

# WHAT MOTIVATES LEGISLATORS TO ACT: PROBLEM DEFINITION & THE OPIOID EPIDEMIC, A CASE STUDY

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## I. INTRODUCTION

Despite the partisan<sup>1</sup> gridlock<sup>2</sup> that has been characteristic of federal congressional behavior in recent years, legislators from both major parties have worked together to draft and enact legislation to address the nation's current drug problem, commonly referred to as the opioid epidemic.<sup>3</sup> Even with the partisan tendency for gridlock, such cooperation and action by congress may not come as a surprise, especially given the record-setting number of drug overdose deaths.<sup>4</sup>

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1. See *Parties Overview: Congress at a Glance*, VOTEVIEW.COM, <https://voteview.com/parties/all> [<https://perma.cc/JM2S-96VX>] (last visited Sept. 2, 2017) (taking Poole & Rosenthal's, *infra*, measures of ideology for each legislator and creating an ideology score for the parties and plotting them by year). Keith T. Poole and Howard Rosenthal developed a measure of ideology for each legislator based on her voting record in past roll call votes. See generally KEITH T. POOLE, SPATIAL MODELS OF PARLIAMENTARY VOTING (Cambridge U. Press 2005). The measure, called DW-NOMINATE (Dynamic Weighted NOMINAL Three-step Estimation), is widely used as a measure of how liberal or conservative a legislator is based on her voting behavior. See Nolan McCarty, *Measuring Legislative Preferences*, in THE OXFORD HANDBOOK OF THE AMERICAN CONGRESS (Eric Schickler & Frances E. Lee eds., 2011). The DW-NOMATE data is also used to measure the growing polarization of the American Congress. See Keith T. Poole & Howard Rosenthal, *The Polarization of American Politics*, 46 J. POL. 1061-79 (1984). See also NOLAN MCCARTY, KEITH T. POOLE & HOWARD ROSENTHAL, POLARIZED AMERICA: THE DANCE OF IDEOLOGY AND UNEQUAL RICHES (2006).

2. The congressional gridlock has led to congress being referred to as largely unproductive. See Drew DeSilver, *Congress Still on Track to Be Among Least Productive in Recent History*, PEW RES. CTR. (Sept. 23, 2014), <http://www.pewresearch.org/fact-tank/2014/09/23/congress-still-on-track-to-be-among-least-productive-in-recent-history/> [<https://perma.cc/A47E-PLV3>].

3. See, e.g., 42 U.S.C. § 201 (2012); 21st Century Cures Act, Pub. L. No. 114-255, 130 Stat. 1033 (2016).

4. See Nadia Kounang, *US Drug Overdose Deaths Reach New Record High*, CNN, <http://www.cnn.com/2017/08/08/health/drug-overdose-rates-2016-study/index.html> [<https://perma.cc/38PK-G&S2>] (last updated Aug. 8, 2017). See also Opioid Overdose: Understanding the Epidemic, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/>

However, Congress did not just enact legislation to address problem drug use. It enacted legislation that embodied a more health-oriented approach than decades of past legislation. And, it adopted such an approach almost unanimously.<sup>5</sup> Moreover, many legislators defined problem drug use using terminology that attributed the cause of the problem to medical or biological origins—creating opportunities for the adoption of solutions that call for the involvement of health actors.<sup>6</sup>

Defining a social problem, like problem drug use, involves attributing the cause of the problem to a source<sup>7</sup> and often results in assigning responsibility or blame for the problem.<sup>8</sup> The problem definition is significant in that it shapes “the perception of policy trade-offs”<sup>9</sup> and limits the policy alternatives available to a class of solutions that addresses the problem, as it was defined.<sup>10</sup> In the case of problem drug use, congress has seemingly redefined addiction as being caused by a disease<sup>11</sup> or over-prescription as opposed to being caused by the drug user’s poor moral character. Such a re-definition align with the provisions in the Comprehensive Addiction and Recovery Act (“CARA”)<sup>12</sup>—legislation comprised

drugoverdose/epidemic/index.html [https://perma.cc/DN3L-3LKL] (last updated Aug. 30, 2017) [hereinafter CDC].

5. CARA passed with a 94-1 vote in the Senate and a 400-5 vote in the House. *See* S. REP. NO. 1404-1416 (2016); H.R. REP. NO. 2355-2368 (2016).

6. I use “solutions” here in the constructivist sense, not to imply that there is a correct or proper solution for a problem but rather that there are multiple policies proposed with the intent of solving a policy problem. I concede that oftentimes the policy proposals that are proposed or enacted typically do not offer a complete solution. However, the proposer’s intent was to solve at least part of the policy problem.

7. THE POLITICS OF PROBLEM DEFINITION: SHAPING THE POLICY AGENDA (David A. Rochefort & Roger W. Cobb eds., 1994) [hereinafter Rochefort & Cobb].

8. DEBORAH A. STONE, POLICY PARADOX: THE ART OF POLITICAL DECISION MAKING (3rd ed. 2012).

9. Isaac William Martin, *Redistributing Toward the Rich: Strategic Policy Crafting in the Campaign to Repeal the Sixteenth Amendment, 1938-1958*, 116 AM. J. SOC. 1, 6 (2010).

10. STONE, *supra* note 8.

11. Some legislators in Congress have also blamed other parties aside from the drug user, like physicians for overprescribing pain medication and pharmaceutical companies for downplaying the addictive properties of opioid prescriptions. *See, e.g.*, Harriet Ryan & Noam N. Levey, *Lawmaker Calls for Scrutiny of Drug Makers’ Role Amid Opioid Abuse Epidemic*, L.A. TIMES (May 12, 2016), <http://www.latimes.com/local/california/la-me-oxycontin-react-20160513-story.html> [https://perma.cc/RDY4-8yTW]. *See also* Susan Brooks, *House Acts to Address Heroin and Opioid Abuse Crisis* (July 8, 2016, 8:30 PM), <https://susanwbrosoks.house.gov/media-center/press-releases/house-acts-to-address-heroin-and-opioid-abuse-crisis> [https://perma.cc/MMC2-4D97].

12. Comprehensive Addiction and Recovery Act of 2016, Pub. L. No. 114-198, 130 Stat. 695 (2016). CARA includes the provision of funding to expand treatment access to persons suffering from addiction, calls for increased access to overdose reversal medication, encourages states to establish prescription drug monitoring programs (PDMPs), and instructs federal agencies to develop education campaigns to help prevent overdoses and addiction, among other provisions. *Id.* Such

mostly of health-oriented solutions used to address problems of disease.<sup>13</sup>

Such problem redefinition, or substitution by the dominant problem definition with another,<sup>14</sup> is rare, even without the complications of sharp ideological divisions. Further, the institutionalization of policy solutions favors the status quo.<sup>15</sup> As time passes, the dominant policy solution becomes embedded in legislation, regulations and agency guidelines, making it more resistant to change.<sup>16</sup> The institutionalization of policy solutions can also result in the creation of organizations or agencies charged with implementation and enforcement—creating another set of actors that may be invested in maintaining the status quo.<sup>17</sup>

Since the United States (“U.S.”)’s criminal justice orientated problem definition of problem drug use has been dominant for almost a century, with few exceptions,<sup>18</sup> a legislative redefinition of problem drug use as a health issue necessitating health-oriented solutions can be viewed as a noteworthy change in legislative orientation. Aside from the theoretical implications of this problem redefinition, such a change has normative implications—including the de-

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solutions can be considered “health-oriented” in that they invoke public health or medical solutions that are used to address disease epidemics. I use the term “health-oriented” because although CARA may not embrace a true public health approach, it samples some of the solutions typical of a public health and medical approach and defers to health actors, as opposed to criminal justice actors, for much of its implementation and enforcement.

13. More specifically, population health and disease management solutions align with solutions for chronic diseases—the type of disease that addiction is now often categorized as. *See, e.g.,* Jane Murray Cramm & Anna Petra Nieboer, *Is “Disease Management” the Answer to Our Problems? No! Population Health Management and (Disease) Prevention Require “Management of Overall Well-Being”*, 16 BMC HEALTH SERVS. RES. 500 (2016).

14. FRANK R. BAUMGARTNER ET AL., *LOBBYING AND POLICY CHANGE: WHO WINS, WHO LOSES, AND WHY* (U. Chicago Press 2009).

15. Baumgartner et al.’s analysis of ninety-eight policy issues over four years demonstrated only one instance of problem redefinition. *Id.* *See also* ANNE LARASON SCHNEIDER & HELEN INGRAM, *POLICY DESIGN FOR DEMOCRACY* (1997).

16. *See* BAUMGARTNER ET AL., *supra* note 14. Baumgartner et al. conducted more than 300 interviews with policy-makers and organizations on a random sample of 98 policy issues for two congressional sessions. *Id.* Their dataset included these interviews and publicly available information with which they created measures of monetary and non-monetary resources that may advantage some interest groups over others in influencing different phases of the policy process. In their analysis of these interviews, the authors also analyzed problem redefinition. *Id.*

17. *Id.*

18. *See* DAVID T. COURTWRIGHT, *DARK PARADISE: OPIATE ADDICTION IN AMERICA BEFORE 1940* (2d 2001) [hereinafter COURTWRIGHT, *DARK PARADISE*]; DAVID T. COURTWRIGHT, *FORCES OF HABIT: DRUGS AND THE MAKING OF THE MODERN WORLD* (2001) [hereinafter COURTWRIGHT, *FORCES OF HABIT*]; DAVID F. MUSTO, *THE AMERICAN DISEASE: ORIGINS OF NARCOTIC CONTROL* (3d ed. 1999); *FEDERAL DRUG CONTROL: THE EVOLUTION OF POLICY AND PRACTICE* (Jonathon Erlen & Joseph F. Spillane eds., 2004) [hereinafter Erlen & Spillane].

stigmatization of problem drug use<sup>19</sup> and the substitution of more empirically and comparatively supported health solutions<sup>20</sup> for the ineffective criminal justice solutions utilized in the past.<sup>21</sup>

Given that the U.S. has preferred a criminal justice approach to addressing problem drug use for almost a century, legislators' decision to adopt a health-oriented approach to address this drug crisis is significant. Some may argue that congress' health-orientated approach was simply a result of shifting demographics,<sup>22</sup> institutionalized racism,<sup>23</sup> or because the current drug crisis was objectively caused by different factors than past drug problems.<sup>24</sup> Although these theories have merit, they do not explicitly acknowledge the politics of problem definition and its role in the legislative decision-making process. Too often, in both legislative and legal scholarship, the role that problem definition plays in the legislative process is ignored, downplayed, or simply forgotten. Aside from omitting considerations of problem definition, such theories do not explain how changes in demographics of the drug user population translated to enacted

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19. The criminalization of possession of illicit substances in the U.S. has stigmatized problem drug use and created a criminal subculture associated with drug use. See EDWIN M. SCHUR, *CRIMES WITHOUT VICTIMS: DEVIANT BEHAVIOR AND PUBLIC POLICY: ABORTION, HOMOSEXUALITY, DRUG ADDICTION* (1965).

20. See TAMYKO YSA ET AL., *GOVERNANCE OF ADDICTIONS: EUROPEAN PUBLIC POLICIES* (2014) (providing a review of such solutions).

21. Criminal justice, punitive solutions, or supply side solutions have not only been deemed ineffective by foreign governments, former U.S. President Barack Obama and former Drug Czar Michael Botticelli. See Bernd Debusmann, *Obama and the Failed War on Drugs*, REUTERS (Apr. 16, 2012, 1:55 PM), <http://www.reuters.com/article/us-column-debusmann-drugs/obama-and-the-failed-war-on-drugs-bernd-debusmann-idUSBRE83F0ZR20120416> [<https://perma.cc/4YCP-CAAP>].

22. While drug epidemics of the 1980s and 1990s primarily affected African Americans, the current opioid epidemic has purportedly affected White Americans at greater rates than minority populations. Recent data, however, suggests that the overdose rates of racial and ethnic minorities are increasing and approaching those of Whites. Meredith S. Shiels et al., *Trends in U.S. Drug Overdose Deaths in Non-Hispanic Black, Hispanic, and Non-Hispanic White Persons, 2000–2015*, 168 *ANNALS INTERNAL MED.* 453 (2018).

23. Institutionalized racism refers to racism that is imbedded in political or societal institutions. See MICHELLE ALEXANDER, *NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010). Historically, in the U.S., punitive solutions have been pursued to address problem drug use most often when the drug users come from marginalized populations, including racial minorities. See COURTWRIGHT, *DARK PARADISE*, *supra* note 18. See also Taled El-Sabawi, *Defining the Opioid Epidemic: Congress, Pressure Groups and Problem Definition*, U. Memphis L. J. 2018.

24. In the past, government agencies may have defined the nation's drug problem as being characterized by street drug use, in describing the current epidemic, federal agencies have focused more so on attributing the cause to over-prescription. See *America's Addiction to Opioids: Heroin and Prescription Drug Abuse: Hearing Before the S. Caucus on Int'l Narcotics Control*, 113th Cong. (2014) (statement of Nora D. Volkow, Director, National Institute on Drug Abuse).

legislation that changed the path of U.S. drug policy. Although this may be the U.S.'s largest overdose epidemic involving primarily white Americans, this is neither the U.S.'s first overdose epidemic affecting Whites, nor is it the first drug epidemic that has been blamed on prescribers and drug manufacturers.<sup>25</sup> These explanations may be true, but are at best an incomplete list of factors that might have contributed to legislators'<sup>26</sup> decisions to adopt a health-oriented approach.

This article explores why legislators approached problem drug use as a health problem as opposed to a criminal justice problem when deciding how to address the nation's opioid epidemic. This article analyzes theories of legislative behavior in an effort to identify the factors that influence legislators to redefine a social problem, in general, and problem drug use in particular. In doing so, this article proposes that the factors that most likely influenced legislators' decision to adopt a health-oriented approach to this opioid epidemic include: local needs, voter preferences, and interest group and administrative preferences (collectively, "pressure group preferences").

Part II of this article provides an overview of the problem redefinition that was evidenced by CARA and discusses its significance. Part III analyzes theories of legislative behavior and ends with a legislative decision-making framework tailored to the political climate and issues surrounding the opioid epidemic. Part IV analyzes each factor identified in the proposed framework in depth and provides evidence of each factor's influence on the redefinition of problem drug use as health issue. Lastly, Part V summarizes the proposed framework, suggests additional avenues for research, and briefly discusses the practical utility of the proposed framework.

## II. CARA AND THE REDEFINITION OF PROBLEM DRUG USE

Due to a historically high number of opioid overdose deaths and the quadrupling of opioid overdoses since 1998, both the Centers for Disease Control ("CDC") and Department of Health and Human Services ("HHS") have declared that we are amidst an opioid overdose epidemic.<sup>27</sup> In response to this opioid

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25. See COURTWRIGHT, DARK PARADISE, *supra* note 18; MUSTO, *supra* note 18. For an in depth comparison of the current Opioid Epidemic to past drug epidemics in U.S. history and a justification for such a comparison, please see El-Sabawi, *supra* note 23.

26. When I refer to legislators in this paper, I am referring to federal legislators who were in office during the proposal and passage of CARA.

27. According to data compiled from the CDC, more people died of drug overdoses in 2015 than any other year before it. See CDC, *supra* note 4. Approximately 60% of these overdoses involved an opioid. See Rose A. Rudd et al., *Increases in Drug and Opioid-Involved Overdose Deaths—United States, 2010–2015*, 65 MORBIDITY & MORTALITY WKLY. REP. 1445, 1445-52 (2016). Approximately half of the opioid overdoses were attributed to prescription opioids. See CDC, *supra* note 4; see also *The Opioid Epidemic: By the Numbers*, U.S. DEP'T OF HEALTH & HUMAN SERVS., <https://www.hhs.gov/sites/default/files/Factsheet-opioids-061516.pdf> [<https://perma.cc/92WN-UTH7>] (last updated June 2016).

overdose death epidemic,<sup>28</sup> (hereinafter referred to as “opioid epidemic”) Congress, on July 13, 2016, passed CARA.

The current opioid epidemic is not the first that Congress has faced.<sup>29</sup> However, CARA is arguably the first comprehensive legislative response to problem drug use that promotes health solutions<sup>30</sup> over criminal justice solutions. For the greater part of a century, legislators in the U.S. Congress have predominately adopted policy solutions that deferred to the criminal justice system to solve the nation’s drug problem. Such criminal justice solutions involved the use of criminal sanctions to punish the drug user, to deter his bad behavior, and to punish the supplier, including the drug’s country of origin.<sup>31</sup> Incarcerating drug users was justified as one of the only proven methods to keep the drug user from harming himself and to protect society from the drug users’ dangerous behavior.<sup>32</sup> Congressional representatives competed to demonstrate to voters who was the “toughest” on drugs, by supporting the use of tougher criminal sanctions against those who sold or possessed illicit substances.<sup>33</sup> Congressional support for such solutions was steadfast, despite convincing empirical and comparative evidence that had existed since at least the 1960s,<sup>34</sup> demonstrating that utilization of a health approach, an approach that emphasizes

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28. It is important to note that Congress was specifically responding to an overdose death epidemic and not a rise in addiction rates. Federal government agencies, like Health and Human Services and the Centers for Disease Control, have defined the current problem as an overdose epidemic and in their definition of the problem, do not refer to the problem as an addiction epidemic. *See* CDC, *supra* note 4.

29. *See* COURTWRIGHT, DARK PARADISE, *supra* note 18; MUSTO, *supra* note 18.

30. *See generally* DEBORAH A. STONE, POLICY PARADOX AND POLITICAL REASON (1988) (providing an overview of how policy solutions are crafted in the policy-making process to address social problems). Both health solutions and criminal justice solutions are defined *infra*.

31. *See* MUSTO, *supra* note 18; Erlen & Spillane, *supra* note 18.

32. *See* COURTWRIGHT, DARK PARADISE, *supra* note 18.

33. *Id.*

34. For example, in 1958, the American Bar Association (ABA) and the American Medical Association (AMA) teamed up to author a special report urging the federal government to reverse its previous hard line anti-harm reduction and anti-maintenance approaches to addressing problem drug use. Although the report was based on empirical evidence, it was dismissed as fiction by administrative agency officials and Congress determined to continue with the criminal justice approach. The AMA and ABA finally found supporters in the Kennedy administration’s Advisory Commission on Narcotic and Drug Abuse, which also recommended the investment in methadone maintenance treatment and a greater emphasis on treatment as the solution for problem drug use. *See* EDWARD M. BRECHER & THE EDITORS OF CONSUMER REPORTS, LICIT AND ILLICIT DRUGS: THE CONSUMERS UNION REPORT ON NARCOTICS, STIMULANTS, DEPRESSANTS, INHALANTS, HALLUCINOGENS, AND MARIJUANA—INCLUDING CAFFEINE, NICOTINE, AND ALCOHOL (1972).

However, the focus on a health approach was brief. When President Nixon took office, he declared a War on Drugs and emphasized the executive’s commitment to a criminal justice and supply side emphasis. In his rhetoric, President Nixon associated drugs with crime and targeted young Black males as the leading culprits. *See* COURTWRIGHT, DARK PARADISE, *supra* note 18.

medical and public health methods for both treating and preventing problem drug use, would have been more effective at addressing problem drug use.<sup>35</sup>

Despite the empirical evidence, criminal justice solutions were supported by actors who depicted the drug user or populations at risk for drug use as persons of weak character, who could not help but give in to the seduction of a high, no matter the cost.<sup>36</sup> Historically, the dominant<sup>37</sup> problem definition<sup>38</sup> in drug policy has been that the drug user's poor moral character and his inability to refrain from engaging in hedonistic behavior caused his drug use.<sup>39</sup> This causal story<sup>40</sup> limited the policy alternatives to legislative solutions that included punishment and supply reduction—solutions aimed at punishing the drug user's bad behavior and keeping drugs away from him to decrease the likelihood of his use. Any health-oriented solutions, which may have included prevention, treatment and medical management of the user (“health solutions”), were treated as secondary solutions, at best.<sup>41</sup> The dominant causal narrative argued that to rid the user of the bad behavior, he must be punished and rehabilitated, not offered treatment. Punishment was the proper solution for the deviant, while treatment was a solution reserved for the ill.<sup>42</sup> In sum, since the early 1900s,<sup>43</sup> federal law had largely characterized drug users as “undesirable and criminal”<sup>44</sup> and unworthy of public assistance. Legislators' adherence to this causal theory of deviance, and the criminal justice solutions that accompanied such a narrative, was steadfast, despite scientific evidence that demonstrated that factors outside of the drug user contributed to his addiction.

This is not to say that there were not any efforts to address problem drug use with more health-oriented solutions. Some legislation addressed treatment and

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35. See COURTWRIGHT, DARK PARADISE, *supra* note 18; YSA ET AL., *supra* note 20.

36. MERRILL SINGER & J. BRYAN PAGE, THE SOCIAL VALUE OF DRUG ADDICTS: THE USES OF THE USELESS (2014).

37. Individuals and groups compete to define problems in the policy arena. As such, there are often multiple problem definitions for a single policy issue. The dominant problem definition is the problem definition that is accepted by the majority of actors as the explanation for the cause or source of the issue. See Rochefort & Cobb, *supra* note 7.

38. Throughout this proposal, I will use “problem definition” to represent both what is referred to by Rochefort and Cobb and Stone as defining a problem and to represent what other scholars refer to as “issue framing” or “issue definition.” Rochefort & Cobb, *supra* note 7; STONE, *supra* note 8. See, e.g., BAUMGARTNER ET AL., *supra* note 14 (referring to it as “issue definition”).

39. See COURTWRIGHT, DARK PARADISE, *supra* note 18; Courtwright, Forces of Habit, *supra* note 18; MUSTO, *supra* note 18. See also SCHUR, *supra* note 19.

40. The elements of causal stories and the strategic manner in which they are used in policymaking are outlined in Part III *infra*.

41. COURTWRIGHT, DARK PARADISE, *supra* note 18; MUSTO, *supra* note 18.

42. COURTWRIGHT, DARK PARADISE, *supra* note 18.

43. In 1914, Congress passed the Harrison Tax Act. Harrison Narcotics Tax Act, Ch. 1, 38 Stat. 785 (1914) (superseded by the Controlled Substances Act, Pub. L. 91-513, 84 Stat. 1242 (1970) (codified as amended in scattered sections of 21 U.S.C. (2012))).

44. SINGER & PAGE, *supra* note 36, at 168.

prevention. However, it was in conjunction to and overshadowed by proposals for criminal justice-oriented solutions, as was the allocation for funding to implement and enforce criminal justice proposals.<sup>45</sup>

CARA was passed in 2016 despite this criminal justice oriented policy history. CARA was a bi-partisan bill that passed with an overwhelming majority in both the House and the Senate<sup>46</sup> during a time of tremendous division between the Republicans and Democrats.

It radically diverges from the U.S.'s historic criminal justice legislative approach<sup>47</sup> because of its utilization of health-oriented solutions over criminal justice solutions. For example, CARA increases federal funding to the states for treatment of drug addiction and overdoses. CARA increases access to medication assisted treatment providers and requires federal and state agencies to disseminate more information to consumers about the risks of prescription opioid abuse, among other provisions.<sup>48</sup> CARA even focused attention on the potential consequences of the U.S.'s previous legislative commitment to a criminal justice approach<sup>49</sup> by requiring the U.S. Government and Accountability Office

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45. Notably, even prior to CARA, legislators often opined that the proper solution for classes of addicts that were addicted iatrogenically, or by medical error, was treatment, preferably in a private facility. COURTWRIGHT, DARK PARADISE, *supra* note 18. After the early 1900s, the number of iatrogenic addicts dwindled as did the popularity of treatment as a solution. COURTWRIGHT, DARK PARADISE, *supra* note 18. The preference for criminal justice solutions over treatment solutions is evidenced by the discrepancy between funding allocations to criminal justice enforcement vs. treatment and other health oriented responses. See GONZENBACH, *infra* note 83.

46. See S. REP. NO. 1404-1416 (2016).

47. When I refer to a criminal justice approach here and throughout this paper, I am referring to a category of proposed solutions that involve the use of criminal sanctions to deter behavior and result in processing the accused individual in the criminal justice system. The frame of criminal justice is used to define the social problem and often leads to the use of punitive problem solutions. Regarding explicit vs. implicit criminal justice approaches, I use the word "explicit" to signify a total criminal justice solution, as opposed to a hybrid solution. For example, CARA encourages states to develop prescription monitoring programs, a policy solution that can be considered a health solution, in so far as it is used to identify patients that need addiction treatment, and a criminal justice solution, in so far as it is used to provide law enforcement with information on the prescribing practices of physicians that they may prosecute criminally. CARA also includes provisions that expand access of medication-assisted treatment to incarcerated substance abusers, applying a health solution within the criminal justice system.

48. Comprehensive Addiction and Recovery Act of 2016, Pub. L. No. 114-198, 130 Stat. 695 (2016).

49. Almost all major federal drug legislation has emphasized a criminal justice approach to dealing with problem drug use. See Marihuana Tax Act of 1937, ch. 553, 50 Stat. 551 (1937) (repealed 1970); Boggs Act of 1951, Pub. L. No. 82-255, 65 Stat. 767 (repealed 1970); Narcotics Control Act of 1956, Pub. L. No. 84-728, 70 Stat. 567 (repealed 1970); Comprehensive Drug Abuse Prevention and Control Act (CDAPCA) of 1970, Pub. L. No. 91-513, 84 Stat. 1236 (codified as amended in scattered sections of 18 U.S.C., 19 U.S.C., 21 U.S.C., 26 U.S.C., 28 U.S.C., 31 U.S.C., 40 U.S.C., 42 U.S.C.); Racketeer-Influenced and Corrupt Organizations Act (RICO), Pub. L. No.



(“GAO”) to prepare a report on the “collateral consequences”<sup>50</sup> of criminalization for individuals who were convicted of non-violent drug possession.<sup>51</sup>

Legislators not only adopted health-oriented solutions when enacting CARA, but also redefined the problem of drug use as a health issue. Legislators who authored the bill redefined problem drug use as a health problem, caused by a disease or disorder of the body and mind—a problem definition that clearly differs from past criminal justice problem definitions of deviance and poor moral character.<sup>52</sup> As Republican Senator Robert Portman, who authored the Senate version of the CARA, noted:

This is a historic moment, the first time in decades that Congress has passed comprehensive addiction legislation, and the first time Congress has ever supported long-term addiction recovery. This is also the first

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91-452, tit. IX, 84 Stat. 922, 941-48 (1970) (codified as amended in scattered sections of 18 U.S.C. §§ 1961-1968); Continuing Criminal Enterprise (CCE) Statute, 21 U.S.C. § 848 (2012); Posse Comitatus Act Amendments of 1981, Pub. L. No. 97-86, § 905, 95 Stat. 1099, 1114-16; Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837 (codified in scattered sections of 18, 31 U.S.C.); Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207; Anti-Drug Abuse Amendments Act of 1988, Pub. L. No. 100-690, 102 Stat. 4312; and Crime Control Act of 1990, Pub. L. No. 101-647, 104 Stat. 4789 (codified as amended in scattered sections of 18 U.S.C.).

There were a few departures from purely criminal justice oriented legislative. Arguably, the Drug Abuse Control Amendments of 1965 and the Narcotic Addict Rehabilitation Act of 1966 were less criminal justice and more “medical treatment” focused. *See* COURTWRIGHT, DARK PARADISE, *supra* note 18, at 163; Drug Abuse Control Amendments of 1965, Pub. L. No. 89-74, 79 Stat. 226 (1965); Narcotic Addict Rehabilitation Act of 1966, Pub. L. No. 89-793, 80 Stat. 1438 (1966). But both pieces of legislation were replaced two years later by Nixon’s CDAPCA, so they did not have a lasting effect. The Drug Abuse Office and Treatment Act of 1972, which resulted in the creation of NIDA, and the 1974 legislation that created the Alcohol, Drug Abuse, and Mental Health Administration (“ADAMHA”), which later became SAMHSA, were not criminal justice oriented either, but only resulted in the creation of agencies within the administration. *See* Drug Abuse Office and Treatment Act of 1972, Pub. L. No. 92-255, 86 Stat. 65 (codified as amendment 21 U.S.C. §§ 1101-81); ADAHMA Reorganization Act of 1992, Pub. L. No. 102-321, 106 Stat. 323 (codified as amended in scattered sections of 42 U.S.C.). Moreover, the 2007 Second Chance Act focused on increasing treatment options and rehabilitation options to those who had been convicted and completed their sentence. *See* 2007 Second Chance Act, Pub. L. No. 110-199, 122 Stat. 657 (2008) (codified as amended in scattered sections of 42 U.S.C.). Although this footnote does not provide an exhaustive list of legislation, it provides the reader with an overview of the legislation that is most typical of U.S. drug policy.

50. According to Title IV, Sec. 401 of CARA, collateral consequences are penalties or disadvantages imposed on such individuals by law, an administrative agency, or a court, not including consequences imposed at sentencing. *See* Comprehensive Addiction and Recovery Act of 2016 § 401(b).

51. Comprehensive Addiction and Recovery Act § 401.

52. COURTWRIGHT, DARK PARADISE, *supra* note 18; MUSTO, *supra* note 18.

time that we've treated addiction like the disease that it is, which will help put an end to the stigma that has surrounded addiction for too long.<sup>53</sup>

CARA was soon funded by the 21<sup>st</sup> Century Cures Act with an unprecedented one billion dollars, perhaps demonstrating a more serious commitment to a health-oriented approach to problem drug use.

This problem redefinition by Congress leads one to ask: Why such a change and why now? Further, what motivated legislators to act to change drug policy given their inaction in other policy areas?

### III. WHAT MOTIVATES LEGISLATORS' BEHAVIOR?

#### *A. A Legislator's Goals: General Theory*

Although most scholars would agree that legislative behavior is motivated by a variety of factors, they disagree as to which of these factors is most influential. I briefly outline a few competing theories, including those that emphasize party preferences, cues from other legislators and even legislators' own personal preferences as central motivators. I then summarize more comprehensive models of legislative decision-making, including Kingdon's Consensus Model—the model upon which I base my framework. I analyze each theory, ascertaining its strengths, weaknesses, and utility in explaining legislative behavior as applied to the opioid epidemic. The summary below is by no means exhaustive, but offers a short review of the theory on legislative decision-making and provides the foundation needed to justify the legislative decision-making framework that I propose for analyzing the opioid epidemic at the end of Part III.

##### *1. The Party*

Some scholars, like Cox and McCubbins, argue that legislators consider their party preferences before casting a vote.<sup>54</sup> They argue that parties act as cartels influencing legislators to vote in the best interest of the party, even if it means voting in opposition to district preferences.<sup>55</sup> Other scholars disagree, arguing that party is just a label for legislators that already have similar preferences and that legislators are just voting their preferences.<sup>56</sup> Aldrich and Rohde take the middle road and argue for conditional party government, articulating the conditions

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53. Press Release, Rob Portman, Portman, Whitehouse, Ayotte, Klobuchar Cheer Final Passage of Comprehensive Addiction and Recovery Act (July 13, 2016).

54. See GARY W. COX & MATHEW DANIEL MCCUBBINS, *LEGISLATIVE LEVIATHAN: PARTY GOVERNMENT IN THE HOUSE* (Cambridge U. Press, 2nd ed. 2007). See also GARY W. COX & MATHEW DANIEL MCCUBBINS, *SETTING THE AGENDA: RESPONSIBLE PARTY GOVERNMENT IN THE U.S. HOUSE OF REPRESENTATIVES* (2005). See also Tim Groseclose & James M. Snyder, *Interpreting the Coefficient of Party Influence: Comment on Krehbiel*, 11 *POL. ANALYSIS*, Winter 2003, at 104-07.

55. Some scholars argue that political parties also influence legislative behavior. However, once controlling for ideology and voting records, evidence for an independent party effect is weak. See Keith Krehbiel, *Where's the Party?*, 23 *BRIT. J. POL. SCI.* 235, 235-66 (1993).

56. *Id.*

necessary for the party to influence legislators independently.<sup>57</sup> In sum, the literature is undecided as to the degree to which, if at all, party affiliation affects legislator votes. However, the straight party line votes that have been the hallmark of health policy for the last eight years provide some anecdotal evidence that in at least some circumstances parties can influence a legislator's voting behavior.<sup>58</sup> Since members of both parties drafted and voted for the adoption of CARA's health-oriented approach, at the surface, party membership does not seem to explain legislator behavior, at least in this instance of drug policy-making.

### 2. Cue-Taking

Matthews and Stimson, among others, argue that legislators take cues from one another as to how to vote on an issue in order to cut the information costs associated with making a decision on how to vote.<sup>59</sup> Similarly, Truman finds that legislators often form blocs with other legislators who have common interests, and they consult with these blocs on issues prior to votes.<sup>60</sup> Even if such cue-taking is influential, it seems most influential on issues that legislators' constituents do not have intense preferences.<sup>61</sup> Since constituents typically have opinions and preferences on drug policy issues, cue-taking would likely be less influential on the legislators' decision-making process.<sup>62</sup>

### 3. Legislator Preferences

Other scholars argue that even if party pressure and cue-taking influence legislative behavior, the factor that is most likely to predict a legislator's vote on an issue is her own personal ideology.<sup>63</sup> Such ideology is said to supersede even constituent preferences and re-election considerations.<sup>64</sup> To support such claims, scholars point to studies that show that there is low congruence between legislator

57. John H. Aldrich & David Rohde, *The Consequences of Party Organization in the House: The Role of the Majority and Minority Parties in Conditional Party Government*, in POLARIZED POLITICS: CONGRESS AND THE PRESIDENT IN A PARTISAN ERA (Jon R. Bond & Richard Fleisher ed., 2000).

58. See generally JOHN E. McDONOUGH, *INSIDE NATIONAL HEALTH REFORM* (2012).

59. See Donald Matthews & James Stimson, *Decision-making by U.S. Representatives*, in POLITICAL DECISION-MAKING 14-43 (S. Sidney Ulmer, ed., 1970). See also DONALD MATTHEWS & JAMES STIMSON, *YEAS AND NAYS: NORMAL DECISION-MAKING IN THE U.S. HOUSE OF REPRESENTATIVES* (1975).

60. DAVID TRUMAN, *THE CONGRESSIONAL PARTY* (1959).

61. John W. Kingdon, *Models of Legislative Voting*, 39 J. POL. 563-95 (1977).

62. See COURTWRIGHT, *supra* note 18, which provides evidence of legislators' efforts to please their constituency by being tough on drugs. There does not appear to be any systematic analysis of legislative cue-taking on the issue of drug policy.

63. CLEO CHERRYHOLMES & MICHAEL SHAPIRO, *REPRESENTATIVES AND ROLL CALLS* (1969). Keith T. Poole, *Changing Minds? Not in Congress!*, 131 PUB. CHOICE, 435, 435-51 (2007); Keith T. Poole & Howard Rosenthal, *Patterns of Congressional Voting*, 35 AM. J. POL. SCI., 228, 228-78 (1991); Keith T. Poole & Howard Rosenthal, *Are Legislators Ideologues or the Agents of Constituents?*, 40 EUROPEAN ECON. REV. 717, 717 (1996) [hereinafter POOLE & ROSENTHAL 1996].

64. POOLE & ROSENTHAL 1996, *supra* note 63.

votes and district preferences.<sup>65</sup> The literature on policy congruence proves more often than not that legislators' votes do not align with the majority of voters' preferences or the median voter's preference in their local districts—leading some scholars to question the degree to which legislators consider their constituents' policy preferences.<sup>66</sup> Normatively, such behavior can be justified by the “trustee view” of legislative representation, wherein a legislator's duty is to vote in a manner that she believes is in the best interest of her district, even if such a vote is not reflective of the preferences of her constituents.<sup>67</sup> Despite the evidence supporting legislator ideology as the primary predictor of a legislator's behavior, CARA's vote was a “lopsided vote with no ideological division”,<sup>68</sup> suggesting that factors aside from ideology influenced legislators' decisions to adopt a health-oriented approach to addressing the opioid crisis.

#### 4. *Models of Legislative Decision-making*

According to Fenno (1973) in his seminal work on Congress, *Congressmen in Committees*, legislators are motivated by three main goals: re-election, influence within Congress, and good public policy. Mayhew and other scholars<sup>69</sup> argue that the goal of re-election is the most central motivating factor for legislators, for re-election must be achieved before any other goals can be met.<sup>70</sup> Building on Mayhew and Fenno's work, Kingdon developed a “Consensus Model.” To do so, he conducted 200 interviews of legislators and identified actors who legislators considered prior to voting on an issue. He found that these actors were voters, interest groups, administrative agencies, and fellow legislators.<sup>71</sup> While considering these actors' preferences, legislators also reported considering their own preferences<sup>72</sup> and voting record. Although Kingdon's work on legislative decision-making precedes some of the studies cited above, his consensus framework combines theories of legislative behavior and, surprisingly,

65. Jeffrey R. Lax & Justin H. Phillips, *The Democratic Deficit in the States*, 56 AM. J. POL. SCI. 148, 148-66 (2012); John G. Matsusaka, *Popular Control of Public Policy: A Quantitative Approach*, 5 Q. J. POL. SCI. 133, 133-67 (2010).

66. See Part III for a more in depth discussion of policy congruence.

67. Martin J. Osborne & Al Slavinski, *A Model of Political Competition with Citizen-Candidates*, 111 Q. J. POL. SCI. 65, 65-96 (1996); Timothy Besley & Stephen Coate, *An Economic Model of Representative Democracy*, 112 Q. J. POL. SCI. 85, 85-114 (1997).

68. For the House vote, see Jeffrey B. Lewis et al., VOTEVIEW: CONGRESSIONAL ROLL-CALL VOTES DATABASE (2017), <https://voteview.com/rollcall/RH1141099> [<https://perma.cc/CX2Z-6NZF>]. For the Senate vote, see Jeffrey B. Lewis et al., VOTEVIEW: CONGRESSIONAL ROLL-CALL VOTES DATABASE (2017), <https://voteview.com/rollcall/RS1140373> [<https://perma.cc/8Y82-9LE7>].

69. See also MORRIS P. FIORINA, REPRESENTATIVES, ROLL CALLS, AND CONSTITUENCIES (1974).

70. DAVID R. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION (1974).

71. Kingdon, *supra* note 61.

72. *Id.* Since a legislator's ideology is often strongly correlated with the ideology of her constituents, it is difficult to ascertain the independent effect of ideology after controlling for constituent ideology. *Id.*

also addresses factors that were later identified by scholars as influential.<sup>73</sup> Kingdon's model demonstrates that legislators' primary goals are to satisfy constituents, increase or maintain intra-Washington influence, and create good public policy.<sup>74</sup> Elaborating on the factors in his model, Kingdon argues that legislators consider constituency preferences, not only when they are up for re-election, but do so throughout their term and anticipate re-election consequences far in advance.<sup>75</sup> Kingdon's goal of intra-Washington influence expands on Fenno's conceptualization, by including not only fellow members of Congress, but party leadership and the administration, thus including "party" as a factor. Lastly, Kingdon conceptualizes good public policy as a reflection of legislators' "policy attitudes, their ideology."<sup>76</sup> This definition of good public policy demonstrates that Kingdon's model includes legislative ideology or preferences as factor in a legislator's decision-making process.

Kingdon's model can be differentiated from other models in that he attempts to map out the factors in the order that they are considered by a legislator. According to Kingdon's model, first, a legislator votes with the consensus of her environment. If there is controversy over how she should vote, then she will be most persuaded by voters and interest groups. Voters and interest groups are most effective if their opinions are "intense" and the issue is salient.<sup>77</sup> Kingdon found that this held true regardless of whether an election is near or whether the legislator is in a safe seat. Kingdon notes however that a legislator does not necessarily consider all voters and interest groups, but may, for example, consider a narrow subset of her constituents.<sup>78</sup>

Kingdon's model of legislative decision-making provides a framework with which to explore why legislators redefined problem drug use when enacting CARA. The factors from Kingdon's model which seem most relevant are constituents' and interest groups' preferences. The issue of opioid misuse and opioid overdoses have been salient in the media. As such, if voters and interest groups demonstrate "intense" and clear support for a health-oriented approach to addressing the opioid epidemic—Kingdon's model would suggest that their preferences will heavily influence legislators' decisions to support health-oriented proposals. Conversely, Kingdon's model would also suggest that, in the past, when Congress enacted criminal justice oriented legislation, constituents were either silent or intense in their support for the criminal justice proposals. If voters and groups do not voice especially strong opinions on how to address problem drug use, then the legislators' considerations would shift to intra-Washington

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73. For example, Kingdon confirmed that legislators consulted their own individual preferences. Kingdon, *supra* note 61. These "preferences" are the predecessors for what scholars, like Poole & Rosenthal, later quantified as "ideology."

74. Kingdon, *supra* note 61.

75. *Id.* at 570-71.

76. *Id.* at 571.

77. *Id.*

78. *Id.*

actors, including fellow legislators and the administration.<sup>79</sup> These possibilities will be explored *infra*.

Kingdon's model also identifies administrative agency preferences as an input in the legislative decision-making process. Drug policy historians provide ample evidence that at various points in U.S. history federal administrative officials have influenced the problem definition of drug use, by at times publishing reports that over-estimated the number of addicts in the country in order to make drug use appear more widespread,<sup>80</sup> and at other times, publishing statistics that selectively highlighted the apparent success of the criminal justice approach.<sup>81</sup> Historically, administrative officials have also publicly denounced Medication Assisted Treatment ("MAT") policy solutions and have actively worked to discredit research reports supporting its efficacy.<sup>82</sup> Legislators have cited such reports and administrative agency official testimony as support for their policy positions on drug issues.<sup>83</sup> According to Kingdon's model, however, these administrative agency preferences would have been at the forefront of a legislator's considerations only when constituents' preferences were not intense.

#### *5. Proposed Framework for Analyzing Legislative Decision-making in Drug Policy*

The legislative behavior theories discussed above outline certain factors that may influence a legislator's decision to support a particular problem definition or policy solution. Each theory reviewed is supported by evidence; however, in no case is the evidence conclusive. Further, each theory may interact with issue specific variables unique to that policy domain. The identified factors may be influenced or restricted by policy history and policy path dependence. Its factors may also be affected by specialized institutions that may not be active on all issues. For example, the institutions at both the state and federal level that are affected by drug policy differ from those that are affected by tax reform. As such, the utility of each theory in explaining legislative decision-making will likely differ depending on the type of issue addressed.

In sub-sections 1-3, I briefly outlined why it is unlikely that party pressure, cue-taking, and legislator ideology explain legislators' decisions to adopt a health

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79. Further, Kingdon found that the administration is especially persuasive if the President is of the same party. Kingdon, *supra* note 61. Whitford and Yates extend this claim arguing that regardless of the party of the president, most U.S. presidents have utilized rhetoric to affect the types of policy proposals adopted to address problem drug use. See ANDREW B. WHITFORD & JEFF YATES, *PRESIDENTIAL RHETORIC AND THE PUBLIC AGENDA: CONSTRUCTING THE WAR ON DRUGS* (2009).

80. MUSTO, *supra* note 18; Erlen & Spillane, *supra* note 18.

81. Such statistics focused on reporting increases in the number of drug related arrests as opposed to statistics highlighting better treatment outcomes for problem drug users. See MUSTO, *supra* note 18; Erlen & Spillane, *supra* note 18.

82. See Erlen & Spillane, *supra* note 18; MUSTO, *supra* note 18.

83. COURTWRIGHT, *DARK PARADISE*, *supra* note 18. See also WILLIAM J. GONZENBACH, *THE MEDIA, THE PRESIDENT, AND PUBLIC OPINION: A LONGITUDINAL ANALYSIS OF THE DRUG ISSUE, 1984-1991* (1996).

approach to address the opioid epidemic. I argued that the insights such theories could provide were limited due to the bipartisan support for a health-oriented approach in 2016. Of the theories summarized in this article, Kingdon's Consensus Model appears to be most useful in identifying factors that may have influenced legislators to adopt a health approach to the opioid epidemic.

Kingdon's model provides a useful organizational framework for which to begin our analysis. In the following section, I will build upon Kingdon's framework, tailoring it to address drug policy specific issues. Further, I will demonstrate that legislators may have supported the enactment of health-oriented proposals, as embodied by CARA, because doing so allowed legislators to both protect their re-election prospects and create good public policy by (1) solving a pressing social problem that affects local voters ("Local Needs Consideration") using health-oriented policy proposals (2) supported by voters ("Voter Preferences Consideration"), (3) supported by organized interest groups ("Interest Group Preferences Consideration"), and (4) that had buy-in from the administrative agencies responsible for enforcement ("Administrative Preferences Consideration"). For each factor, I will begin with a review of the literature that supports the factor's inclusion in the proposed legislative decision-making framework. I will then follow with evidence of each factor's relevance as applied to legislative decision-making in relation to drug policy and the opioid epidemic.

#### IV. A LEGISLATOR'S CONSIDERATIONS

##### *A. Local Needs Considerations*

###### *1. Theoretical Justification*

Legislators want to solve problems that affect their local districts and that are considered important by their voting constituents. One way legislators can fulfill both of these considerations is to direct federal money to programs that address a salient local issue.<sup>84</sup> Because the public is often unaware of the new influx of federal money into the district, the legislator would then put out messages to constituents claiming credit for the allocation of federal money aimed at solving the local problem.<sup>85</sup> These credit-claiming messages would directly cultivate support for the incumbent,<sup>86</sup> thereby increasing the likelihood for re-election. Theoretically, a legislator would be rewarded most for addressing a local problem that (1) affects the greatest number of her *voting* constituents and in doing so, (2) considers their policy preferences, or opinions on which policy solution should be adopted to address the problem.

Since legislative resources are limited, it is in a legislator's best electoral

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84. BRUCE CAIN, JOHN FEREJOHN & MORRIS FIORINA, *THE PERSONAL VOTE: CONSTITUENCY SERVICE AND ELECTORAL INDEPENDENCE* (1987).

85. Justin Grimmer, Solomon Messing & Sean Westwood, *How Words and Money Cultivate a Personal Vote: The Effect of Legislator Credit Claiming on Constituent Credit Allocation*, 106 AM. POL. SCI. REV. 703-19 (2012).

86. *Id.*

interest to focus her attention on addressing the policy problems that affect the greatest number of constituents. The more constituents the problem affects, the greater the electoral payoff, because the enacted policy solution would inevitably affect more voters. Moreover, if re-election is indeed an important consideration for legislators, then solving a problem that affects populations that have high voter turnout would provide the most re-election benefits for the legislator. Solving a problem that affects wealthy donors would also be a strategic use of a legislators' time, as doing so may attract additional campaign contributions. Not only would legislators be most incentivized to focus on problems that affect the greatest number of constituents, likely voters and wealthy donors, but they would also be incentivized to consider the policy preferences of these groups when choosing the type of policy solution to endorse.

Although such logic is sound, the literature is divided on whether or not legislators pay more attention to the issues and opinions of demographic groups that are more likely to turn out to vote.<sup>87</sup> Demographics that have been associated with voter turnout include race, income and education, with Whites that are higher income earners reporting the highest voter turnout rate ("upper class Whites").<sup>88</sup> Although Whites only represent 65% of the U.S. population, they represented 75% of the voters in the 2014 election,<sup>89</sup> suggesting that they have a higher voter turnout rate than minority groups. Similarly, individuals in the middle- to high-income brackets are more likely to vote than those in lower income brackets. Individuals coming from families with incomes of less than \$30,000 made up only 16% of the voters in the 2014 election, even though they represent 28% of the population.<sup>90</sup> If legislators pay attention to the issues affecting voters more than nonvoters, then addressing issues affecting White middle-and upper-class constituents may appear to have a greater re-election payoff and may therefore be prioritized, especially if some of these constituents are generous campaign contributors.

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87. See, e.g., James Avery, Does Who Votes Matter? Income Bias in Voter Turnout and Economic Inequality in the American States from 1980 to 2010, 37 POL. BEHAV. 955-76 (2015).

88. *Comparing the Results of Different Likely Voter Models*, in PEW RES. CTR., CAN LIKELY VOTER MODELS BE IMPROVED? EVIDENCE FROM THE 2014 U.S. HOUSE ELECTIONS 14-18 (Jan. 7, 2016), [http://assets.pewresearch.org/wp-content/uploads/sites/12/2016/01/PM\\_2016-01-07\\_likely-voters\\_FINAL.pdf](http://assets.pewresearch.org/wp-content/uploads/sites/12/2016/01/PM_2016-01-07_likely-voters_FINAL.pdf).

89. *Id.*

90. As of 2014, the age group with the greatest age adjusted rates of overdose deaths are white men and women between the ages of forty-five and fifty-four. See Rudd et al., *supra* note 27. I was unable to locate the age group with the greatest age adjusted rate of overdose deaths in the 1980s and 1990s. Persons between the age of fifty and sixty-four are overrepresented at the poll. See PEW RES. CTR., *supra* note 88. This suggests that they are considered likely voters whose preferences may be especially important to legislators.



TABLE. Number and age-adjusted rates of drug overdose deaths,\* by sex, age, race and Hispanic origin,<sup>†</sup> Census region, and state — United States, 2013 and 2014

Decedent characteristic	2013		2014		% change from 2013 to 2014
	No.	Age-adjusted rate	No.	Age-adjusted rate	
All	43,982	13.8	47,055	14.7	6.5 <sup>§</sup>
Sex					
Male	26,799	17.0	28,812	18.3	7.6 <sup>§</sup>
Female	17,183	10.6	18,243	11.1	4.7 <sup>§</sup>
Age group (yrs)					
0–14	105	0.2	109	0.3	0.0
15–24	3,664	8.3	3,796	8.6	3.6
25–34	8,947	20.9	10,055	23.1	10.5 <sup>§</sup>
35–44	9,320	23.0	10,134	25.0	8.7 <sup>§</sup>
45–54	12,045	27.5	12,265	28.2	2.5
55–64	7,551	19.2	8,122	20.3	5.7 <sup>§</sup>
≥65	2,344	5.2	2,568	5.6	7.7 <sup>§</sup>
Race and Hispanic origin <sup>†</sup>					
White, non-Hispanic	35,581	17.6	37,945	19.0	8.0 <sup>§</sup>
Black, non-Hispanic	3,928	9.7	4,323	10.5	8.2 <sup>§</sup>
Hispanic	3,345	6.7	3,504	6.7	0.0

Figure 1.

The empirical evidence supporting the contention that legislators are influenced most by the preferences of upper-class Whites is mixed. Some studies show that legislators tend to pay more attention to the opinions of high income and wealthy individuals<sup>91</sup> and to non-Hispanic Whites' preferences over African Americans or Latinos, even after controlling for income.<sup>92</sup> While other studies find no statistically distinguishable difference between high vs. low income constituents,<sup>93</sup> Conflicting studies also demonstrate that on issues that are especially salient to minority groups, like crime, education, and healthcare, their preferences are at least as influential as Whites.<sup>94</sup>

Although the findings in the literature are inconclusive, the evidence suggests that *at times* legislators may prioritize the policy preferences of certain races or classes over others. Therefore, it is plausible that legislators were willing to adopt a health-oriented approach to the current opioid epidemic if upper-class Whites or other likely voters were affected by the opioid epidemic and supported health-oriented solutions. Further, it is likely that as the opioid epidemic became more geographically dispersed, more legislators saw the opioid epidemic as a problem

91. Fay Lomax Cook, Benjamin Page & Rachel Moskowitz, *Political Participation by Wealthy Americans*, 129 POL. RES. Q. 381, 381-98 (2014); KAY LEHMAN SCHLOZMAN, SIDNEY VERBA & HENRY E. BRADY, *THE UNHEAVENLY CHORUS: UNEQUAL POLITICAL VOICE AND THE BROKEN PROMISE OF AMERICAN DEMOCRACY* (2012).

92. JOHN D. GRIFFIN & BRIAN NEWMAN, *MINORITY REPORT: EVALUATING POLITICAL EQUALITY IN AMERICA* (2008).

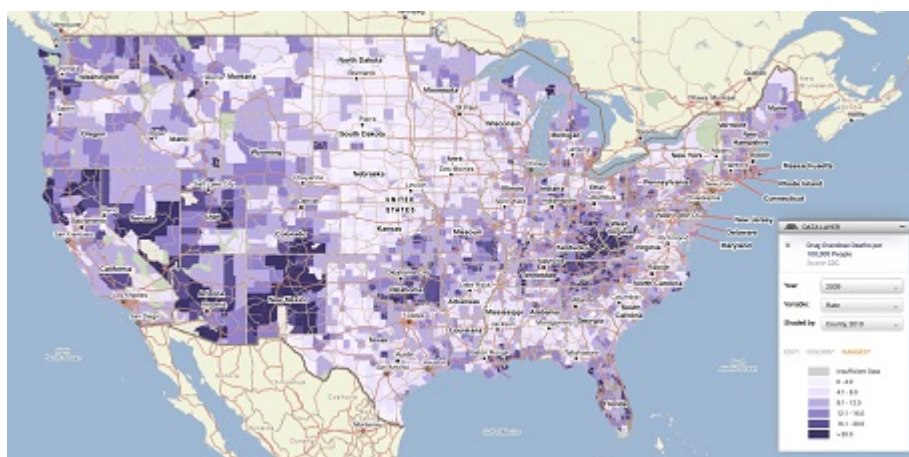
93. Yosef Bhatti & Robert S. Erikson, *How Poorly Are the Poor Represented in the U.S. Senate?*, in *WHO GETS REPRESENTED?* 223-46 (Peter K. Enns & Christopher Wlezien eds., 2011).

94. *Id.* There is some question, however, as to whether such differences are true differences or if they are due to the fact that districts with a majority of minority residents tend to be more ideologically heterogeneous; when such heterogeneity is controlled for, differences in legislator representation of preferences no longer exists. Brandice Canes-Wrone, *From Mass Preferences to Policy*, 18 ANN. REV. POL. SCI. 147, 147-65 (2015).

affecting a large number of their local constituents and thereby worthy of their time and attention.

## 2. *The Opioid Epidemic as a Local Issue*

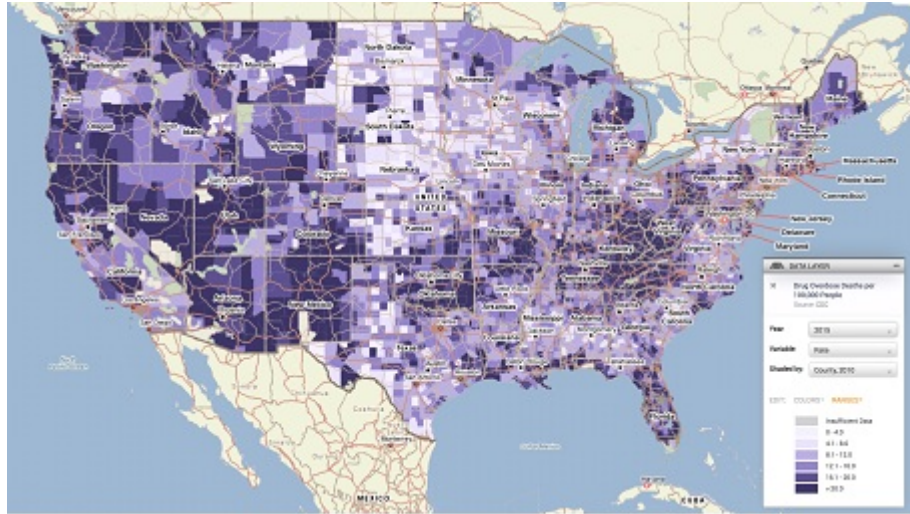
As it has progressed, the opioid epidemic has become denser and more geographically dispersed, affecting more local populations and states and doing so at greater degrees (*see* Figure 1).<sup>95</sup> From 2009 to 2015, the rate of overdose deaths increased in most states and localities. But not only has the problem gotten worse in the affected areas, but the problem has also spread to more communities, more districts, and more states (See Figure 2).



2009.

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95. Such increased geographic distribution has a number of consequences at the state and federal level. For example, at the state level, as the problem increases in geographic range and density, it reaches magnitudes at which the state cannot afford to address the problem without federal assistance, resulting in state administrations lobbying federal legislators to provide federal funds to assist. Such pleas for federal assistance may be made using media outlets and further focuses constituents' attention on the need for federal legislative action.



2015.

Figure 2.

And as the problem spreads to more legislators' districts and states, the opioid epidemic has become a "local problem" for a greater number of legislators. As more constituents become affected by problem drug use in the form of addiction and overdose deaths, the calls from voters for legislative action to address the problem are likely to increase. Since problem drug use devastates families, networks of friends, co-workers, and members of the helping professions, one overdose death affects a network of voters, thus magnifying the issue in ways the maps in Figure 2 cannot begin to capture. The geographic distribution of the problem spans the rural-urban divide and does not distinguish between Republican or Democratic led states—unlike past drug epidemics that may have been confined to certain urban or metropolitan areas. Given that the problem is so geographically widespread, the bipartisan call for a legislative solution becomes less surprising.

The opioid epidemic has cut across more than just geographic boundaries. Whereas, past drug epidemics may have been confined to poor or otherwise marginalized populations, the current epidemic is not confined to the poor nor is the population comprised of primarily racial or ethnic minorities.<sup>96</sup> The current

96. During the crack-cocaine epidemic of the late 1980s, overdose victims were primarily poverty-stricken African Americans. See the following graph which I created using CDC data that compares the rates of overdose deaths from 1979-1998 by race: *Compressed Mortality, 1979-1998 Charts*, CTRS. FOR DISEASE CONTROL & PREVENTION (Aug. 13, 2017), <https://wonder.cdc.gov/controller/saved/D16/D19F641> [<https://perma.cc/9YPW-H2ZK>].

population of overdose victims are whiter and more middle-class than previous populations.<sup>97</sup> The majority of overdose victims are still primarily members of the lower class,<sup>98</sup> yet there has been an increase in the number of overdose deaths in both the middle-<sup>99</sup> and upper-class—suggesting that the problem affects a variety of constituents and affects “likely voters.”

Since the opioid epidemic impacts sub-populations of constituents that have traditionally had high voter turnouts, legislators may be more incentivized to address problem drug use and to do so in a less stigmatizing manner. Solutions that emphasize punishment and incarceration—and stigmatize the user—are likely less popular when the population being targeted is a demographically diverse cross-section of a legislator’s constituency. When the affected constituents are calling for legislative aid in addressing the opioid epidemic, they are likely seeking help for themselves or their loved ones—help that is more characteristic of health institutions than criminal justice institutions. Such claims are facially convincing but do voter preference measures support the claim that these affected populations prefer health-oriented solutions as opposed to criminal justice solutions?

### *B. Voter Preferences Considerations*

When ascertaining voter preferences on an issue, legislators likely look to public opinion polls or media framing.<sup>100</sup> Legislators also report considering “latent public opinion,” or how they believe the public will react if they were to enact certain policies.<sup>101</sup> If these claims hold true, then a national shift in public support for health approach versus a criminal justice approach would have encouraged legislative support to shift in a similar direction. However, the relationship between Congressional action and public opinion is complex.<sup>102</sup>

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97. Admittedly, such changes, especially involving the racial composition of the target population, likely contributed to the near-abandonment of a criminal justice approach for a health approach—due in part to the racism endemic drug policy documented by other scholars. See ALEXANDER, *supra* note 23.

98. Because the CDC provides income or education levels for overdose deaths in their publicly facing query system, WONDER, it is difficult to discern which income bracket has the greatest number of overdose victims. However, data from the National Survey on Drug Use and Health does indicate that persons with an annual income of less than \$20,000 has the greatest rate of heroin use (as of 2011-2013, 5.5 per 100,000, compared to 2.3 for \$20,000 to \$49,999 and 1.6 for \$50,000 or more). Although all income groups have seen an increase in the rate of heroin use from 2002 to 2013. See *Vital Signs: Today’s Heroin Epidemic*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/vitalsigns/heroin/index.html> [<https://perma.cc/527Y-EDJ8>] (last updated July 7, 2015).

99. *Id.*

100. JOHN W. KINGDON, *AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES* (1984) [hereinafter *AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES*].

101. V.O. KEY, *PUBLIC OPINION AND AMERICAN DEMOCRACY* (1961).

102. Robert S. Erikson, *Roll Calls, Reputations, and Representation in the U.S. Senate*, 15

Although qualitative interviews with legislators suggest that legislators consider public opinion when making decisions,<sup>103</sup> the quantitative literature on the congruence between public opinion and policy do not demonstrate a high level of correlation between the policies supported by the majority of the population and policies that are enacted by legislators.<sup>104</sup> Such results, however, may be explained by the limitations of the methodology, differential congruence depending on sub-group, or differences between policy issues.<sup>105</sup> Much of the literature on policy congruence looks at the global opinion of the American public on a number of policy issues when reporting their findings and do not explore differences in congruence based on policy issue.<sup>106</sup> On average, global public opinion may not be congruent with policy, but some studies show that after controlling for partisanship, legislators are responsive to local voter preferences on issues<sup>107</sup> and state voter preferences.<sup>108</sup> The global average may be masking interesting individual differences. These individual differences may be further evident when looking at specific policy domains, like drug policy, as opposed to looking at a large category of policies, like social welfare policy. Further, the

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LEGIS. STUD. Q. 623-42 (1990). First, elected officials may share values with the constituents who elected them. Second, voters take cues from a legislator's stance on issues when deciding for whom to vote. Third, elected officials may give weight to their district's preferences prior to voting on a roll call. *Id.*

103. See, e.g., AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES, *supra* note 100; see also RICHARD F. FENNO, HOME STYLE: HOUSE MEMBERS IN THEIR DISTRICTS (1978).

104. See, e.g., Matsusaka, *supra* note 65; Jeffrey R. Lax & Justin H. Phillips, *The Democratic Deficit in the States*, 56 AM. J. POL. SCI. 148, 153 (2012). These studies found legislative votes to be congruent only 59% and 48% of the time, respectively.

105. Canes-Wrone, *supra* note 94.

106. An example of such is Matsusaka's article analyzing congruence of roll-call votes with public opinion. John G. Matsusaka, *When Do Legislators Follow Constituent Opinion? Evidence from Matched Roll Call and Referendum Votes* 11-12 (Stigler Ctr. for Study Econ. and State, Working Paper No. 9, May 2017), <https://research.chicagobooth.edu/~media/A048F1608A6B4963A7A201259AEF03E9.pdf> [<https://perma.cc/JTP3-ETVU>]. Matsusaka found that legislators voted their district's preference only 65% of the time, which is 15% greater than chance. *Id.* Further, Matsusaka found that policy congruence may depend on type of policy issue. *Id.* For example, when analyzing California's gambling law, he only found a 27.9% congruence, yet a 92.4% congruence was found when looking at California's health insurance law – suggesting that policy specific factors may affect congruence. *Id.*

107. Larry M. Bartels, *Constituency Opinion and Congressional Policy Making: The Reagan Defense Buildup*, 85 AM. POL. SCI. REV. 457 (1991); Thomas Stratmann, *Congressional Voting over Legislative Careers: Shifting Positions and Changing Constraints*, 94 AM. POL. SCI. REV. 665 (2000).

108. Erikson, *supra* note 102; Christopher Warshaw, *Are Senators More Responsive to Public Opinion Later in the Electoral Cycle?* (Columbia University Conference on Responsiveness, Representation and Democracy, unpublished manuscript, Feb. 25, 2013), <https://responsiveness2013.files.wordpress.com/2013/02/warshaw-senators-more-responsive-later-in-cycle.pdf> [<https://perma.cc/XP5P-E3KY>].

literature exploring the effects of *shifts* in public opinion on legislative decision-making provides support for the idea that a shift in public support for a health approach vs. a criminal justice approach may have preceded and influenced the legislative shift evidenced by CARA.

*1. Shifts in Public Opinion*

There is strong support for the contention that legislators are responsive to changes in public opinion, also called dynamic representation.<sup>109</sup> It is hypothesized that as public opinion changes, legislators sense the change and alter their policy behavior in response, especially in anticipation of an upcoming election.<sup>110</sup> Since voters replace legislators who are “out of step with public opinion,” legislators may be threatened with an electoral loss if they do not respond to the change in opinion.<sup>111</sup> “When politicians perceive public opinion change, they adapt their behavior to please their constituency and, accordingly, enhance their chances of re-election.”<sup>112</sup>

Legislators are most likely to re-characterize an issue when the change in

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109. Canes-Wrone, *supra* note 94.

110. See, e.g., AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES, *supra* note 100; James A. Stimson, Michael B. Mackuen & Robert S. Erikson, *Dynamic Representation*, 89 AM. POL. SCI. REV. 543 (1995); Thomas Hartley & Bruce Russett, *Public Opinion and the Common Defense: Who Governs Military Spending in the United States?*, 86 AM. POL. SCI. REV. 905 (1992); Christopher Wlezien, *Dynamics of Representation: The Case of US Spending on Defence*, 26 BRIT. J. POL. SCI. 81 (1996); Mark A. Smith, *Public Opinion, Elections, and Representation within a Market Economy: Does the Structural Power of Business Undermine Popular Sovereignty?*, 43 AM. J. POL. SCI. 842 (1999).

111. Canes-Wrone, *supra* note 94, at 149. If a legislator is not aligned with voters’ preferences, then she risks being replaced by another legislator. There is evidence that federal legislators are sanctioned by voters for votes that are not popular with their constituents on issues concerning the budget, Congressional salaries, and healthcare. See Gary C. Jacobson, *Deficit-Cutting Politics and Congressional Elections*, 108 POL. SCI. Q. 375 (1993); John A. Clark, *Congressional Salaries and the Politics of Unpopular Votes*, 24 AM. POL. RES. 150 (1996); Brendan Nyhan et al., *One Vote Out of Step? The Effects of Salient Roll Call Votes in the 2010 Election*, 40 AM. POL. RES. 844 (2012). Such accountability is more likely under certain political conditions than others. See, e.g., Steven Ansolabehere, James M. Snyder & Charles Stewart, *Constituents’ Responses to Congressional Roll-Call Voting*, 46 AM. POL. SCI. J. 583 (2001). For example, recent research by Rodgers finds that legislators are much less likely to be held accountable by voters at the state level. Steven Rogers, *Electoral Accountability for State Legislative Roll Calls and Ideological Representation*, 111 AM. POL. SCI. J. 555 (2017). Some argue that this is likely a result of less media attention, more uncompetitive political elections, and incumbency advantages at the state level. See, e.g., *id.*; JOHN M. CAREY, RICHARD G. NIEMI & LYNDY W. POWELL, *TERM LIMITS IN THE STATE LEGISLATURES* (2000); *THE MARKETPLACE OF DEMOCRACY: ELECTORAL COMPETITION AND AMERICAN POLITICS* (Michael P. McDonald & John Samples eds., 2006). However, others like Matsusaka, *supra* note 65, find that electoral pressure has no statistically significant effect.

112. Stimson, Mackuen & Erikson, *supra* note 110, at 545; see, e.g., Hartley & Russett, *supra* note 110; Wlezien, *supra* note 110; Smith, *supra* note 110.

public opinion is a “large[,] stable” change on a salient issue.<sup>113</sup> Legislators change their behavior on the margin, making the changes they can within their ideological spectrum to match the change in public opinion.<sup>114</sup> Due to the preference for the status quo built into the legislative system, “more than a moderate level of popular support for a policy reform is generally needed for it to be enacted.”<sup>115</sup> Further, there are structural conditions that can interfere with the dynamic representation hypothesis, including: (1) partisan bias, (2) manipulation of public opinion, (3) the electoral cycle, (4) issue salience, and (5) policy domain.<sup>116</sup>

## 2. *Shifts in Public Opinion Coinciding with Changes in the Target Population*

A factor that can impact the manner in which public opinion on an issue shifts is the composition of the target population, or population that the policy solution is thought to benefit or burden. For example, the target population of policies enacted to address the opioid epidemic could include drug users, drug suppliers, family members of drug users, or employers, among others. Legislators choose from the list of affected actors when enacting a solution.

The demographics and characteristics of a target population can influence both public and legislator perceptions of who or what caused the problem and which legislative proposals are best suited to address the problem, due in part to the social construction of categories of persons that are members of the target population. These categories are defined by rules that determine the terms of inclusion.<sup>117</sup> Schneider and Ingram argue that categories of persons are socially constructed into two main types, those who are deserving of social assistance and those who are undeserving. Examples of deserving populations include senior citizens, veterans or active military, children, mothers, the middle-class, farmers and the ill.<sup>118</sup> The poor, on the other hand, are constructed as undeserving. Due in part to early Puritan influences on the development of American values, the poor have been traditionally depicted as lazy and lacking discipline.<sup>119</sup> Therefore, Americans harbor a general distaste for policy benefits that appear to be “handouts,” or “unearned” benefits, to the poor.<sup>120</sup>

Individuals addicted to illicit substances have been traditionally categorized alongside criminals as deviants, undeserving of public assistance.<sup>121</sup> Past drug epidemics in the U.S. have affected poor and marginalized populations that resided in urban areas already riddled with crime, so even if the label of the drug

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113. Benjamin I. Page & Robert Y. Shapiro, *Effects of Public Opinion on Policy*, 77 AM. POL. SCI. REV. 175, 181 (1983).

114. Stimson, Mackuen, & Erikson, *supra* note 110.

115. Canes-Wrone, *supra* note 94, at 148.

116. Canes-Wrone, *supra* note 94.

117. STONE, *supra* note 8; SCHNEIDER & INGRAM, *supra* note 15.

118. STONE, *supra* note 8; SCHNEIDER & INGRAM, *supra* note 15.

119. See JAMES A. MORONE, *HELLFIRE NATION: THE POLITICS OF SIN IN AMERICAN HISTORY* (Yale U. Press 2008).

120. See STONE, *supra* note 8.

121. *Id.*

user as a criminal was not deserving, the correlation between drug use and crime made the association believable. Moreover, according to Schneider and Ingram, deviants are not only viewed as undeserving of public benefits, but are also viewed as most deserving of punishment, often in the form of criminal sanctions.<sup>122</sup> Evidence from public discourse surrounding past drug epidemics offer support for the claim that the poor are more likely to be constructed as undeserving of benefits, like treatment. Drug policy historian Courtwright has documented that as the demographics of the target population of drug users changes from the upper middle-class to poor or from the mainstream to the marginalized, public preferences shift from supporting treatment as a solution to supporting criminal sanctions and incarceration of the user and his supplier.<sup>123</sup>

Unlike past drug epidemics, the current Opioid Epidemic has been characterized as a “white” problem and as a problem that affects not only the poor, but the middle-and upper-class as well. Since the middle-class is constructed as a deserving class, Schneider and Ingram’s typology would predict that society would support policy solutions that benefit the target population of drug users, as opposed to punishing them.<sup>124</sup> The demographic changes to the target population noted *supra* in Part III.A.2. support this contention as the target population for the opioid epidemic includes categories of persons, like the middle-class, that are socially constructed as more deserving of policy benefits and less deserving of punitive solutions. But does the evidence support this theorized shift in public support?

### 3. Evidence of Shifts in Public Opinion on Drug Policy

According to Courtwright, legislators have historically perceived public support for a criminal justice approach to problem drug use.<sup>125</sup> He attributes this legislative perception of public support to “a key electoral group, middle-class suburban voters, [who] remained convinced that the punitive drug war was the only thing standing between their children and a flood of drugs.”<sup>126</sup> To this electoral group, any other approach, including the health approach, was too risky, as it communicated to their children that they could experiment with drugs and then just seek treatment.<sup>127</sup> The punitive, or criminal justice approach, also pleased religious conservatives whose votes were becoming “increasingly important in the political equation.”<sup>128</sup>

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122. SCHNEIDER & INGRAM, *supra* note 15.

123. COURTWRIGHT, DARK PARADISE, *supra* note 18.

124. SCHNEIDER & INGRAM, *supra* note 15. The social construction of the affected population is not the only construction that affects public opinion and subsequently available legislative solutions. *Id.* Certain groups may be viewed by the public as undeserving of public benefits but are also politically powerful groups. *Id.* A group’s political power can serve as a moderator for the effects of social construction. *Id.*

125. COURTWRIGHT, DARK PARADISE, *supra* note 18.

126. *Id.* at 178.

127. See MICHAEL MASSING, THE FIX (U. California Press 2000).

128. COURTWRIGHT, DARK PARADISE, *supra* note 18, at 178. There does not appear to be any formal analysis of drug policy and public opinion congruence. Studies analyzing public opinion and



Although public support for a criminal justice approach has been historically dominant with few exceptions, public opinion surveys suggest that there has been a shift in public support away from criminal justice solutions and toward health solutions. From 1988 to 2001, surveys indicated that the support for criminal justice solutions declined.<sup>129</sup> More specifically, support for arresting drug users and drug dealers dropped from 37% to 30% and 59% to 49%, respectively.<sup>130</sup> By 2001, the support for criminal justice solutions was still greater than health-oriented solutions, with support for treatment at a mere 36%.<sup>131</sup> Yet, the shift away from the criminal justice approach laid the groundwork for the support for the health-approach that was yet to come. By 2014, 67% of respondents supported policy solutions that focused on treatment over prosecution.<sup>132</sup> The changes in public support from 1988 to 2014 evidence a steady shift in public

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drug policy have focused mostly on the degree to which drug policy, as an issue, is salient and on the public's agenda, as well as what causes drugs to make it onto the public's agenda. These studies have focused on news media coverage of the drug problem, coding newspaper articles and broadcast transcripts based on content and then conducting either a frequency analysis or an ARIMA analysis to determine whether there has been a change over time in how the media frames the drug problem. Such methodology is based on empirical analysis that shows that the saliency of a news media frame increases the likelihood that a frame (1) will reflect the manner in which the public defines an issue, (2) will influence the importance the public assigns the issue, and (3) will influence legislators' framing of an issue. See e.g. WHITFORD & YATES, *supra* note 79; GONZENBACH, *supra* note 83.

129. *Interdiction and Incarceration Still Top Remedies*, PEW RES. CTR. (Mar. 21, 2001), <http://www.people-press.org/2001/03/21/interdiction-and-incarceration-still-top-remedies/> [<https://perma.cc/CBF8-M5AV>] [hereinafter, PEW 2001].

130. All survey questions were designed and administered by Pew Research Center for the People and the Press, and the survey responses were weighted so that the results were representative of the U.S. adult population. *Id.*

131. Notably, public support for "educating about drugs," which could be argued to be a health promotion solution, also declined from 1988 to 2001. See PEW 2001, *supra* note 129; Figure 2. This suggests that the public may have been dissatisfied overall with the effectiveness of government intervention on the issue of problem drug use.

132. These figures summarize the results of a particular survey question used by Pew, in which they asked survey respondents whether the government should focus more on "persecuting people who use illegal drugs such as heroin or cocaine" or "focus more on providing treatment for people who use these types of drugs." *America's New Drug Policy Landscape: Two-Thirds Favor Treatment, Not Jail, for Use of Heroin, Cocaine*, PEW RES. CTR. 1 (Apr. 2, 2014), <http://www.people-press.org/files/legacy-pdf/04-02-14%20Drug%20Policy%20Release.pdf> [<https://perma.cc/XFC6-BR3T>] [hereinafter PEW, *New Policy*]. The findings are supported by a recent study by Barry et al. See Colleen L. Barry et al., *Understanding Americans' Views on Opioid Pain Reliever Abuse*, 111 ADDICTION 85-93 (2016). Barry et al. aimed to uncover American's views on the opioid epidemic. *Id.* Although the researchers did not ask respondents to report whether they felt that opioid addicts should be penalized for their actions, or otherwise measure support for criminal justice solutions, they did find substantial support for the health solutions that were considered by legislators prior to passage of CARA. *Id.*

opinion in support of health approaches to problem drug use over criminal justice approaches.<sup>133</sup> This is the type of large and stable shift in public opinion necessary to create a change in legislator support. However, for the shift in public opinion to be most effective in translating to a legislative problem redefinition and a policy change, a coinciding shift in pressure group support for the problem redefinition is ideal. In the following sub-section, I demonstrate how and why pressure groups are theorized to affect legislative problem definition. I then provide anecdotal evidence to support the claim that while pressure groups may have supported a criminal justice approach in the past, pressure groups are likely defining the opioid epidemic as a health problem involving health actors – thus supporting the health shift evidenced in public opinion surveys.

### *C. Pressure Group Considerations*

#### *1. The Theoretical Literature: Problem Definition, Pressure Groups & the Policy Process*

In the U.S., pressure groups can play an integral part in convincing legislators to adopt a particular problem definition.<sup>134</sup> Groups compete for legislator time and attention with the goal of being awarded the ability to define the problems that affect their interests.<sup>135</sup> Legislators look to pressure groups for not only campaign finance and electoral support, but also subject matter expertise, research and even assistance in implementing legislation. As such, changes in pressure group framing can affect the contents of legislation drafted to address the problem.<sup>136</sup>

In competing to define the problem, groups vie for the ability to narrate the “causal story” by explaining the cause of the problem, identifying who or what is to be blamed for the problem and who should benefit from the problem

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133. See PEW, *New Policy*, *supra* note 132, at 1. The 2014 support for treatment spanned “nearly all demographic groups,” with support being about the same whether or not the individual viewed drug abuse as a crisis in their own local neighborhood (64% vs. 68%). *Id.* However, Republicans did show less support for treatment (51%) than Democrats (77%) and Independents (69%), which is not surprising since the 2001 Pew report, *supra* note 129, showed that less Republicans considered addiction a disease than Democrats (61% v. 30%). *Id.* This suggests that ideology may affect the strength of support for treatment solutions. *Id.* at 8. Aside from ideological differences, differences in support for treatment vs. incarceration correlated with race and ethnicity with 81% of Blacks supporting treatment over incarceration, compared to 66% of Whites and 61% of Hispanics. *Id.* at 9.

134. BAUMGARTNER ET AL., *supra* note 14; SCHNEIDER & INGRAM, *supra* note 15; STONE, *supra* note 8.

135. STONE, *supra* note 8; Joshua L. Kalla & David E. Broockman, *Campaign Contributions Facilitate Access to Congressional Officials: A Randomized Field Experiment*, 60 AM. J. POL. SCI. 545-58 (2016).

136. BAUMGARTNER ET AL., *supra* note 14; SCHNEIDER & INGRAM, *supra* note 15; STONE, *supra* note 8; Beth L. Leech, *Lobbying and Influence*, in THE OXFORD HANDBOOK OF AMERICAN POLITICAL PARTIES AND INTEREST GROUPS 534-51 (L. Sandy Maisel & Jeffrey M. Berry eds., 2010).

solution.<sup>137</sup> Pressure groups use these causal stories to assign blame and responsibility for the problem, empower certain actors as the “fixers” of the problem, create new political alliances, and “either challenge or protect an existing social order.”<sup>138</sup> By defining the problem with causal stories, groups also limit the policy solutions that legislators are left with to those that best align with their interests.<sup>139</sup> According to Stone, pressure groups use common strategies to define the problem for legislators in ways that (1) attribute blame to outside groups, (2) limit alternative solutions, and (3) strategically define the target populations.<sup>140</sup>

*a. Problem definition strategies: Attributing blame*

By analyzing causal stories used in the policymaking process, Stone was able to identify the following common causal theories—which argue that the policy problem (1) was an accident of nature or fate, (2) was the result of “human agency,” (3) was a problem created by a “few bad apples,” (4) was the result of hidden motives, (5) was the result of a calculated risk that someone took, (6) was the result of a purposeful action but one for which the individual or group could not have possibly known the outcomes for, or (7) was the result of such a complex process that it is simply out of the actors’ control.<sup>141</sup>

Examples of such strategies can be found in recent causal stories used to describe the cause of the current opioid epidemic. For example, the Attorney General in Ohio recently pursued litigation against five pharmaceutical companies for causing the current opioid epidemic in Ohio by intentionally misrepresenting the addictive properties of opioid prescription painkillers.<sup>142</sup> He was quoted as saying, “They knew they were wrong, but they did it anyway—and they continue to do it.”<sup>143</sup> In doing so, the Attorney General was blaming the pharmaceutical companies for taking a calculated risk where the benefits, for the company, would outweigh the costs and asserting that the opioid crisis in Ohio was a result of willful acts. This shifts the blame to the pharmaceutical companies as the actors that caused the epidemic. It also suggests to federal legislators that the cause of the opioid epidemic was pharmaceutical companies’ greed and that the appropriate solutions to the problem include regulation and punishment.

Another example of strategic use of causal stories by a pressure group is physicians’ counter-story to the causal story that blames physicians for causing the epidemic by overprescribing opioid painkillers. As a group, physicians would want to shift blame from the medical community at large, to the “few bad

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137. STONE, *supra* note 8.

138. *Id.* at 223-24.

139. Rochefort & Cobb, *supra* note 7; STONE, *supra* note 8.

140. STONE, *supra* note 8.

141. STONE, *supra* note 8, at 233.

142. Press Release, Ohio Attorney Gen. Mike DeWine, Attorney General DeWine Files Lawsuit Against Opioid Manufacturers for Fraudulent Marketing; Fueling Opioid Epidemic, (May 31, 2017), [www.ohioattorneygeneral.gov/Media/News-Releases/May-2017/Attorney-General-DeWine-Files-Lawsuit-Against-Opio](http://www.ohioattorneygeneral.gov/Media/News-Releases/May-2017/Attorney-General-DeWine-Files-Lawsuit-Against-Opio) [<https://perma.cc/D9DY-SHCN>].

143. *Id.*

apples”—doctors who were intentionally and willfully trafficking in illegal drug sales. An example of a legislative policy solution that aligns with this counter causal story is a prescription monitoring program that identifies the bad apples who are overprescribing. Such a solution targets the bad seeds, as opposed to punishing the medical profession as a whole.

*b. Problem definition strategies: Limiting alternative solutions*

Pressure groups craft causal stories not only to attribute blame, but also to identify a causal theory that supports a particular legislative solution. Causal stories are powerful in that they limit the policy alternatives, or acceptable solutions (“alternatives”) to the problem.<sup>144</sup> So, for example, if the pharmaceutical industry’s willful acts have caused the current opioid epidemic, then the policy solutions available involve regulating or penalizing the pharmaceutical industry. Whereas, if physicians are to be blamed for the current opioid epidemic, then the alternatives are prescription monitoring programs and punishing the bad apples. Neither of these causal stories call for penalizing the drug user, because the drug user did not cause the problem—the pharmaceutical industry and the physicians did.

However, if we again shift back to blaming the drug user for his problem drug use, blaming his poor moral character for failing to prevent him from resisting sinfully pleasurable indulgencies if they are within his reach, then a criminal justice solution is more likely. For example, if the cause of the increase in heroin use is, instead, the influx of heroin from Mexico that inevitably results in an increase in heroin use because populations at risk of problem drug use cannot help but use if the supply is available, then building a wall between the U.S. and Mexico and punishing those who supply and possess heroin is a viable solution to the problem.<sup>145</sup> Therefore, she who tells the story has the power to limit the policy alternatives available by the way that she attributes the cause of the problem.<sup>146</sup> In sum, the causal story limits the policy alternatives available to policies that address the cause of the problem, and if pressure groups describe problem drug use as a health problem that involves health actors, legislators are more likely to support a health solution.

In order to best limit the policy alternatives to their desired choices, pressure groups utilize certain strategies when deciding which cause of the problem to focus on in their causal stories. According to Stone, some common strategies used to limit alternative solutions include: (1) using the causal narrative to make the preferred alternative the only apparent solution, (2) “focus[ing] on one part of the causal chain and ignor[ing] others that would require politically difficult or costly policy actions,” (3) in analyzing the evidence, focusing on consequences that

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144. Rochefort & Cobb, *supra* note 7; STONE, *supra* note 8.

145. *KHN Morning Briefing: Trump Blaming Mexico For N.H.’s Opioid Crisis Exposes Lack Of Understanding Of The Epidemic*, KAISER HEALTH NEWS (Aug. 4, 2017), <http://khn.org/morning-breakout/trump-blaming-mexico-for-n-h-s-opioid-crisis-exposes-lack-of-understanding-of-the-epidemic/> [https://perma.cc/2CBD-JA53]. Such a supply driven causal theory also attributes blame to the supplier who keeps in abundant supply the irresistible substance.

146. Rochefort & Cobb, *supra* note 7; STONE, *supra* note 8.

make their preferred alternative appear to be the best solution, and (4) ensuring that the alternative hurts the most powerful constituents, or “advantaged” targets least,<sup>147</sup> but still appears to be best for the social good<sup>148</sup> and punishes any social deviants.<sup>149</sup>

Examples of such strategies can be found not only in drug policy, but in health policy in general. For example, S. Bryn Austin demonstrated how in the late 1980s to early 1990s public health officials teamed up with the food industry, most notably, ConAgra, Inc., a manufacturer of a new food brand Healthy Choice, to battle obesity.<sup>150</sup> Although there was not much scientific evidence that demonstrated a link between dietary fat and poor health outcomes, it was dietary fat that was focused on in the causal chain of obesity. Nestlé’s Stouffer’s Lean Cuisine division soon joined the movement, investing money in what was then called Project LEAN (Low-Fat Eating for American Now). By limiting the focus on the causal chain to dietary fat, these groups were able to limit the alternative solutions to educating the public on the harmful effects of fat and the benefits of a low-fat diet, meanwhile profiting from increased sales of their new diet food lines.<sup>151</sup> The power of narratives extends beyond drug policy.

## 2. *Theoretical Literature: Pressure Group Influence*

The preceding sub-section provided evidence of the role that pressure groups play in the problem definition discourse. The following sub-sections explain additional factors that may influence a legislator’s receptiveness to a pressure group’s narrative. Since the literature on interest group influence is distinct from that discussing administrative agency influence, I have presented summaries of each literature separately.

### a. *Interest group influence and Congress*

Influence is often narrowly defined by the interest group literature as “the power to change a public policy or to defeat efforts to have the policy changed.”<sup>152</sup> The ways that interest groups are theorized to influence policy are (1) by providing campaign contributions, (2) by providing legislators with insight as to the preferences of their constituents and mobilizing its members for or against a legislator, and (3) by acting as “service bureaus” that provide research, information, and popular support.<sup>153</sup>

#### (1) *Campaign contributions and pressure group resources*

Much of a legislator’s campaign funds come from interest groups.<sup>154</sup> It is hypothesized that legislators pay special attention to donors who donate

147. SCHNEIDER & INGRAM, *supra* note 15.

148. STONE, *supra* note 8, at 260.

149. SCHNEIDER & INGRAM, *supra* note 15, at 104.

150. S. Bryn Austin, *Constructing the Need for “Low Fat” Food*, in SOCIAL PROBLEMS: CONSTRUCTIONIST READINGS 180, 180-88 (Donileen R. Loseke & Joel Best eds., 2003).

151. *Id.*

152. Leech, *supra* note 136.

153. *Id.* at 536.

154. Benjamin I. Page, Larry M. Bartels & Jason Seawright, *Democracy and the Policy Preferences of Wealthy Americans*, 11 PERSP. ON POL. 51, 51-73 (2013).

substantial money to campaigns because the money can buy advertising to help increase the chances that the legislator will be re-elected.<sup>155</sup> Further legislators may give preferential treatment to interest groups who donate to other legislators' campaigns, based on the belief that they may be able to elicit funds from the group in the future.<sup>156</sup>

Scholars theorize that legislators may see campaign contributions as shared values, preferences, or expertise.<sup>157</sup> A recent study by Kalla and Broockman found that interest groups who donate to Congressional campaigns have the most access to having their opinions heard.<sup>158</sup> Access to Congress does not automatically mean that Congress will adopt the groups' position, but it does increase the likelihood that the group will be able to influence the framing of policy.<sup>159</sup>

The degree to which legislators believe that campaign finance is important is reflected in the amount of time legislators spend per day trying to raise campaign funds.<sup>160</sup> Perceptions of the importance of campaign finance is also reflected in interest group campaign finance activity of groups that have high exposure to regulation. More specifically, interest groups with such potential exposure are much more likely to contribute campaign funds to legislators who have committee seats in policy areas that affect that group.<sup>161</sup>

Although theoretically and anecdotally, access to legislators seems likely to result in interest group influence, there is insufficient quantitative evidence to show a causal impact of contributions.<sup>162</sup> While some studies evidence a correlation between financial contributions to legislators and policy outcomes, others do not.<sup>163</sup> Leech suggests this may be because all such studies focus on dichotomous, yes or no votes on a policy as the outcome measure, thereby ignoring other parts of the policy making process where interest groups may have

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155. *Id.*

156. Kalla & Broockman, *supra* note 135, at 547.

157. *Id.*

158. *Id.*

159. *See, e.g.*, JOHN MARK HANSEN, GAINING ACCESS: CONGRESS AND THE FARM LOBBY, 1919-1981 (1991); Richard L. Hasen, *Lobbying, Rent-Seeking, and the Constitution*, 64 STAN. L. REV. 191, 191-253 (2012); Richard L. Hall & Alan V. Deardorff, *Lobbying as Legislative Subsidy*, 100 AM. POL. SCI. REV. 69, 69-84 (2006).

160. Legislators report spending several hours per day to raise campaign funds. Ryan Grim & Sabrina Siddiqui, *Call Time for Congress Shows How Fundraising Dominates Bleak Work Life*, HUFFINGTON POST (Dec. 6, 2017), [http://www.huffingtonpost.com/2013/01/08/call-time-congressional-fundraising\\_n\\_2427291.html](http://www.huffingtonpost.com/2013/01/08/call-time-congressional-fundraising_n_2427291.html) [https://perma.cc/76P9-4CZT].

161. Eleanor N. Powell & Justin Grimmer, *Money in Exile: Campaign Contributions and Committee Access*, 78 J. POL. 974, 974-88 (2016); Stephen Ansolabehere & James M. Snyder, Jr., *Money and Institutional Power*, 77 TEX. L. REV. 1673, 1673-1704 (1999).

162. BAUMGARTNER ET AL., *supra* note 14; Justin Fox & Lawrence Rothenberg, *Influence without Bribes: A Noncontracting Model of Campaign Giving and Policymaking*, 19 POL. ANALYSIS 325, 325-41 (2011).

163. Leech, *supra* note 136.

influenced the policy process—for example by affecting which issues reach the agenda or how legislators talk about a policy problem.<sup>164</sup>

Baumgartner et al. argue that campaign contributions and lobbying expenditures alone do not adequately measure the resources that groups have available to them to affect a policy redefinition, which is why studies sometimes find a relationship and other times do not.<sup>165</sup> For example, the number of former Congressional staffers employed by an organization<sup>166</sup> may be considered a more predictive resource than campaign contributions. To improve upon campaign contributions as measures of influence, Baumgartner et al. used disclosures under the Lobbying Disclosure Act of 1995 to identify other resources, like the number of lobbyists per organization who were former Congressional staff members or high-level officials.<sup>167</sup> Disclosures were also used to identify campaign contributions and soft-money contributions to parties for two successive two-year election cycles before the policy outcome.<sup>168</sup> Even though Baumgartner et al. defined interest group resources more broadly than their predecessors, they still found little correlation between a pressure group's resources and specific policy outcomes. An individual pressure group's resources did not seem to predict whether its desired policy outcome would be adopted.<sup>169</sup>

Baumgartner et al. then shifted their analysis from the individual level to the population level and compared the aggregate resources of all interest groups for each “side” of a policy issue.<sup>170</sup> In their definition of interest group resources, Baumgartner et al. included high ranking officials in government, including administrative officials.<sup>171</sup> Their subsequent analysis showed that the *side* supported by the greatest number of high ranking government officials was most likely to be successful.<sup>172</sup> The higher ranking the government official, the better.<sup>173</sup> Further, if a “side” was seeking to redefine a problem, it was more likely to succeed if supported by high ranking government officials.<sup>174</sup> Not surprisingly, the president being on the side of the policy change was also a significant

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164. *Id.*

165. BAUMGARTNER ET AL., *supra* note 14.

166. It is presumed that such former staffers still have relationships in Congress, relationships that allow these former staffers to influence how a problem is framed and the types of solutions supported.

167. BAUMGARTNER ET AL., *supra* note 14, found that citizens groups were much less likely than business corporations, trade and business associations, professional associations and unions to file disclosures. They also noted that unions and citizens seemed to work more with the “rank and file” government officials but that businesses had greater access to higher ranking members of the government. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

predictor.<sup>175</sup> Aside from support from high-ranking government officials, a general resource advantage did seem to aid the side mobilizing for policy change, especially during the first two years of mobilization.<sup>176</sup>

In sum, although campaign contributions and resources at groups' disposal are believed to affect the groups' ability to lobby legislators to adopt their problem definition and policy solution, the relationship between lobbying resources and success in doing so is not always evident in the literature. As such, lobbying resources by any one specific organization may not have caused the redefinition of problem drug use as a health problem prior to CARA's enactment. Baumgartner, et al.'s work, however, suggests that the "health side" of the problem definition discourse likely had greater lobbying resources, including access to campaign contributions and support from high-ranking administrative officials.<sup>177</sup> Before such conclusions can be drawn, of course, a systematic analysis of the lobbying resources available to the health side of the problem definition discourse prior to CARA is needed.

*(2) Influence as information on constituents' preferences and as a legislative subsidy*

Groups that contribute to legislators' campaigns or have access to electoral resources are not the only interest groups that are theorized to affect how a problem is defined or the types of policy proposal adopted to address a problem. Interest group theorists have challenged the "exchange theories" of lobbying that depict lobbying as a simple exchange of campaign contributions for votes and propose instead "persuasion theories" that theorize that interest groups are influential because they have access to constituency's opinions on policy issues, giving legislators information that they would not have otherwise had about how policy actions may affect their re-election prospects.<sup>178</sup> Unfortunately, there is not much support for this theory, as interviews with lobbyists reveal that when advocating for a policy proposal to legislators, lobbyists use arguments that are "electoral in nature" less than 3% of the time.<sup>179</sup>

Hall and Deardorff suggest that interest groups use yet another tool to influence legislators—a legislative resource subsidy.<sup>180</sup> Hall and Deardorff theorize that pressure groups are powerful, not just because they contribute to political campaigns, but mostly because they can also offer "costly policy information, political intelligence and legislative labor," also referred to as a "legislative subsidy."<sup>181</sup> Although Hall and Deardorff do not explicitly refer to administrative agencies as offering a legislative subsidy, administrative agencies can provide a legislative subsidy just the same, as they provide detailed reports and information on specific subject matters often outside the expertise of

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175. *Id.*

176. *Id.*

177. *Id.*

178. Hall & Deardorff, *supra* note 159.

179. Leech, *supra* note 136, at 546.

180. Hall & Deardorff, *supra* note 159.

181. *Id.*



legislators. While providing this legislative subsidy, both organized interest groups and administrative agencies are in a prime position to define the policy problem.

Public interest groups, or citizens groups, are especially situated to provide credible and researched expertise and reports, putting them at an advantage for the provision of information in comparison to other interest groups due to their research accuracy and credibility.<sup>182</sup> In order for legislators to influence legislation, they require “in-depth policy analysis, reports or expertise” that can be provided by public interest groups thereby saving legislators the time and resources they would have spent on compiling such information.<sup>183</sup> “Matthews (1960, 182) observed, quoting one senator: ‘They can tell me in thirty minutes or less what it would take me hours to learn through reading and study.’”<sup>184</sup> Legislators are also aware that reports produced by public interest groups are likely to be received more favorably by the press than reports produced by industries.<sup>185</sup> This may be why Baumgartner, et. al. found that citizens groups were most likely to be named by legislators as the central actors on an issue,<sup>186</sup> as their provision of such reports can be indispensable to defining a policy problem.

*b. Administrative agency influence*

Organized interests are not the only groups that provide legislators with policy-relevant information. Federal administrative agencies, even those outside of the Cabinet, are another source of policy expertise and information.<sup>187</sup> Their influence on legislators is independent of the President and his cabinet.<sup>188</sup> A longitudinal analysis of the issue attention cycle of the media, public attention, and the legislative activity on problem drug use in the U.S. found that problem drug use only made the public agenda after an administrative agency released reports citing a rise in addiction or overdose deaths.<sup>189</sup>

Policy entrepreneurs within administrative agencies, policy-makers invested in defining a problem in particular manner or in seeking certain policy solutions, can further influence legislative decision-making.<sup>190</sup> Baumgartner et al. found that

182. JEFFREY M. BERRY, *THE NEW LIBERALISM: THE RISING POWER OF CITIZEN GROUPS* (1999); WILLIAM P. BROWNE, *CULTIVATING CONGRESS: CONSTITUENTS, ISSUES, AND INTERESTS IN AGRICULTURAL POLICYMAKING* (1995).

183. Hall & Deardorff, *supra* note 159, at 74.

184. *Id.*

185. BERRY, *supra* note 182.

186. According to Baumgartner et al., because citizens groups have fewer resources than business interests, they were often spread thin. BAUMGARTNER ET AL., *supra* note 14, at 242. To succeed, they teamed up with business actors who had access to greater resources. *Id.* If citizens groups were unable to align themselves with interest groups with deeper pockets, they could find themselves in a “David and Goliath” situation. *Id.*

187. Frederick J. Boehmke, Sean Gailmard & John Wiggs Patty, *Whose Ear to Bend? Information Sources and Venue Choice in Policy-Making*, 1 Q. J. POL. SCI. 139-69 (2005).

188. AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES, *supra* note 100.

189. GONZENBACH, *supra* note 83.

190. BAUMGARTNER ET AL., *supra* note 14.

41% of advocates for the adoption of a side on a policy issue were government officials.<sup>191</sup> Because Congress relies on administrative agencies to interpret legislation, as well as implement and enforce it, administrative acceptance of a problem definition and solution is exceedingly important—regardless of whether or not Congress is controlled by the same political party for which the President is a member. Further, noting the influence of administrative agency officials, organized interest groups often team-up with administrative agency officials that support their lobbying position in the hopes of forming a stronger coalition. The most successful lobbying groups are the ones that work with, not only policy entrepreneurs in Congress, but also high-level bureaucrats in the federal administration who support their policy stance on an issue.<sup>192</sup>

Aside from federal administrative agency support, successful problem redefinition has occurred when (1) pressure groups, who were previously absent from discourse, joined and supported the problem redefinition, (2) new networks or coalitions of pressure groups supporting the problem redefinition emerged, and/or (3) there was a substantial and punctuated shift in mobilization and resources to the “redefinition” side.<sup>193</sup> In sum, pressure groups, including administrative agencies and interest groups, influence the types of policy proposals adopted, due in part to their influence on legislative decision-making. Such influence is further evidenced by an analysis of drug policy history.

### 3. Evidence of Pressure Group Activity in Drug Policy

Although a systematic analysis of pressure group involvement in the problem definition of the current Opioid Epidemic has yet to be published, historical analysis of pressure group activity in drug policy suggests that pressure groups have been active in the problem definition process and have a continued interest in continuing to lobby for the adoption of particular problem definitions and policy proposals. Historically, physicians, pharmacists, prescription drug

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191. *Id.* (conceptualizing federal agencies, not as pressure groups, but as resources to pressure groups). I conceptualize a government agency as both a resource to organized interests or as advocates and a pressure group in and of itself. After all, government agencies have their own tools of persuasion including relationships with Congressional members, the endorsement of the President, and the ability to develop and disseminate supportive research. *Id.*

192. Christine Mahoney & Frank R. Baumgartner, *Partners in Advocacy: Lobbyists and Government Officials in Washington*, 77 J. POL. 202-15 (2015).

193. BAUMGARTNER ET AL., *supra* note 14, identified the following factors as important predictors of policy change: (1) changes in the types of pressure groups involved, (2) addition or departure of specific pressure groups or pressure group leadership, and (3) the changes of who is on each side. For example, in one case study, there was a change in officials overseeing an executive agency and the new official desired a different policy outcome. To accomplish this, he constructed a new narrative aligned with his policy solution, recruited the support of organized interests and was successful in reframing the policy issue. *Id.*

In another instance, business interests entered into the policy debate and introduced a new narrative, which was quickly supported by state governments interested in achieving the same policy goals. *Id.* Therefore, formations of new connections, including new coalitions, can also contribute to policy reframing.

manufacturers, and the Narcotics Bureau (which was later merged with the Drug Enforcement Agency) have had political and strategic reasons for supporting certain problem definitions and policy solutions over others.<sup>194</sup> Such problem definitions have historically influenced the types of legislative solutions enacted, including whether or not that definition supports health-oriented versus criminal justice oriented legislative solutions,<sup>195</sup> and will arguably continue to do so. However, for most of these groups, the role that they may or may not have had in defining the Opioid Epidemic as a health versus a criminal justice issue has yet to be empirically documented. However, anecdotal evidence suggests that pressure groups have been on the “health-side” of the current policy debate.

For example, in the past, and the present, the medical profession has been blamed for creating classes of opiate addicts who were initially prescribed the opiate by a prescriber (“iatrogenic addicts”).<sup>196</sup> Such accusations have historically mobilized organized interest groups representing these professions, including the American Medical Association (“AMA”) and the American Pharmacists Association (“APhA”).<sup>197</sup> Although one might predict that such groups would always support a health-oriented approach to addressing problem drug use, historically, these groups have supported the approach most aligned with their immediate needs. For instance, the AMA has oscillated between supporting the contention that addiction is a disease that necessitates treatment by the medical profession to supporting the claim that addicts were persons with psychosocial personality disorders who must be locked away so as not to do harm to themselves or to society.<sup>198</sup> Courtwright argues that the AMA has advocated for the remedy of treatment most when the addict population was comprised of a class of persons that physicians preferred treating: White, middle-to upper-class populations.<sup>199</sup> Courtwright contends that when the population of addicts became poorer and lower class, the AMA adopted the view that addiction was a result of a personality disorder that law enforcement officials were best suited to handle.<sup>200</sup>

Similarly the APhA has supported the addiction as a disease narrative explicitly when doing so aligned with their policy objectives of maintaining a legal supply of opiates to prescribe and include in druggists’ elixirs.<sup>201</sup> For sub-populations of users that were marginalized, like Chinese immigrants, the APhA adopted popular narratives of deviancy and supported punitive solutions.<sup>202</sup> The APhA drafted early model drug legislation for states and convened working groups to negotiate the terms of the nation’s first large scale opiate regulation, the Harrison Tax Act of 1914, evidencing the medical profession’s influence on early

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194. COURTWRIGHT, DARK PARADISE, *supra* note 18; MUSTO, *supra* note 18.

195. El-Sabawi, *supra* note 23.

196. COURTWRIGHT, DARK PARADISE, *supra* note 18; MUSTO, *supra* note 18.

197. COURTWRIGHT, DARK PARADISE, *supra* note 18; MUSTO, *supra* note 18.

198. *Id.*

199. *Id.*

200. *Id.*

201. MUSTO, *supra* note 18; Erlen & Spillane, *supra* note 18.

202. MUSTO, *supra* note 18; Erlen & Spillane, *supra* note 18.

drug policy.<sup>203</sup> However, when their financial stake in the problem definition disappeared, so did their involvement in the problem definition discourse and their support for a health-oriented disease narrative.<sup>204</sup>

Further systematic analysis is needed to determine whether there has been a marked increase in the medical industry's involvement in the legislative discourse prior to CARA's enactment and whether their contribution to the discourse supported a health-oriented approach—an approach that was subsequently embodied in CARA. However, preliminary evidence suggests that health actors have been supportive of a health-oriented approach. Namely congressional testimony by members of the medical industry, supports the claim that problem drug use is a health issue or a disease that needed prevention, education and treatment.<sup>205</sup>

Drug manufacturers may have also influenced the problem definition of drug use as a health issue. Historically, the drug manufacturing industry's support for a health approach was also influenced by their financial stake in the outcome, as was their involvement in the drug policy discourse. In the nascent stage of U.S. drug manufacturing the pharmaceutical industry was dominated by so called “patent” medicine manufacturers who commonly utilized cocaine and opiates in their over-the-counter medication that were marketed directly to consumers.<sup>206</sup> It was therefore in their interest to support a health-oriented definition of opiate and cocaine use to ensure its continued legalization. As “ethical drug companies” began to dominate, companies that were more focused on research and discovering new drugs, the needs and interests of the drug industry evolved.<sup>207</sup> Their support for a health approach dissipated, as did their general involvement in drug policy. However, as new forms of MAT develop and demand for opioid reversal medications increase, drug manufacturers have renewed incentives to engage in the drug policy discourse. Again, systematic analysis is needed here to identify the causal theories supported by these drug manufacturers and the degree to which such causal stories align with a health-approach. However, defining addiction as a disease of the brain aligns quite well with the access to medication as a solution.

Aside from the medical industry's involvement in the problem definition discourse, administrative agency officials have historically had significant influence on the legislative approach to problem drug use. Although Richard Nixon is often remembered for having declared the first “war on drugs,” with subsequent presidents declaring similar “wars,” it was not the president who was

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203. MUSTO, *supra* note 18. These working groups included representatives from physicians associations and the drug manufacturing industry. MUSTO, *supra* note 18; Erlen & Spillane, *supra* note 18.

204. MUSTO, *supra* note 18.

205. See, e.g., *Testimony, S. Comm. Homeland Security and Government Affairs: Wisconsin Heroin Epidemic*, 2016 WL 1572172 (Apr. 15, 2016) (statement of Timothy Westlake, M.D., Chairman, Controlled Substances Comm.).

206. MUSTO, *supra* note 18; Erlen & Spillane, *supra* note 18.

207. Erlen & Spillane, *supra* note 18.

the first to resort to a militarized, criminal response to drugs, but rather, high level bureaucrats in the administrative branch. Henry Anslinger, of the Narcotics Bureau (NB), is often cited as the father of America's criminal justice approach to drug control.<sup>208</sup> Anslinger began as an upper level bureaucrat in the Prohibition Bureau during the Progressive Era and maintained his Prohibition Era rhetoric for the thirty-two years of his tenure, during which he influenced Congress through his emotionally-charged stories and half-truths.<sup>209</sup> Anslinger fueled fearful, punitive responses to problem drug use and perpetuated the construction of the drug user as a criminal and deviant within the DEA, well before the first president declared the first of the many "wars" on drugs that was to come.<sup>210</sup> Anslinger's influence is reported to have had a lasting effect on the culture and approach taken by the DEA to address problem drug use.<sup>211</sup> The DEA's influence on Congress did not end when Anslinger left.

How administrative agency officials have influenced the problem definition of the opioid epidemic has yet to be documented. Notably, the DEA's reference to drug users not as deviants or criminals, but as friends, families, co-workers and neighbors in congressional hearing testimony regarding the opioid epidemic suggests that the DEA has changed its rhetoric.<sup>212</sup> Further, although the legislative solutions supported by the testimony focused on decreasing the supply of drugs, the solutions proposed were not exclusively criminal justice oriented, in that they involved and were even partially administered by health actors.<sup>213</sup> Given Baumgartner et al.'s conclusion that administrative agency support of a problem redefinition is important to successful problem redefinition, this anecdotal evidence suggests that shifts in the DEA's problem definition may have influenced the legislative support for less criminal justice oriented solutions and in the least, a facially more health-oriented approach.

In conclusion, the contention that pressure groups influence how a policy problem is characterized is evidenced in drug policy history. Although a detailed analysis of pressure groups' involvement in the problem definition discourse prior to CARA's enactment is still needed, anecdotal evidence suggests that certain groups that have been historically active in drug policy may have contributed to support the definition of the Opioid Epidemic as a problem necessitating a health-oriented solution.

## V. CONCLUSION

In this article, I have provided an interdisciplinary review of theories of

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208. *Id.*; see also COURTWRIGHT, DARK PARADISE, *supra* note 18.

209. See Erlen & Spillane, *supra* note 18.

210. *Id.*

211. *Id.*

212. See Testimony, S. Caucus on Narcotics Control: Controlled Substances Quota Process, 2015 WL 1643509 (May 14, 2015) (statement of Joseph T. Rannazzisi, Deputy Assistant Administrator Office of Diversion Control, Drug Enforcement Admin.).

213. *Id.*

legislative decision-making and in doing so, provided evidence to support the relevance of these theories to explaining the types of legislative proposals adopted to address the current opioid epidemic. Using these theories as a foundation, I proposed that legislators considered local needs, voter preferences, interest group preferences and administrative agency preferences when deciding to adopt a health-oriented approach to the opioid epidemic. More specifically, I provided evidence to support the claim that in adopting a health approach, legislators acted to ensure re-election and create good public policy by a solving a pressing social problem that affected local voters in a manner supported by voters, interest groups and administrative agencies. The evidence presented in this article only demonstrates that such a theory is viable and that additional empirical research is needed to verify its true utility. However, it narrows down the possible influential factors to a manageable number of most likely candidates. It also provides interested researchers and scholars with a framework to verify and build on.

Moreover, it contributes to the discourse by explaining how changes in the demographics of drug users, particularly changes in the race or class of drug users, or the rural or metropolitan distribution of a drug problem, can factor into a legislator's decision-making process. Even without considering the effects of explicit or implicit racial bias, this article demonstrates that legislators are incentivized to define policy problems in ways that not only result in the adoption of good policy, but also ensure their re-election. Legislators, in concert with other actors, construct policy problems and solutions and when such a construction aligns with public opinion and pressure group preferences, that construction is most likely to become an enacted legislative solution. Such an acknowledgement is powerful in that it provides advocates with tools with which to affect the policy process and convince legislators to adopt certain policy solutions over others. As applied to the case of drug policy, understanding the factors that convinced Congress to abandon its longstanding love affair with ineffective criminal justice solutions and commit to more empirically supported public health solutions,<sup>214</sup> will allow advocates to try to prevent Congress resorting to ineffective criminal justice solutions when faced with drug epidemics in the future.

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214. There is a litany of academic scholarship, comparative examples, and even the federal administration's own reports that indicate that the U.S. government's adoption of criminal justice solutions to address problem drug use has not been successful in decreasing the number of overdoses or cases of addiction, causing a former President Obama official to declare that the "War on Drugs," the name often used to personify this approach, has failed. *See* Debusmann, *supra* note 21; *see also* YSA ET AL., *supra* note 20.