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The Opioid Crisis and the Federal Death Penalty

Richard Broughton
University of Detroit Mercy School of Law

THE OPIOID CRISIS AND THE FEDERAL DEATH PENALTY

J. Richard Broughton*

I. INTRODUCTION

A "horrible problem."[1] A "scourge."[2] An "epidemic" for which "failure is not an option."[3] President Trump is prone to hyperbole. But on March 19, 2018, in Manchester, New Hampshire, his descriptions of the opioid drug crisis were not hyperbolic assertions divorced from lived experiences; they instead reflected the view of millions of other Americans and the realities of modern drug use and addiction.[4] Along with those devastating descriptions, the President also reminded the audience that his administration's approach to the opioid crisis would neither divert attention from criminal prosecution nor

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* Associate Dean for Academic Affairs & Associate Professor of Law, University of Detroit Mercy. I am grateful to Erin Rodenhouse for her valuable research assistance and comments. I am a former trial attorney in the Capital Case Unit of the United States Department of Justice. I have noted references in this Article to litigation in which I was involved, and the Article does not contain non-public information.

1. President Donald J. Trump, Remarks on Combatting the Opioid Crisis (Mar. 19, 2018), https://www.whitehouse.gov/briefings-statements/remarks-president-trump-combatting-opioid-crisis.

2. *Id.*

3. *Id.*

4. *See* Nathaniel Weixel, *CDC: Fentanyl is Deadliest Drug in America*, THE HILL (Dec. 12, 2018, 9:59 AM), https://thehill.com/policy/healthcare/420959-cdc-fentanyl-is-deadliest-drug-in-america (showing government research that fentanyl was involved in more overdoses in 2016 than any other drug and that opioids are among the ten deadliest drugs).

soften criminal punishments for those whose trafficking in opioids results in another's death. "These are terrible people, and we have to get tough on those people, because we can have all the Blue Ribbon committees we want, but if we don't get tough on the drug dealers, we're wasting our time," the President stated.[5] "Just remember that. We're wasting our time. And that toughness includes the death penalty."[6]

And with those comments, the President set in motion yet another ongoing controversy, this time about the legality—and the wisdom—of using capital punishment to address the national opioid crisis.[7]

Yet important points remained ambiguous after the President's call for the death penalty. Was he calling for new capital opioid laws, or was he merely suggesting the use of existing death penalty statutes for drug traffickers? Public reporting prior to the President's New Hampshire speech indicated that the White House Domestic Policy Council and the Department of Justice were actively considering new legislation, including making it a capital offense to traffic large quantities of fentanyl.[8] Also, when the President referred to "big" and "bad" "pushers,"[9] did the President intend to focus federal prosecutorial resources on major traffickers, gangs, and criminal organizations, or was his reference to "drug dealers" meant to apply to *anyone* who distributes drugs like opioids that result in the death of the end user?

Although not reflected precisely in the President's New Hampshire remarks, the White House later released its plan for combatting the opioid crisis and stated specifically that the President's opioid initiative will "strengthen criminal penalties for dealing and trafficking in fentanyl and other opioids" and that the Justice Department "will seek the death penalty against drug traffickers, where appropriate under current law."[10] The White House

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5. Trump, *supra* note 1.

6. *Id.*

7. *See* German Lopez, *Read: Jeff Sessions's Memo Asking Federal Prosecutors to Seek the Death Penalty for Drug Traffickers*, VOX (Mar. 21, 2018, 12:40 PM), https://www.vox.com/policy-and-politics/2018/3/21/17147580/trump-sessions-death-penalty-opioid-epidemic (discussing emphasis of drug policy experts on other means of addressing the opioid epidemic contrasted with the President and Attorney General Sessions' punitive approach).

8. *See* Katie Zezima & Josh Dawsey, *Trump Administration Studies Seeking the Death Penalty for Drug Dealers*, WASH. POST (Mar. 9, 2018), https://www.washingtonpost.com/national/trump-administration-studying-possibility-of-seeking-death-penalty-for-drug-dealers/2018/03/09/4d9cc994-23c3-11e8-94da-ebf9d112159c_story.html?noredirect=on&utm_term=.b2c3418f8a13.

9. Trump, *supra* note 1.

10. THE WHITE HOUSE, PRESIDENT DONALD J. TRUMP'S INITIATIVE TO STOP OPIOID ABUSE AND REDUCE DRUG SUPPLY AND DEMAND (Mar. 19, 2018),

proposed no new federal death penalty legislation in this document. Indeed, when the White House released a new fact sheet on the President's initiative in October 2018, that document retained the same language with respect to the death penalty for drug traffickers as the March 19, 2018 fact sheet.[11] Notably, the original initiative was released shortly after the reporting on the Administration's consideration of new legislative approaches to a federal death penalty connected to opioid trafficking.[12] And the amended initiative was posted shortly after more public reporting that the President had suggested seeking the death penalty for dealers of large quantities of fentanyl—reporting that also cited one United States Senator as saying that such legislation would have to be separated from existing criminal justice reform efforts in Congress.[13]

The day after the President's New Hampshire speech and release of the opioid initiative, then Attorney General Jeff Sessions sent a memorandum (the Memo) to all United States Attorneys to explain the Justice Department's next steps in implementing the President's initiatives.[14]

The Memo directed prosecutors to "consider every lawful tool at their disposal" to combat the opioid epidemic.[15] In addition to designating opioid coordinators and seeking criminal and civil penalties for unlawful opioid manufacturing and distribution, the Memo said that prosecutorial tools "should also include the pursuit of capital punishment in appropriate cases."[16] The Memo did not propose new legislation, but it listed several existing capital statutes relevant to drug-trafficking crimes, and "strongly encourage[d] federal prosecutors to use these statutes, when appropriate, to aid in [the United States'] continuing fight against drug trafficking and the destruction it causes [the] nation."[17]

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https://www.whitehouse.gov/briefings-statements/president-donald-j-trumps-initiative-stop-opioid-abuse-reduce-drug-supply-demand.

11. *See* THE WHITE HOUSE, PRESIDENT DONALD J. TRUMP'S INITIATIVE TO STOP OPIOID ABUSE AND REDUCE DRUG SUPPLY AND DEMAND (Oct. 24, 2018), https://www.whitehouse.gov/briefings-statements/president-donald-j-trumps-initiative-stop-opioid-abuse-reduce-drug-supply-demand-2.

12. *See* Zezima & Dawsey, *supra* note 8.

13. *See* Jennifer Jacobs & Steven T. Dennis, *Trump Tells Sessions He Favors Death Penalty for Fentanyl Dealers*, BLOOMBERG (Aug. 23, 2018, 6:41 PM), https://www.bloomberg.com/news/articles/2018-08-23/trump-is-said-to-propose-death-penalty-for-fentanyl-dealers.

14. *See* Memorandum from Jefferson Sessions, U.S. Attorney Gen. to U.S. Attorneys, Guidance Regarding Use of Capital Punishment in Drug-Related Prosecutions (Mar. 20, 2018), https://www.justice.gov/opa/press-release/file/1045036/download.

15. *Id.*

16. *Id.*

17. *Id.*

Here, then, is the import of the President's ambiguity: when the White House said that the Justice Department "will" seek death penalties for drug traffickers "where appropriate under current law," did that statement mean that only current federal criminal laws would be employed in doing so, or that the death notices would have to be appropriate in light of current Justice Department standards for seeking the death penalty? If the former is true, then this means that the President's initiative contemplates no new statute. But if the latter is true, then this means that the Attorney General would simply be relying on existing standards pursuant to the Department's death penalty protocol in deciding whether to seek the death penalty in any given case, but the underlying substantive criminal law that may authorize the death penalty would not be limited to those already in existence. Indeed, if understood this way, it is conceivable that federal criminal law could be altered to include a new statutory scheme that would provide the death penalty for a drug-induced homicide in which the end user dies from voluntarily ingesting a drug transferred to him by another.

Such a change would be consistent with a more aggressive movement among federal prosecutors' offices in addressing the opioid crisis[18] as well as the growing popularity of drug-induced homicide laws at the state level,[19] some of which permit the imposition of the death penalty.[20] However, critics contend that those laws are too often applied against low-level distributors who are also addicts or are otherwise closely connected to, and simply shared

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18. *See* Rod J. Rosenstein, Opinion, *Fight Drug Abuse, Don't Subsidize It*, N.Y. TIMES (Aug. 27, 2018), https://www.nytimes.com/2018/08/27/opinion/opioids-heroin-injection-sites.html (vowing to "aggressively prosecute criminals who supply the deadly poison."). *See generally* Rachel L. Rothberg & Kate Stith, *The Opioid Crisis and Federal Criminal Prosecution*, 46 J.L., MED. & ETHICS 292, 295–307 (2018) (discussing change in federal prosecution addressing the opioid crisis).

19. *See* LINDSAY LASALLE, AN OVERDOSE DEATH IS NOT MURDER: WHY DRUG-INDUCED HOMICIDE LAWS ARE COUNTERPRODUCTIVE AND INHUMANE 2 (2017) (stating that twenty states have existing drug-induced homicide laws, naming Colorado, Delaware, Florida, Illinois, Kansas, Louisiana, Michigan, Minnesota, New Hampshire, New Jersey, North Carolina, Oklahoma, Pennsylvania, Rhode Island, Tennessee, Vermont, Washington, West Virginia, Wisconsin, and Wyoming). Some jurisdictions have also enacted legislation that immunizes those who witness overdoses. Kelsey Bissonnette, *Anti-Death Legislation: Fighting Overdose Mortality from a Public Health Perspective*, 23 TEMP. POL. & C.R.L. REV. 451, 460 (2014).

20. According to the Drug Policy Alliance report, these include COLO. REV. STAT. ANN. § 18-1.3-401 (West, Westlaw through the end of the 2d Reg. Sess. of the 71st General Assembly (2018)); FLA. STAT. ANN. § 782.04 (West, Westlaw through the 2018 2d Reg. Sess. of the 25th Leg.); and OKLA. STAT. ANN. tit. 21, § 701.9 (West, Westlaw through legislation of the 2d Reg. Sess. of the 56th Leg. (2018)); LASALLE, *supra* note 19, at 56–60. *See also* N.H. REV. STAT. ANN. § 630:1(f) (West, Westlaw through Chapter 379 of the 2018 Reg. Sess., and C.A.C.R. 15 and 16). This list does not include those states that could use their generic homicide laws to prosecute a drug-induced death and that otherwise allow for imposition of the death penalty.

the drug with, the victim.[21] Consequently, adopting this approach would force Congress, the President, and the Justice Department to make critical policy choices about which drug distributors would be the targets of such legislation and eventual prosecutions, and which distributors would bear sufficient culpability to warrant capital punishment.

The opioid crisis—which involves a complicated mix of social, medical, psychological, business, and legal elements, as well as the interests of victims and their families, the health care community, the legal community, and the pharmaceutical community—is far too complex to address comprehensively in this short Article. Therefore, his Article analyzes only a small, but important, fragment of the legal debate related to the crisis.

In particular, this Article addresses the significance of these two distinct but interconnected elements of the Trump Administration's prosecutorial approach to the opioid crisis—the President's announcement of his stated opioid policy initiatives and the Memo—evaluating their meaning for lawyers and policymakers on the front lines of opioid prosecution and legislation. I give special attention to use of the federal death penalty by first examining the Sessions Death Penalty Memo and considering its meaning and significance in light of existing law and Justice Department policy in capital cases. I then explain that Congress could lawfully craft a new capital statute targeting opioid trafficking resulting in death but doing so would also raise a number of difficult legal issues, including potential culpability issues pursuant to both the Eighth Amendment and the Federal Death Penalty Act (FDPA). I conclude that, while a strategy of aggressive criminal prosecution and punishment will not alone provide an answer to the national opioid problem, federal prosecution—including the possibility of death penalty authorization in rare but appropriate cases—should nonetheless play an important role in a comprehensive plan of counter-opioid action across government agencies.

II. THE MEMO

The Memo appears, at first, to look like a directive to federal prosecutors to seek the death penalty in cases involving death resulting from certain drug trafficking crimes. Indeed, that is the way that the news media characterized it. That reading, however, misunderstands federal criminal law and Justice Department policy in federal death penalty cases. The Memo is better

21. *See* LASALLE, *supra* note 19, at 3; *see also* Valena E. Beety, *The Overdose/Homicide Epidemic*, 34 GA. ST. U. L. REV. 983, 984 (2018) (citing LASALLE, *supra* note 19, at 3) (noting that, in rural areas, the "vast majority" of drug-induced homicide prosecutions involve a distributor who is "simply a friend or acquaintance who shared the drug with the deceased").

understood as a reminder to federal prosecutors about the seriousness with which the Department is taking these death-resulting drug crimes, as well as the seriousness of the opioid crisis more broadly. But it should also be understood as seeking to achieve one—and perhaps two—other goals: encouraging federal prosecutors to recommend the death penalty more often in drug-related cases, and perhaps, appeasing the "audience of one."

A. Understanding the Directive to Federal Prosecutors

The Memo says that the Attorney General "strongly encourage[s] federal prosecutors to use [the capital drug trafficking] statutes, when appropriate, to aid in our continuing fight against drug trafficking and the destruction it causes in our nation."[22] The statutes cited include the Violent Crimes in Aid of Racketeering (VICAR) statute, which punishes, among other things, murder in aid of racketeering activity (which can include drug trafficking);[23] the firearm enhancement statute, which punishes using or carrying a firearm during or in relation to, or possession of a firearm in furtherance of, a federal drug trafficking crime;[24] the Continuing Criminal Enterprise (CCE) statute, which targets those who are principal administrators, organizers, or leaders of large-scale drug trafficking organizations;[25] and the drug kingpin provisions of the Federal Death Penalty Act (FDPA), which allows the Government to seek the death penalty for a CCE-related offense under specific conditions involving very high quantities of drugs or attempts to kill a public officer, juror, or witness, or their family members, in order to obstruct a prosecution or investigation into an enterprise offense.[26] Although the other statutes require that death result from the predicate drug offense, the drug kingpin provision of the FDPA—section 3591(b)—does not. Also, special statutory aggravating factors apply to a section 3591(b) prosecution.[27]

After the Memo's release, many in the news media characterized it as urging federal prosecutors to seek the death penalty in drug-related homicides. "Following Trump's Lead, Sessions Urges Federal Prosecutors to Seek the

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22. Memorandum from Jefferson Sessions, U.S. Attorney Gen. to U.S. Attorneys, *supra* note 14.

23. 18 U.S.C. § 1959(a)(1) (2012). *But see* United States v. Conyers, 227 F. Supp. 3d 280 (S.D.N.Y. 2016) (invalidating provision for mandatory life sentence under VICAR, as applied to juvenile defendants).

24. 18 U.S.C. § 924(c), (j) (2012), *partially recognized as unconstitutional in* United States v. Neihart, 2018 WL 6131772 (10th Cir. 2018).

25. 21 U.S.C. § 848(b), (c), (e) (2012), *partially repealed by* Pub. L. 109-177, Title II § 221(2), Mar. 9, 2006, 120 Stat. 231.

26. 18 U.S.C. § 3591(b) (2012).

27. *Id.* § 3592(d).

Death Penalty Against Major Drug Dealers," read the headline in the *Los Angeles Times*.[28] A piece in the *National Review* was titled, "Sessions Instructs Prosecutors to Seek Death Penalty for Drug Dealers."[29] *Salon* touted the Memo this way: "Jeff Sessions to Prosecutors: Seek Death Penalty for Drug Dealers."[30]

This characterization, however, is not entirely accurate. Contrary to the interpretation implicit in these attention-grabbing and surely well-meaning headlines, the language from the Memo cannot be a directive to United States Attorneys to unilaterally seek the death penalty, or even to seek it after internal office review in the district. Pursuant to the Justice Department's death penalty protocol, only the Attorney General can authorize the government to seek the death penalty in a federal criminal case.[31] United States Attorneys can merely recommend that the Department seek (or not seek) the death penalty after submitting the case to the Capital Review Committee for Main Justice review.[32]

Thus, the Attorney General's choice of the word "use" to describe an action related to the capital drug trafficking statutes cannot have the meaning that has been ascribed to it. Instead, the Memo is better understood as reminding the United States Attorneys to be cognizant of these statutes and their importance to the Administration's policy goals with respect to the opioid crisis.

Pursuant to the Memo, then, United States Attorneys should be *prepared* to seek indictments for offenses using these statutes in cases where the facts satisfy the requisite elements and to pursue capital prosecution where the Attorney General authorizes them.

But even this is an odd reminder. First, federal prosecutors presumably are already cognizant of the death penalty components of these offenses. And second, federal prosecutors must *already* submit cases to the Attorney General's Review Committee for Capital Cases where there is the possibility

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28. Joseph Tanfani, *Following Trump's Lead, Sessions Urges Federal Prosecutors to Seek the Death Penalty Against Major Drug Dealers*, L.A. TIMES (Mar. 21, 2018), https://www.latimes.com/politics/la-na-pol-sessions-death-penalty-20180321-story.html.

29. Jack Crowe, *Sessions Instructs Prosecutors to Seek Death Penalty for Drug Dealers*, NAT'L REV. (Mar. 21, 2018, 5:10 PM), https://www.nationalreview.com/2018/03/sessions-instructs-prosecutors-to-seek-death-penalty-for-drug-dealers.

30. Matthew Rozsa, *Jeff Sessions to Prosecutors: Seek Death Penalty for Drug Dealers*, SALON (Mar. 21, 2018, 6:53 PM), https://www.salon.com/2018/03/21/jeff-sessions-to-prosecutors-seek-death-penalty-for-drug-dealers.

31. U.S. DEP'T OF JUSTICE, U.S. ATTORNEYS' MANUAL § 9-10.050, https://www.justice.gov/jm/jm-9-10000-capital-crimes (last updated Apr. 2014).

32. *See generally id.* § 9-10.000 (last updated Apr. 2018).

of a federal death penalty.[33] So regardless of the United States Attorney's recommendation (to seek or not to seek), every case in which the death penalty *could* be sought must be submitted to Main Justice in Washington for review. Even if the United States Attorney believes that the death penalty should be sought, the Attorney General can refuse to authorize it.[34]

As such, the Memo should not be interpreted as requiring United States Attorneys to unilaterally issue notices of intent to seek the death penalty in drug-related prosecutions. Rather, it should be read in conjunction with the existing Justice Department death penalty protocol, in which all death-eligible cases receive Main Justice review and which permits only the Attorney General to authorize capital punishment in a given case—and then, only after a careful review of the facts and circumstances underlying the individual case.[35]

B. Objectives of the Memo

Rather than serve to displace existing protocol review and arm United States Attorneys with unilateral death-authorization powers in drug cases, the Memo was likely designed to achieve other objectives.

First, the tone of the Memo—an aggressive prosecutorial posture toward drug trafficking, generally,[36] and toward drug trafficking resulting in death, specifically—makes clear to federal prosecutors that the Administration takes the federal death penalty seriously as an option in these cases. Moreover, the Memo should be understood in the larger context of Administration policy on the death penalty generally, reflecting a preference for more robust use of capital punishment.[37]

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33. *See id.* § 9-10.050–10.060 (last updated Apr. 2014).

34. *Id.* § 9-10.050.

35. *See id.* § 9-10.030 (last updated June 2007).

36. *See* Rosenstein, *supra* note 18.

37. *See* Jim Mustian, *Under Trump, Federal Death Penalty Cases are Ticking Up*, ASSOCIATED PRESS (Oct. 31, 2018), https://www.apnews.com/20bb9bfc954248bda8b13b4a4240adad (noting that, under Attorney General Sessions, the Justice Department has sought the death penalty in at least a dozen cases in less than two years and noting a "near moratorium" on authorizations in the second term of the Obama Administration); *see also* Mark Berman, *The Justice Dept. is Seeking its First Federal Death Sentences Under Sessions and Expects More to Follow*, WASH. POST (Jan. 9, 2018), https://www.washingtonpost.com/news/post-nation/wp/2018/01/09/the-justice-department-is-seeking-its-first-federal-death-sentences-under-sessions-and-expects-more-to-follow/?utm_term=.51bf368e1863 (discussing Justice Department expectations of more federal death penalty authorizations).

With these contexts in mind, and understanding that United States Attorneys already have an obligation to submit for review any possible federal death penalty case, United States Attorneys' Offices may be more likely to recommend the death penalty in a greater number of drug-related cases. Although the Attorney General need not agree with the United States Attorney's recommendation, his decision to seek the death penalty in a given case may be less complicated where he and the United States Attorney are in agreement about pursuing capital punishment. The Department would be speaking with one voice about the death penalty for a particular defendant, and this could mitigate any tensions that might otherwise exist, or be created, between Main Justice and the relevant district.

Second, the Memo may also have been designed to appease the so-called "audience of one"—the President.[38] The President, on multiple occasions, has made no secret of his affinity for capital punishment, though his public statements on the death penalty have at times been intemperate, misinformed, and poorly timed.[39] He also made no secret of his disdain for Attorney General Sessions, specifically, and for the Justice Department more generally.[40] In

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38. This phenomenon has been reported with respect to various figures associated with President Trump, seeking his attention or approval. *See, e.g.*, Daniel D'Addario, *The Kavanaugh Hearings Were Pitched at One Viewer – Trump*, VARIETY (Sept. 27, 2018, 4:23 PM), https://variety.com/2018/tv/columns/brett-kavanaugh-christine-blasey-ford-trump-1202960433; Paul Kane, *Focus is on an Audience of One – Trump – to Prevail with House GOP*, WASH. POST (Jan. 27, 2018), https://www.washingtonpost.com/powerpost/focus-is-on-an-audience-of-one--trump--to-prevail-with-house-gop/2018/01/26/76ae4836-02c0-11e8-8acf-ad2991367d9d_story.html?utm_term=.74b0b7206935; James Poniewozik, *Sean Spicer's Briefings, Cringe TV for an Audience of One*, N.Y. TIMES (Mar. 10, 2017), https://www.nytimes.com/2017/03/10/arts/television/sean-spicer-donald-trump-melissa-mccarthy.html; Darren Samuelsohn, *Ty Cobb's Audience of One in the Trump-Russia Probe*, POLITICO (Jan. 26, 2018, 7:40 PM), https://www.politico.com/story/2018/01/26/ty-cobb-trump-white-house-russia-lawyer-373194.

39. *See* J. Richard Broughton, *The Federal Death Penalty, Trumpism, and Civil Rights Enforcement*, 67 AM. U. L. REV. 1611, 1622–27 (2018) (discussing President Trump's often troubling and ill-considered public remarks on the death penalty before and during his presidency).

40. *See, e.g.*, Donald J. Trump (@realdonaldtrump), TWITTER (Jul. 25, 2017, 3:12 AM), https://twitter.com/realDonaldTrump/status/889790429398528000 (accusing Sessions of being "VERY weak" on Hillary Clinton's potential criminal activity); Donald J. Trump (@realdonaldtrump), TWITTER (Jul. 24, 2017, 5:49 AM), https://twitter.com/realDonaldTrump/status/889467610332528641 (referring to Sessions as "our beleaguered A.G."); *see also* Avery Anapol, *Trump: Many People are Disappointed in the Justice Department, "Including Me"*, HILL (Nov. 3, 2017, 10:01 AM), http://thehill.com/homenews/administration/358600-trump-lots-of-people-are-disappointed-in-justice-department-including (reporting that the President told a group of reporters "a lot of people are disappointed in the Justice Department, including me"); Michael S. Schmidt & Maggie Haberman, *Trump Humiliated Jeff Sessions After Mueller Appointment*, N.Y. TIMES (Sept. 14, 2017),

light of this strained relationship, the Attorney General's Memo could, in addition to other motives, also have been a way of regaining the confidence of the President by showing the Attorney General's steadfast commitment to the President's publicly-stated goal of pursuing the death penalty for drug traffickers.[41] Although Attorney General Sessions resigned at the President's request in November 2018 and was eventually replaced by now-Attorney General William Barr, there is no indication yet that General Barr will alter the guidance set forth in the Memo.[42]

It is important, then, that the Memo does not alter the existing death penalty protocol, empower United States Attorneys to unilaterally seek the death penalty, or signal that the Department will uncritically pursue capital punishment in every case involving death resulting from a drug trafficking crime. Nonetheless, consistent with the evidence suggesting that the Trump Administration has thus far favored robust use of the federal death penalty,[43] it is sensible to view the Memo as a signal to federal prosecutors that pursuing the death penalty in drug-related cases would be in line with general Justice Department attitudes—and those of the President—toward capital punishment.

III. IMAGINING A FEDERAL CAPITAL DRUG-INDUCED HOMICIDE LAW

If the Trump Administration's policy is to pursue capital punishment in drug-related cases, then that policy would best be effected by a focus on the most culpable drug offenders—those whose crimes are sufficiently

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https://www.nytimes.com/2017/09/14/us/politics/jeff-sessions-trump.html (reporting that the President berated Sessions and "said he should resign" after Sessions recused himself from the Russian meddling investigation).

41. Public reporting suggested a similar notion with respect to Attorney General Sessions' public remarks on leaks within the Administration. *See* Josh Gerstein, *Sessions' Broad Attack on Leaks Aimed at Audience of One: Trump*, POLITICO (Aug. 4, 2017, 6:53 PM), https://www.politico.com/story/2017/08/04/trump-jeff-sessions-leaks-media-241334 ("Sessions' eight-minute broadside against leaks and stern warning to leakers seemed to aimed at trying to repair his badly frayed relationship with Trump . . . .").

42. *See generally* David Jackson & Kevin Johnson, *President Trump to Nominate Former Attorney General William Barr to Replace Jeff Sessions*, USA TODAY (Dec. 7, 2018, 3:41 PM), https://www.usatoday.com/story/news/politics/2018/12/07/donald-trump-william-barr-attorney-general/2231211002. Between November 2017 and December 2018, the Justice Department rescinded numerous guidance documents, but the Sessions Death Penalty Memo was not among them. *See* Press Release, U.S. Dept. of Justice, Acting Attorney General Whitaker Announces Justice Department Rescission of 69 Guidance Documents (Dec. 21, 2018), https://www.justice.gov/opa/pr/acting-attorney-general-whitaker-rescinds-69-guidance-documents.

43. *See* Mustian, *supra* note 37.

aggravated and insufficiently mitigated—to warrant serious death penalty consideration. The existing statutes, noted in the Memo, provide a legal basis for targeting such actors.[44] But Congress could also craft a capital opioid trafficking statute not already in existence, and not among those outlined in the Sessions Memo, that imposes the possibility of capital punishment for manufacturing, distributing, or dispensing an opioid resulting in death—and do so consistently with traditional principles of criminal law and with existing Eighth Amendment jurisprudence. Of course, such a law could prove undesirable, even counter-productive. Numerous commentators, including those in the legal academic community, have criticized the use of drug-induced homicide prosecutions[45] and outlined a variety of legal challenges to them.[46] Further, the idea of capital punishment for such a crime has drawn special disapproval.[47] A federal drug-induced homicide law that imposes the death penalty would surely face significant criticism, opposition, and litigation hurdles. Moreover, creating such a law may not ultimately result in more death sentences, or even capital prosecution authorizations, and thus, might not ultimately serve a policy of more robust use of the federal death penalty in drug cases.

A. Models for a New Federal Capital Drug-Induced Homicide Law

Recall that the President's remarks from March 19, 2018, identified "drug dealers" as the object of his attacks.[48] It is unclear to what kind of drug distributor this refers: perhaps only those associated with gangs and other criminal organizations, or perhaps *any* significant seller.[49] Public reporting suggests that the President has shown interest in death penalty legislation that reaches opioids specifically,[50] but it remains unclear who, exactly, the targets of that legislation would be. The Memo could create the impression that

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44. *See* sources cited *supra* notes 23–26.

45. LASALLE, *supra* note 19, at 2–4; Beety, *supra* note 21, at 1004–05.

46. *See generally* Valena Beety et al., *Drug-Induced Homicide Defense Toolkit* (Ohio State Pub. Law Working Paper No. 467), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3265510 (outlining several legal grounds for challenging the use of drug-induced homicide laws).

47. *See* Nina Bala & Arthur Rizer, *Trump's Death Penalty for Drug Dealers Proposal is Bad Policy*, BALT. SUN (Apr. 5, 2018, 10:00 AM), https://www.baltimoresun.com/news/opinion/oped/bs-ed-op-0406-dealer-death-20180404-story.html.

48. *See* Trump, *supra* note 1.

49. *See id.* (referring to punishing "the big pushers" and "the death penalty for the really bad pushers and abusers").

50. *See* Jacobs & Dennis, *supra* note 13.

federal criminal law already addresses the interests that the President identifies.[51]

But this depends upon the nature of the drug-related death and the target of the prosecution. The President's New Hampshire speech indicated a focus on what the President referred to as "the big pushers" and "the really bad pushers and abusers."[52] Perhaps, then, the Administration is interested in targeting for capital prosecution those involved in gangs or criminal organizations, or who are relatively moderate- to high-level traffickers or regular street-level soldiers who combine drug transactions with guns and threats of violence or with maintaining or increasing position in a criminal organization. If so, then the existing federal criminal law set forth in the Memo—the firearms enhancement, VICAR, the CCE statute, and the Drug Kingpin provision of the FDPA—is likely adequate.[53]

Consider the simplest case involving the kind of scenario that has produced so much disdain from critics of drug-induced homicide prosecutions: the case of a bilateral opioid exchange in which a seller or distributor—often *not* a gang member nor a seller connected to a criminal organization[54]—transfers the drug to a buyer or user who ingests the drug, resulting in the buyer's or user's death, typically without any intent to kill on the part of the seller/distributor. The victim dies from his or her own overdose or ingestion of the drug—not from the distributor's gunshot or other violence, or from any design to cause death. That scenario is likely captured by existing federal law[55] but *not* by any existing federal death penalty provision.

Consequently, there is a gap in existing federal statutes that impose the death penalty for drug-related crimes. The practical effect of that gap is to exempt from federal capital prosecution those distributors—unconnected to a drug trafficking or racketeering enterprise and without any specific intent to kill—who transfer a drug to someone who, in turn, dies from the voluntary use of the drug. Perhaps that is a sensible omission. But if Congress and the President *are* interested in capital-level accountability for this particular category of "drug dealer," then Congress and the President could craft legislation to fill this gap, at least where the defendant acted with subjective fault as to the risk to human life that his drug/opioid distribution created. Also,

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51. Memorandum from Jefferson Sessions, U.S. Attorney Gen. to U.S. Attorneys, *supra* note 14.

52. *See* Trump, *supra* note 1.

53. *See* Memorandum from Jefferson Sessions, U.S. Attorney Gen. to U.S. Attorneys, *supra* note 14.

54. *See* Beety, *supra* note 21, at 984 (citing LASALLE, *supra* note 19, at 3).

55. *See* 21 U.S.C. § 841(b)(1)(B) (2012).

presumably, the actor would need to be among the "big pushers" to which the President referred.

In doing so, Congress could look to the experience of the States and to the general principles of criminal law. At least twenty states have drug-induced homicide statutes.[56] Of those, capital punishment is available in multiple jurisdictions.[57] These statutes have faced legal challenges but have consistently been validated by state courts.[58] Moreover, drug-induced homicide prosecutions—whether using generic homicide law or legislation specific to the drug-induced death—tend to be based on well-established criminal law principles derived from the depraved heart murder rule (i.e., an act of reckless indifference to human life that results in death), the felony rule (death resulting from the commission or attempted commission of a felony), voluntary and involuntary manslaughter, and principles of complicity.[59]

Consistent with this approach, and with the unique structure of federal criminal law,[60] Congress has already approved multiple drug-induced homicide statutes. In setting forth the penalties pursuant to the core drug offense statute,[61] Congress provided for a series of punishments where death results from the commission of the core offense but which were specific as to the schedule or identity and amount of the drug. For example, Congress provided for imprisonment for twenty years to life imprisonment for committing a core offense involving a range of serious drugs where "death or serious bodily injury results from the use of such substance . . . ."[62] The

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56. *See* LASALLE, *supra* note 19, at 2.

57. *Id.* at 8.

58. *See, e.g.*, People v. Boand, 838 N.E.2d 367, 401 (Ill. App. Ct. 2005); Lofthouse v. Commonwealth, 13 S.W.3d 236, 241 (Ky. 2000); State v. Maldonado, 645 A.2d 1165, 1189 (N.J. 1994); Commonwealth v. Kakhankham, 132 A.3d 986, 992 (Pa. Super. Ct. 2015).

59. *See* LASALLE, *supra* note 19, at 2.

60. Although the common law is sometimes used to inform the meaning of a federal criminal statute, there is no federal common law of crimes. *See* United States v. Hudson, 11 U.S. (7 Cranch) 32, 32, 34 (1812). Although there is a general murder statute in federal criminal law, punishment pursuant to that statute applies only where the crime is committed in the special maritime or territorial jurisdiction of the United States—and drug trafficking is not enumerated as a predicate crime for purposes of the federal felony murder provisions. *See* 18 U.S.C. § 1111(a)–(b) (2012). Therefore, the overwhelming majority of federal homicides involve statutes, other than § 1111 murder, that provide an enhanced penalty for death resulting from the commission of some predicate crime. Essentially, then, most federal homicide law is a statutory variation of felony murder law. The offense, however, is not literally described as a "murder," unless committed under § 1111. *See id.*

61. *See* 21 U.S.C. § 841(a)(1) (2012) (making it a crime to "manufacture, distribute, dispense, or possess with intent to manufacture, distribute, or dispense a controlled substance"). "Distribute" means "deliver" and does not require a sale. *Id.* § 802(11) (2012); United States v. Wallace, 532 F.3d 126, 129 (2d Cir. 2008) (citing 21 U.S.C. § 841(a)(1)).

62. 21 U.S.C. § 841(b)(1)(B).

sentence is enhanced to mandatory life imprisonment if the defendant has a prior final conviction for a felony drug offense.[63] Congress also provided for twenty years to life if death results from the use of the substance and the drug is a schedule I or II controlled substance, or is gamma hydroxybutyric acid or a gram of flunitrazepam.[64] The sentence increases to thirty years to life with a serious drug offense prior conviction.[65]

Yet none of these death-resulting statutes imposes the death penalty. Congress could simply amend the existing statute to provide that where death results, the defendant may be punished by death or life in prison or a (specific) term of years. Further, Congress could also narrow the death penalty provision by identifying a specific opioid that resulted in the death of the victim—for example, where death results from the distribution of fentanyl or a mixture of fentanyl and another drug (like heroin). A version of this kind of legislation was proposed in the House in 2016, but it received no action.[66]

Among other challenges, causation could remain a contested issue in a given case employing section 841(b). In *Burrage v. United States*,[67] the Supreme Court held that section 841(b)(1)(c) requires proof of but-for causation in a case of drug distribution resulting in death.[68] That case involved a victim who had consumed a cocktail of drugs (including marijuana and oxycodone), which included the heroin that Burrage had provided.[69] There, the Court found that the Government failed to prove but-for causation, as the medical testimony could not establish that the victim would have survived had he not ingested the heroin.[70] The Court did not, however, address whether the

63. *Id.*

64. 21 U.S.C. § 841(b)(1)(C).

65. *Id.*

66. *See* H.R. 6158, 114th Cong. (2d. Sess. 2016). The bill, which would have amended section 841(b), would have provided for the possibility of capital punishment where the underlying drug offense involved a mixture of heroin and fentanyl and where "death or serious bodily injury results from the use of such substance . . . ." *Id.*

67. 571 U.S. 204 (2014).

68. *Id.* at 218–19.

69. *Id.* at 206.

70. *Id* at 207, 219. For discussion of the significance of *Burrage* generally, see Eric A. Johnson, *Cause-in-Fact After* Burrage v. United States, 68 FLA. L. REV. 1727 (2016). For treatment of *Burrage* in the opioid context, see Beety, *supra* note 21, at 984–85 (citing *Burrage*, 571 U.S. at 212–18); Judge Stephanie Domitrovich & Jeffrey M. Jentzen, *Best Practices and Recommendations: Judicial and Medical Perspectives on Cases Involving Addiction to Opioids*, 57 No. 1 JUDGES' J. 24, 26–27 (2018); Alyssa M. McClure, *Illegitimate Overprescription: How* Burrage v. United States *is Hindering Punishment of Physicians and Bolstering the Opioid Epidemic*, 93 NOTRE DAME L. REV. 1747, 1749 (2018).

statute also required proximate (or legal) causation,[71] though federal courts have consistently held that section 841(b) does not require it.[72]

Even if Congress desires a federal capital statute for drug-induced homicides that cover ground not already covered by the statutes detailed in the Memo, it is unnecessary for Congress to craft an entirely new statute. Congress could simply amend section 841 to include the availability of capital punishment for a death-resulting offense.

B. Culpability and the Eighth Amendment

In addition to creating questions about the meaning and reach of the applicable statute, any congressional effort to create capital liability for a drug-induced death will also raise potential questions about whether imposition of the death penalty is constitutionally proportionate, based on notions of culpability that could be related to the degree of participation—especially in light of the victim's voluntary conduct—or even attenuated causation.

The easier case is one in which the distributor or direct transferor of the opioid gives the drug to the victim and the victim dies. Though easier, it is not uncomplicated because the victim has presumably ingested the drugs voluntarily. But even more complicated questions arise when the defendant is not the person who directly provided the opioid that produced the death. For example, assume that Walter provides a supply of opioids to Jesse, who then distributes the drug to Jane, who dies. We have already discussed Jesse's liability. But what about Walter's? Assume further that Walter manufactures a drug laced with an opioid, such as fentanyl. Walter transfers the supply to Jesse, who then transfers a small amount of his larger supply to Pete, who then distributes to Jane, who dies. Who is responsible for Jane's death?

In each scenario, we can imagine a result in which the criminal law would be implicated. For example, Walter and Jesse may be responsible based on principles of complicity, either for assisting the crime that resulted in Jane's death or as co-conspirators with Pete, using conventional *Pinkerton* liability principles: guilt for any substantive crime committed by any member of the

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71. *Burrage*, 571 U.S. at 210 (quoting WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 6.4(a) (2d ed. 2003)).

72. The Toolkit authors acknowledge that federal courts have not read section 841(b) to require proximate causation, but they urge defense counsel to request a proximate cause instruction in order to preserve the issue. *See* Beety et al., *supra* note 46, at 19.

conspiracy, where reasonably foreseeable and within the conspiracy's scope.[73]

Yet in both the simpler example and the more complicated one involving defendants who are somewhat attenuated from the transaction between the direct distributor and the victim, once we include capital punishment as part of the equation, questions of culpability arise that could trigger litigation about whether the death penalty is a constitutionally proportionate punishment for the crime.

The Supreme Court has placed a number of categorical limits on the power of the government to impose the death penalty where the Court has deemed that punishment to be disproportionate to the crime or to the culpability of the individual defendant.[74] More specifically, these Eighth Amendment proportionality principles have been applied to defendants when the prosecution is based on a theory of felony murder or complicity.[75] These opioid-induced homicides raise potential questions about whether the defendant is sufficiently culpable for the resulting death to justify imposition of the death penalty. In the case of drug sellers, one may sensibly argue that they do not intend to kill—killing the person who buys one's product is bad for business. In the case of those even further removed from the victim (such as Walter and Jesse above), those defendants would likely argue that their culpability is reduced by the sheer distance from the death-resulting conduct. And in both cases, the defendants could argue that the victim's own conduct—that is, voluntarily engaging in the conduct that results in the death—not only mitigates the offense but precludes the death penalty as a matter of constitutional law. These are considerable problems, but they are ultimately not insurmountable obstacles.

In *Enmund v. Florida*,[76] the United States Supreme Court considered whether the death penalty could be imposed upon a defendant, Earl Enmund, who was a passenger in the vehicle that was used to arrive at and flee the scene

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73. *See* Pinkerton v. United States, 328 U.S. 640, 646–47 (1946) (first quoting Hyde v. United States, 225 U.S. 347, 369 (1912); then quoting United States v. Kissel, 218 U.S. 601, 608 (1910)).

74. *See, e.g.*, Kennedy v. Louisiana, 554 U.S. 407, 469 (2008) (holding that the death penalty was disproportionate punishment for aggravated rape of either adult or child); Roper v. Simmons, 543 U.S. 551, 578 (2005) (holding that the death penalty was disproportionate punishment for defendant who committed murder before age 18); Atkins v. Virginia, 536 U.S. 304, 321 (2002) (holding that the death penalty was disproportionate for killer who was mentally disabled); Coker v. Georgia, 433 U.S. 584, 593 (1978) (holding that the death penalty was disproportionate for the rape of adult woman).

75. *See* Tison v. Arizona, 481 U.S. 137, 157–58 (1987); Enmund v. Florida, 458 U.S. 782, 797–800 (1982).

76. 458 U.S. 782 (1982).

of a murder that occurred in the course of a robbery.[77] Enmund was prosecuted for first-degree murder, essentially on a felony murder theory combined with Florida's complicity law.[78] Although Enmund remained in the vehicle while Sampson and Jeanette Armstrong entered the home of two elderly victims, killing and robbing them, the jury found that Enmund was a constructively present aider and abettor.[79] This was enough to bring him within Florida's first-degree capital murder law as a first-degree principal.[80]

Following its now-familiar two-pronged capital proportionality analysis under the Eighth Amendment,[81] the Court first surveyed the legislative landscape and concluded that the objective legislative evidence weighed against permitting the death penalty for a defendant who does not personally kill, intend to kill, or attempt to kill.[82] The Court then stated that, regardless of the objective evidence, in its own judgment the death penalty is disproportionate for a defendant who does not personally kill, intend to kill, or attempt to kill.[83] Considering Enmund's culpability only as to the underlying robbery, his culpability did not extend to the killings perpetrated by the Armstrongs and the Eighth Amendment did not permit the two acts to be treated the same.[84] Robbery, the Court noted, is a serious crime, but it does not equate to murder.[85] Consequently, the Eighth Amendment bars the death penalty for those like Enmund, whose participation in, and culpability for, the predicate crime does not extend to the ensuing homicide.[86]

Following this Eighth Amendment reasoning, one could argue that the distributor of an opioid that results in death is culpable, only for the drug distribution but not the death. Whether criminal liability is predicated on a traditional felony-murder theory, a "death-resulting" statute, or complicity, the defendant can plausibly argue that his connection to the ensuing death is

77. *Id.* at 788.

78. *Id.* at 785 (citations omitted).

79. *Id.* at 784–85.

80. *Id.* (citing Enmund v. State, 399 So.2d 1362, 1371–72 (Fla. 1981), *rev'd*, 458 U.S. 782).

81. *See, e.g.*, Kennedy v. Louisiana, 554 U.S. 407, 421 (2008) (quoting Roper v. Simmons, 543 U.S. 551, 563 (2005)) (employing framework that first considers objective indicia of societal attitudes toward the death penalty practice at issue, then, regardless of objective indicia, considers Court's "own judgment" in independently determining acceptability of the practice under the Eighth Amendment); *see also* J. Richard Broughton, *Kennedy and the Tail of Minos*, 69 LA. L. REV. 593 (2009) (criticizing the two-prong capital proportionality framework).

82. *Enmund*, 458 U.S. at 792–93 (quoting Coker v. Georgia, 433 U.S. 584, 596 (1978)).

83. *Id.* at 798.

84. *Id.* at 797–98 (first quoting Gregg v. Georgia, 428 U.S. 153, 184 (1976); then quoting *Coker*, 433 U.S. at 598).

85. *Id.* at 797 (quoting *Coker*, 433 U.S. at 598)).

86. *Id.* at 798.

sufficiently attenuated and that he lacks the kind of culpability that the *Enmund* Court envisioned for imposition of capital punishment. That is, he did not personally kill, intend to kill, or attempt to kill (attempted murder, of course, usually requires the specific intent to kill).[87]

That is a problematic constitutional argument. In *Enmund*, discussing the penological value of deterrence as it relates to the Eighth Amendment's coverage, the Court specifically stated that "[i]t would be very different if the likelihood of a killing in the course of a robbery were so substantial that one should share the blame for the killing if he somehow participated in the felony."[88] There, the Court determined that the evidence showed only a slight chance of a homicide resulting from a robbery, negating the deterrence value of the death penalty.[89] However, the Court appeared open to a capital punishment regime for perpetrators of predicate crimes where an ensuing death seems more foreseeable or likely.

Five years after *Enmund*, the Court decided *Tison v. Arizona*,[90] which further clarified the opening left by *Enmund*. Brothers Ricky, Raymond, and Donald Tison helped their father, Gary, and another inmate, Randy Greenawalt, escape from an Arizona prison by arming them with weapons smuggled into the facility in an ice chest.[91] On the run in the Arizona desert and stranded with a disabled vehicle, the brothers, their father, and Greenawalt flagged down a passing motorist, John Lyons, who stopped to help and was traveling with his wife, two-year-old son, and fifteen-year-old niece.[92] After Raymond and Donald drove the disabled car farther into the desert—with the Lyons family in the backseat—the Lyons family was ordered to stand in the headlights of the vehicle.[93] Sometime thereafter, after John Lyons begged for his life, and after Gary told his sons to go for water at the Lyons's vehicle, Gary and Greenawalt killed the Lyons family with shotguns.[94]

Ricky and Raymond Tison were later convicted of capital murder pursuant to a felony murder theory (using kidnapping and robbery as predicate felonies) and a complicity theory.[95] They were sentenced to death and

87. *See id.* at 797.
88. *Id.* at 799.
89. *Id.* at 799–800 (footnote omitted).
90. 481 U.S. 137 (1987).
91. *Id.* at 139.
92. *Id.* at 139–40.
93. *Id.* at 140.
94. *Id.* at 140–41 (citing to the record on appeal).
95. *Id.* at 141 (citing ARIZ. REV. STAT. ANN. § 13-452 (1956), *repealed by* Laws 1977, Ch. 142, § 15; and then citing ARIZ. REV. STAT. ANN. § 13-139 (1956), *repealed by* Laws 1977, Ch. 142, § 2). Donald was killed during an eventual standoff with police. *Id.* Gary Tison escaped into the desert, "where he died of exposure." *Id.*

challenged their death sentences pursuant to *Enmund*.[96] The Supreme Court rejected the challenges.[97]

According to the Court, even though the Tison brothers did not personally kill any member of the Lyons family, nor attempt to do so, nor possess an intent to kill, *Enmund* did not protect them.[98] In *Enmund*, the Court was concerned with actors at two distinct extremes: one, a minor actor, not at the scene of the killing, who lacked a culpable mental state as to the killing; and the other, a felony murderer who actually killed, intended to kill, or attempted to kill.[99] Although the Tison brothers did not personally kill, or attempt or intend to kill, they were not minor actors without a culpable mental state.[100] Rather, they fell into an "intermediate"[101] or "midrange" category of culpability for a felony murder:[102] they were "major" participants in the underlying felonies, and the record "would support a finding of the culpable mental state of reckless indifference to human life."[103]

Justice O'Connor's opinion described the recklessness standard as "implicit in knowingly engaging in criminal activities known to carry a grave risk of death," and thus, "represent[ing] a highly culpable mental state" that may be considered in the capital sentencing decision when that conduct "causes its natural, though also not inevitable, lethal result."[104] This combination of factors—major participation in a felony and reckless indifference to human life, which was sufficient for malice under the common law of murder and which the Court said "may be every bit as shocking to the moral sense as an 'intent to kill'"[105]—is sufficient to satisfy the Eighth Amendment's culpability threshold.

Enmund and *Tison*, of course, appear to be narrowly concerned with proportionality based on culpability as measured by the combination of *mens rea* and the level of participation in the predicate conduct. They are not really causation cases. Yet these would seem the most likely cases to cite in a situation where the defendant's reduced culpability is measured by attenuated causation. The trouble with such an argument, however, is that neither *Enmund* nor *Tison*, nor the other proportionality cases, indicate what level of

96. *Id.* at 143 (citing Enmund v. Florida, 458 U.S. 782 (1982)).
97. *Id.* at 143–45 (citing State v. Tison, 690 P.2d 747, 757–59 (Ariz. 1984), *vacated by Tison*, 481 U.S. at 158).
98. *Id.* at 150–51.
99. *Id.* at 149–50.
100. *Id.* at 151–52.
101. *Id.* at 152.
102. *Id.* at 155.
103. *Id.* at 151.
104. *Id.* at 157–58.
105. *Id.*

causation would be required to satisfy the Eighth Amendment. After all, major participation in a felony—combined with at least reckless indifference—could encompass a culpable defendant with some distance from the killing. Neither case appears to suggest that proximate causation would be necessary for constitutionally sufficient culpability.

In the case of a drug-induced homicide in which the end user voluntarily ingested the drug/opioid, *Enmund* and *Tison* could thus be read to favor the prosecution on an Eighth Amendment proportionality challenge. First, in the case of the direct distributor of the drug, if that person is deemed to be the "actual killer," then resort to *Tison* is unnecessary. *Enmund*, at least on its face, appears to allow the death penalty for the one who actually kills, even if he did not intend to kill.[106] Even if the direct distributor is not deemed to be the "actual killer," but is nevertheless criminally responsible under the applicable criminal law on a felony murder or complicity theory, then *Tison* could be applied so long as the Government can demonstrate reckless indifference.[107] The same argument would apply to those further removed from the killing but whose participation in the underlying criminal activity that led to it was deemed to be "major" and who similarly possessed the kind of reckless indifference that the *Tison* Court described—an appreciation of the grave risk of death as a natural consequence of the underlying criminal conduct.[108]

These are, of course, case-by-case assessments of culpability and would not attach to every defendant in a case with a drug-induced death. This is only to say that Eighth Amendment proportionality principles would not pose an insurmountable obstacle in cases involving a limited class of defendants who had significant roles in the underlying criminal activity that led to the death and who, likely because of the nature of the drug/opioid, could anticipate the grave risk—if not the likelihood—of the end user's death.[109]

Enmund and *Tison* are therefore imperfect precedents, even for a defendant who did not intend to kill and whose causal connection to an opioid-related death is attenuated—for example, a supplier, a distributor once-removed, or a manufacturer. And *Tison*'s reckless indifference standard

106. *See* Enmund v. Florida, 458 U.S. 782, 797 (1982). This understanding of the *Enmund–Tison* rule has drawn criticism. *See* Guyora Binder et al., *Capital Punishment of Unintentional Felony Murder*, 92 NOTRE DAME L. REV. 1141 (2017); Joseph Trigilio & Tracy Casadio, *Executing Those Who Do Not Kill: A Categorical Approach to Proportional Sentencing*, 48 AM. CRIM. L. REV. 1371, 1399 (2011).

107. *See Tison*, 481 U.S. at 158.

108. *See id.* at 157–58.

109. *See id.* at 16; *see also* Binder et al., *supra* note 106, at 1206 (arguing that the *Enmund–Tison* rule requires culpability as to the ensuing death, but recklessness would suffice).

would very often capture any defendant who supplied or trafficked in an opioid that resulted in death, even if the death was a product of overdose, particularly if the drug was a highly potent opioid like fentanyl or a mixture that included it. Nonetheless, those cases form an important part of an Eighth Amendment proportionality doctrine that—though deeply flawed[110]—the defense would likely consult in the case of an unintentional drug-induced death resulting from opioid overdose for which capital punishment is sought.

C. Culpability and the Federal Death Penalty Act

Finally, even if the constitutional and statutory arguments failed to prohibit a capital drug-induced homicide prosecution, the Government would nonetheless have to contend with the problem of culpability and mitigation at capital sentencing.

First, even assuming that the Eighth Amendment does not forbid imposition of the death penalty as a constitutional matter, the current FDPA scheme contains culpability provisions that might well limit death-eligibility in a drug-induced homicide. Section 3591(a)(2) states that, in a death penalty case that does not involve treason or espionage, the Government must prove beyond a reasonable doubt that the defendant:

> (A) intentionally killed the victim;
>
> (B) intentionally inflicted serious bodily injury that resulted in the death of the victim;
>
> (C) intentionally participated in an act, contemplating that the life of a person would be taken or intending that lethal force would be used in connection with a person, other than one of the participants in the offense, and the victim died as a direct result of the act; or,
>
> (D) intentionally and specifically engaged in an act of violence, knowing that the act created a grave risk of death to a person, other than one of the participants in the offense, such that participation in the act constituted a reckless disregard for human life and the victim died as a direct result of the act.[111]

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110. *See* Broughton, *supra* note 81, at 606–07 (citing Kennedy v. Louisiana, 554 U.S. 407, 439–41 (2008)).

111. 18 U.S.C. § 3591(a)(2)(A)–(D) (2012).

These provisions were crafted to assure the constitutional minimum of culpability in light of *Enmund* and *Tison*,[112] but they also go further. In the case of a drug-induced homicide, absent a specific intent to kill or to inflict serious bodily injury, the latter two provisions would have to serve as a basis for death-eligibility. That is problematic, for a variety of reasons.

For example, if section 3591(a)(2)(C) is the relevant theory, then "contemplating" a death must equate to at least reckless indifference but not specific intent. Federal courts have not been clear about the meaning of this provision, though the Committee Report on this language appears to allow for reckless indifference[113] and at least one federal appeals court has held that "contemplating" a death means simply "to have in view as a future event" and is something less than intent or knowledge.[114] If section 3591(a)(2)(D) is the relevant theory, then distributing a lethal drug must be an "act of violence." At least one federal appeals court has addressed the issue and found that "act of violence" in this context requires the use of physical force,[115] which would seem to preclude drug trafficking as the relevant underlying conduct.

Furthermore, each provision can plausibly be read to require that the decedent be someone who did not participate in the underlying offense.[116] If, however, the victim died from voluntarily, and unlawfully, ingesting the drug, a court could find that the victim *was* a participant in the underlying offense and therefore the Government could not satisfy either of these threshold culpability-eligibility factors. Of course, Congress could alter this result by amending the FDPA to specifically include a drug-induced homicide as satisfying the culpability-eligibility requirement. Indeed, if Congress were to pass a new capital drug-induced homicide provision, this change in

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112. *See* H.R. REP. NO. 103-466, at 12 (1994).

113. *Id.*; *see also* United States v. Basciano, 763 F. Supp. 2d 303, 344 (E.D.N.Y. 2011) (first citing H.R. REP. NO. 103-466; and then citing *Tison*, 481 U.S. 137) (discussing House Report 466 as finding that reckless indifference would suffice for § 3591(a)(2)(C) eligibility but finding that Government had chosen not to proceed on a reckless indifference theory).

114. United States v. Paul, 217 F.3d 989, 997 (8th Cir. 2000) (quoting *Contemplate*, RANDOM HOUSE WEBSTER'S UNABRIDGED DICTIONARY 438 (Random House 2d ed. 1997)). Disclosure: I served as attorney for the United States during later proceedings in the *Paul* litigation before the Eighth Circuit.

115. *See* United States v. Williams, 610 F.3d 271, 288–89 (5th Cir. 2010). Williams, a commercial truck driver, transported seventy-four unlawful aliens through Texas in the back of his truck but did not provide them with air conditioning. *Id.* at 275. As a result, nineteen of them died. *Id.* The Fifth Circuit held that this did not constitute an act of violence that would trigger death-eligibility pursuant to § 3591(a)(2)(D). *Id.* at 288–89; *see also* United States v. Baskerville, 491 F. Supp. 2d 516, 522 (D.N.J. 2007) (holding that ordering a killing while incarcerated is not an act involving the use of physical force and thus not an "act of violence"). Disclosure: I assisted the United States Attorney's Office in its prosecution of Baskerville.

116. *See* 18 U.S.C. § 3591(a)(2)(C)–(D).

culpability-eligibility would be a wise (and probably necessary) inclusion, so as to avoid these difficulties under the existing FDPA.

Moreover, in light of current statutory mitigators, two distinct theories could be troublesome for prosecutors seeking capital punishment in the context of deaths resulting from an opioid overdose.

First, consistent with the principles set forth in *Enmund* and *Tison*, but going farther than those cases go, the FDPA states that it is a mitigating factor that although the defendant was a principal in the commission of the offense, his participation was relatively minor.[117] This mitigator accounts for the fact that, even though the substantive criminal law holds the defendant criminally responsible, minor participation may mitigate the offense, even if that degree of participation is insufficiently minor to categorically forbid capital punishment pursuant to the *Enmund/Tison* rules. Second, the FDPA provides a statutory mitigator where "[t]he victim consented to the criminal conduct that resulted in the victim's death."[118] This second mitigator may seem especially salient in the case of a homicide resulting from an overdose, where the victim voluntarily ingested the drug, but federal courts have not had occasion to apply it in the drug-induced homicide scenario.

Indeed, there is some question as to whether this mitigator could even apply to such a situation, in which the victim presumably does not consent to the conduct that actually kills her. In other words, if the mitigator applies only to victim consent cases in which the victim wishes to die—for example, a euthanasia-style killing—or in which the death-causing conduct is the object of her consent (e.g., a duel), then it would likely not capture a drug-induced homicide scenario that did not involve a suicide. Courts have held that section 3592(a)(7) does not apply merely because the victim consented to *some* illegal activity, or even because the victim voluntarily engaged in conduct that involved risks to his or her life.[119] Rather, the victim must expressly or implicitly consent to the actual death-causing conduct.[120] Assuming the risk of death is not the same as consenting to it.[121]

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117. *Id.* § 3592(a)(3).

118. *Id.* § 3592(a)(7).

119. *See* United States v. Feliciano, 998 F. Supp. 166, 171 (D. Conn. 1998) (first citing § 3592(a)(7); and then citing United States v. Beckford, 962 F. Supp. 804, 822–23 (E.D. Va. 1997); *Beckford*, 962 F. Supp. at 822 (interpreting 21 U.S.C. § 848(m)(9), which has since been repealed but which contained identical language to 18 U.S.C. § 3592(a)(7)).

120. *See Beckford*, 962 F. Supp. at 823–24 (citing Wuornos v. State, 676 So. 2d 972, 975 (Fla. 1996)) (suggesting that knowingly engaging in a duel could be sufficient to raise victim consent mitigatory before fact-finder).

121. *See Feliciano*, 998 F. Supp. at 171 (citing *Beckford*, 962 F. Supp. at 822).

Nonetheless, in the universe of federal death penalty cases involving drug-related crimes in which a death results, the drug-induced homicide case would seem to present the best possible set of facts for application of the victim consent mitigator, at least where the victim voluntarily ingested the drug that directly caused her death (but probably excluding cases where, for example, the transferor of the drug misrepresented the nature or potency of the drug, or situations in which fraud or misrepresentation might be said to negate the victim's consent). At a minimum, the force of the argument is much stronger where the victim voluntarily engages in an act of self-harm that leads to her death, as compared to engaging in a dangerous drug transaction but not voluntarily ingesting the deadly drug. Even if the narrow language of section 3592(a)(7) did not strictly apply, the defense could present evidence of the victim's voluntary conduct in mitigation using the catch-all factor pursuant to section 3592(a)(8), which permits any evidence regarding the circumstances of the offense that would potentially mitigate the sentence.[122] Federal prosecutors should therefore be prepared to face a claim for these kinds of mitigation in such a case.

Still, however, these are merely mitigating factors. Proving any one—or all—of them does not necessarily preclude imposition of a death sentence. Whether any of them is sufficient to preclude the death penalty would depend upon the weight given to the mitigator as compared to the weight given to aggravating circumstances. If the jury determines that the aggravators "sufficiently outweigh" the mitigators, then the death penalty remains available.[123]

IV. CONCLUSION

Both the general principles of the criminal law and Eighth Amendment capital proportionality jurisprudence would likely permit both criminal liability and imposition of the death penalty for a limited class of drug-induced homicide defendants. Still, a capital drug-induced homicide prosecution would present numerous legal and constitutional hurdles, and would, even if eligibility could be established, challenge prosecutors to persuade a capital jury that the defendant's culpability for the death was so significant as to warrant the death penalty.

Consequently, the Attorney General—and those at the Justice Department who would counsel him in his decision whether to seek the death penalty, including the relevant United States Attorney—may balk at pursuing the death

122. 18 U.S.C. § 3592(a)(8).
123. *Id.* § 3593(e).

penalty in many, if not most, such cases. That hesitation would be prudent pursuant to the existing death penalty protocol at the Justice Department, which requires the Department to consider all of the facts and circumstances of the crime, including both aggravating and mitigating factors.[124] It would also be difficult to reconcile with a Department and Administration policy of expanding the use of the death penalty for these types of cases. The most likely chief purpose of the Memo—to encourage federal prosecutors to remain aware of capital punishment options in drug-related cases and to recommend the death penalty more often in those cases—would therefore be served best by focusing capital prosecution resources on those cases with the most culpable defendants, particularly those with ties to criminal organizations who engage in substantial drug-related criminality and who tend to employ violent means in doing so.

Of course, some critics of aggressive criminal prosecution in opioid-related cases claim that prosecutions will not solve what amounts to a major public health crisis.[125] Rather, the argument goes, effort and resources should be expended on treatment, awareness, care, and prevention.[126] There is much to be said about these other approaches to the opioid crisis, approaches that advisers to the President have acknowledged.[127] It is almost certainly true that criminal prosecutions alone will not solve the crisis. However, criminal prosecution, even if insufficient by itself, can nevertheless form an important element of a multi-prong attack on the opioid crisis, an attack that uses treatment, prevention, and legal—including criminal—accountability as its chief weapons.

Criminal prosecution may not solve the opioid crisis, but as part of a comprehensive approach to combating it, criminal prosecution can seek moral condemnation from the political community of those who use opioids—often for personal gain or profit—to prey upon vulnerable populations. It can hold

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124. *See* U.S. DEP'T OF JUSTICE, *supra* note 31, § 9-10.140 (last updated Apr. 2011).

125. *See, e.g.*, Megan McLemore, *How the Justice Department Can Help Solve the Opioid Crisis*, NATION (Dec. 18, 2017), https://www.thenation.com/article/how-the-justice-department-can-help-solve-the-opioid-crisis; Lloyd Sederer, *We Can't Arrest Our Way Out of Addiction*, U.S. NEWS (Nov. 30, 2017, 2:20 PM), https://www.usnews.com/opinion/civil-wars/articles/2017-11-30/jeff-sessions-new-war-on-drugs-is-the-wrong-way-to-fix-the-opioid-crisis; Alyssa Stryker, *The Police Will Not End the Opioid Epidemic*, DRUG POL'Y ALLIANCE (June 13, 2017), http://www.drugpolicy.org/blog/police-will-not-end-opioid-epidemic. For thoughtful observations about the role of criminal law, while still emphasizing treatment and awareness, see generally Rothberg & Stith, *supra* note 18.

126. *See* Rothberg & Stith, *supra* note 18, at 305–07; McLemore, *supra* note 125; Sederer, *supra* note 125; Stryker, *supra* note 125.

127. *See* THE PRESIDENT'S COMMISSION ON COMBATING DRUG ADDICTION AND THE OPIOID CRISIS, REPORT 12–18 (2017).

accountable, and subject to public scrutiny, those who are aware of the grave dangers to human life that the opioid trade creates. It can punish—perhaps, in limited and appropriate cases, even with death—those who, with awareness of the risks, deliberately ignore those risks and supply fellow human beings with the very instruments of their ultimate demise.