes allow for prosecution of anyone in the supply chain that ultimately led to an overdose death. In some cases, prosecutors have even brought cases against the individuals who drove the addict to the transaction in which they purchased the fatal dose. According to a [recent piece in the *Guardian*](#), in New Hampshire, a state that has been especially hard hit by the opiate epidemic, the attorney general has advised police officers and first responders who show up at the site of an overdose to treat the premises as a crime scene.

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It is lamentable that the recent shift in our policies and public attitudes toward drug addiction only became possible once the horrors of drug addiction began ravaging white communities. Nevertheless, it is a significant sign of progress that political leaders and prosecutors are now empathizing more with addicts, recognizing that they are often in the grip of forces beyond their control, and calling for more robust treatment options. That is a promising development, and the fact that President Obama appointed, as the head of the Office of National Drug Control Policy, a man [who is himself a recovering addict](#), promises to change the tenor of our national conversation on narcotics, and potentially to curtail some of the more counterproductive excesses of the war on drugs.

But ours is a punitive culture. If we absolve addicts of control over their own fates, and instead come to regard them as victims and objects of sympathy, it may be inevitable that local officials, law enforcement officers, and bereaved families will look for someone else to hold accountable. Given the still-toxic racial dynamics that simmer just beneath the surface of conversations about the drug economy, it's likely that, in looking for someone to hold responsible for “killing our kids,” authorities in many states may still end up simply meting out more severe penalties for dealers who happen to be black or brown.

Prosecutors in particular wield an astonishing degree of control in our political system, at the federal, state, and local level. Their discretion about which cases to bring, and how aggressively to pursue them—prone though it is to the distortions of bias and the prevailing political winds—is subject to very little oversight or review. And because the heroin crisis at the moment is being experienced and addressed at a very local level, there has been no major change in federal policy about how we will treat these cases, no national news bulletin saying that selling heroin or fentanyl to someone who is likely to overdose is now tantamount to murder.

Case by case, in states across the country, individual prosecutors are remolding the criminal law. Their reasoning is

clear: of course a dealer doesn't *want* his customer to overdose and die; that wouldn't be much of a business strategy. But he is in a business that is fraught with a degree of fatal risk that is ultimately foreseeable, and as such, when a fatality results, he should be held responsible.

The Solution that Isn't

Despite the semblance of clarity, as a matter of policy, this new approach is deeply misguided, on a number of levels. To begin with, there is the matter of intent, the standard evidentiary hurdle in murder cases.

It could be very difficult to establish that dealers (or others in the supply chain) had any foreknowledge that an addict might overdose. It is one thing to charge a dealer with murder or manslaughter in a case in which prosecutors can establish that the dealer knowingly sold a "bad batch," or a dose that was dangerously adulterated. But those cases are relatively rare. In most instances, the dealer—or the friend, or fellow addict who shares or supplies or resells narcotics—likely doesn't grasp, in advance, the probability that the user in question is going to end up overdosing. "The level of punishment should not be based on fortuity," Ron Sullivan, director of the Criminal Justice Institute at Harvard Law School, told *USA Today*. "It should be based on the intent of the individual at the time the crime was committed."

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To be clear, dealers who are in the business of selling drugs should of course be prosecuted—for selling drugs. The problems arise when you try to prosecute them for murder. Proponents of this approach will often suggest that it is necessary in order to dissuade other dealers from engaging in the business—that bringing homicide or manslaughter charges against people in the drug trade will serve as a deterrent, and in that connection, might ultimately save lives. But is that really likely? Prosecutors in New Orleans are pursuing these kinds of cases against heroin dealers. But as it happens, Louisiana's governor, Bobby Jindal, has already enacted some of the toughest laws in the country *just for dealing* heroin, extending the maximum sentence to 99 years, an ostensibly formidable deterrent that has done little to curb the heroin trade in the state.

Part of the reason that prosecutors seek murder or manslaughter charges in these cases is that they will likely result in more extensive prison sentences than might pertain if the defendant was merely charged with dealing. Yet, as I outlined in an earlier brief, there is an emerging bipartisan consensus that levels of incarceration in this country have

already reached dangerously unsustainable levels, and produce a set of pernicious social costs.

President Obama has made a commitment to criminal justice reform, and to rolling back the size of the prison population, specifically for those serving long sentences for drug crimes. This is another area in which, after years of deeply counterproductive policy, a new and relatively enlightened orthodoxy appears to be taking hold. In that context, the notion that you would seek a resolution to the spike in heroin deaths by sending drug dealers (or drug users) to prison for ever longer stretches seems starkly at odds with the increasingly undeniable reality that we have tried and resolutely failed to jail our way to victory in the war on drugs.

It is also worth mentioning in this context that, given the prevailing trends in the prosecution of drug cases and the population in our prison system, the brunt of such a solution would undoubtedly be borne by people of color. As Clarence Walker wrote last year on Alternet, “For years, police and prosecutors treated fatal overdoses as accidents or as the inevitable fate awaiting drug addicts. Now, with white people and suburbanites doing the dying in many states, when police arrive on the scene, officers are instructed to notify investigators and paramedics to treat the scene as a homicide.” The racial dynamics in these cases may often go unspoken, but they are there, in subtext and dog-whistle, and occasionally even in the public remarks of elected officials. Just ask Paul LePage.

Of course, any prosecutor who is being honest will tell you that one element of their job is retribution, or revenge. When a young person dies, it is perhaps only natural that we look for someone to blame. Retaliation is a deeply ingrained human impulse, as Albert Camus observed in a 1957 essay. Nevertheless, he argued, “Law, by definition, cannot obey the same rules as nature. . . . [T]he law is not intended to imitate or reproduce that nature. It is intended to correct it.”

Law, like policy, should be governed not by its ability to assuage our emotional needs in a tragic situation, but by a dispassionate tabulation of the incentives that it creates. And this leads us to a final sense in which seeking murder or manslaughter charges in drug overdose cases is misguided.

One promising development in recent years has been the increasing use, by police and other first responders, of Narcan, a nasal spray that can reverse the effects of an opiate overdose. The drug is remarkably effective in bringing addicts back from a potentially fatal overdose. Its use in New Jersey, for example, has reportedly saved hundreds of lives, and many police departments and emergency services agencies are now including it in the standard gear carried by first responders, because the key minutes after an overdose are when the drug can save someone, and these officials are often the first on the scene.

But they arrive, mainly, when they are summoned by someone, and that someone is often a friend or fellow addict of the person who overdoses, someone who may have been sharing the fix with the user, or may have helped procure it. Precisely the kind of person, in other words, who under this new law enforcement approach to overdoses would be

dialing 9-1-1 from a “crime scene,” and opening themselves up to potential prosecution for manslaughter, or worse.

The fundamental purpose of any legal measures employed in this kind should be to save lives. While I can understand the punitive impulse behind “death by dealer” prosecutions, it is not at all clear that these kinds of cases, initiated in the aftermath of one death, will produce the sort of deterrent effect that might actually prevent others. But it seems quite probable that, by shifting the burden of culpability from the addict to everyone involved in supplying the addict with a fatal dose, these measures might create a disincentive for those who witness an overdose to alert the authorities, thus resulting, perversely, in more death.



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