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## Missouri Shows the True Meaning of the “Show-Me” State – Missouri’s Unfounded Hesitation to Enact a Prescription Drug Monitoring Program

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## NOTE

# Missouri Shows the True Meaning of the “Show-Me” State – Missouri’s Unfounded Hesitation to Enact a Prescription Drug Monitoring Program

Emma Masse\*

### I. INTRODUCTION

Drug overdoses in the United States have more than doubled over the last two decades, resulting in more deaths due to opioid overdoses than to vehicle accidents.<sup>1</sup> In 2014, there were over 28,000 deaths due to opioid abuse.<sup>2</sup> Out of the total number of drug overdoses in 2013, illicit drugs were not the primary culprits.<sup>3</sup> Rather, over half of the deaths were associated with prescription drugs.<sup>4</sup> Opioids contributed to 42,249 deaths in 2016 and were responsible for the vast majority of accidental overdoses, which more than quintupled since 1999.<sup>5</sup> As prescription drug deaths became an epidemic, forty-nine states as of early 2017 joined to combat this trend by enacting prescription drug monitoring programs.<sup>6</sup> After New Hampshire became the forty-ninth link in the

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1. Maggie Fox, *Drug Overdoses Spur Rise in Accidental Deaths, Says Report*, NBC NEWS (June 17, 2015, 12:55 AM), <http://www.nbcnews.com/health/health-news/fifty-ways-die-report-finds-accidental-deaths-n377131>.

2. Dan Margolies, *Ag Secretary Vilsack Says Long Past Time for Missouri to Adopt Drug Monitoring Program*, KCUR 89.3 (June 13, 2016), <http://kcur.org/post/ag-secretary-vilsack-says-long-past-time-missouri-adopt-drug-monitoring-program#stream/0>.

3. Jacob O’Brien, Note, *A Review and Evaluation of Indiana’s INSPECT System and Governing Legislation: Maximizing Potential Impact on Public Health*, 10 IND. HEALTH L. REV. 701, 702 (2013).

4. Fox, *supra* note 1.

5. *Opioid Overdose: Drug Overdose Death Data*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/drugoverdose/data/statedeaths.html> (last updated Dec. 19, 2017) [hereinafter *Opioid Overdose*].

6. Jason Hancock & Andy Marso, *Gov. Eric Greitens Orders Prescription Drug Monitoring Program for Missouri*, KAN. CITY STAR (July 17, 2017, 12:33 PM),

chain in June of 2012,<sup>7</sup> the “Show-Me” state stood alone from 2012 to 2017 in the battle against prescription drug abuse.<sup>8</sup>

All fifty states have now enacted a prescription drug monitoring program (“PDMP”).<sup>9</sup> A PDMP is a statewide database that monitors the prescriptions distributed within a given state.<sup>10</sup> PDMPs have been shown to act as useful tools in a variety of ways. For example, they aid in decreasing prescription drug abuse through intervention, and they are powerful mechanisms to help physicians realize if they are unknowingly treating addicts searching for unnecessary painkillers<sup>11</sup> (this is known as “doctor shopping”).<sup>12</sup> Because prescription drug abuse is one of the most pressing drug-related problems in the United States,<sup>13</sup> PDMPs have the ability to save lives. Between the years of 1999 and 2014, drug overdose fatalities increased by 386%,<sup>14</sup> and out of the 28,000 opioid abuse-inflicted deaths alluded to above, over 1000 of the lives claimed belonged to Missourians.<sup>15</sup> This is no surprise considering Missouri’s controlled substance death rate is far higher than the national average.<sup>16</sup>

This Note examines the reasons why Missouri took so long to enact any form of PDMP legislation. Part II of this Note introduces the background of PDMPs as they emerged across the country. Part III highlights the hurdles that states encountered in passing PDMP legislation and how they overcame them. Part III also discusses some of the recent developments in Missouri’s own efforts to pass PDMP legislation. Part IV of this Note examines the benefits of PDMPs as they apply to both preventing statewide prescription drug abuse as

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<http://www.kansascity.com/news/local/news-columns-blogs/the-buzz/article161759233.html>.

7. Memorandum from NH Prescription Drug Monitoring Program to Licensed NH Prescribers & Pharmacists (Oct. 29, 2014), <http://www.nhmgma.com/assets/pdmp%20memo%20ltrhead%20102914%20final.pdf>.

8. See Alan Schwarz, *Missouri Alone in Resisting Prescription Drug Database*, N.Y. TIMES (July 20, 2014), <https://www.nytimes.com/2014/07/21/us/missouri-alone-in-resisting-prescription-drug-database.html>.

9. *Prescription Drug Monitoring Frequently Asked Questions (FAQ)*, PRESCRIPTION DRUG MONITORING PROGRAM TRAINING & TECH. ASSISTANCE CTR., <http://www.pdmpassist.org/content/prescription-drug-monitoring-frequently-asked-questions-faq> (last visited Apr. 2, 2018).

10. *Id.*

11. *Id.*

12. *Doctor Shopping Law and Legal Definition*, USLEGAL, <https://definitions.uslegal.com/d/doctor-shopping/> (last visited Apr. 2, 2018) (for brief background on doctor shopping).

13. See *Prescription Drug Monitoring Frequently Asked Questions (FAQ)*, *supra* note 9.

14. *Prescription Drug Monitoring Programs Save Lives. Missouri Needs One Now.*, SHATTER PROOF, <https://www.shatterproof.org/prescription-drug-monitoring-programs-save-lives-missouri-needs-one-now> (last visited Apr. 2, 2018).

15. Margolies, *supra* note 2.

16. *Id.*

well as aiding prescribers in knowing exactly what their patients have previously been prescribed. Part IV then discusses the criticisms PDMP legislation has received across the nation, specifically in Missouri. Finally, this Note concludes with a brief comment on the outlook of drug abuse in Missouri now that Missouri has joined the war against prescription drug abuse.

## II. LEGAL BACKGROUND

This Part traces the history of PDMPs in the United States and discusses how PDMPs have evolved to become law across the country. Though PDMPs are not mandated in every state, the federal government provides financial aid to states that want to construct and implement statewide PDMPs as part of a combative fight against drug abuse.<sup>17</sup> As of 2012, all states had implemented operational PDMPs or had enacted PDMP legislation, except for Missouri.<sup>18</sup> In 1918, New York became the first state to enact a PDMP.<sup>19</sup> California and Hawaii followed suit in the early 1940s, chased by many others during the 1970s to 1990s, including Washington, Texas, Illinois, Michigan, Rhode Island, and Indiana.<sup>20</sup> In 1991, Oklahoma became the first state to enact an electronic PDMP.<sup>21</sup>

### A. What Do PDMPs Monitor?

Though each state's PDMP differs, the basic information collected and utilized through the programs remains consistent. Dispensers<sup>22</sup> are asked to submit data that includes patient identification (name, address, birth date, gender), prescriber information, dispenser information, drug information, quantity dispensed, and date dispensed.<sup>23</sup> Specifically, PDMPs are formulated to operate by monitoring the collected information for possible abuse or diversion (such as funneling opioids into illegal uses, etc.) and can prove to be life-saving

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17. Neha Casturi, Comment, *A Modern Day Apocalypse: The Pill Mill Epidemic, How It Took Texas by Storm, and How Texas Is Fighting Back*, 14 TEX. TECH. ADMIN. L.J. 445, 459–60 (2013).

18. See *Prescription Drug Monitoring Program*, OFF. PROF. LICENSURE & CERTIFICATION, <https://www.oplc.nh.gov/pharmacy/drug-monitoring.htm> (last visited Apr. 2, 2018).

19. ALL OF STATES WITH PRESCRIPTION MONITORING PROGRAMS, PRESCRIPTION MONITORING PROGRAMS 5 (Oct. 18, 2010), <http://www.pdmpassist.org/pdf/PPTs/LI2010/1-PMP-Overview-History.pdf>.

20. *Id.*

21. *Id.*

22. *Id.* at 13 (Dispensers include pharmacies in the state, out of state pharmacies licensed to dispense into the state, hospitals, and practitioners dispensing out of their office.).

23. *Id.* at 12.

devices.<sup>24</sup> For example, consider a situation in which a patient visits a physician in hopes of obtaining opioids in addition to the prescription medications he has already been prescribed by his treating physician. Had he tried to obtain unnecessary opioids in Missouri prior to July of 2017, he would have likely succeeded with no monitoring program in place for a prescriber to reference to see if the patient had already been prescribed the medication. However, if the patient attempts the same goal in Missouri today, the likelihood of the patient receiving a prescription for unnecessary opioids drops significantly if his prescriber is able to verify through a statewide database whether another physician has already prescribed the patient these medications. This is, at its most basic level, how PDMPs help to save lives across the nation.

With respect to the prescription medications monitored by PDMPs, the Controlled Substances Act<sup>25</sup> is the federal drug policy through which the United States classifies and categorizes prescription medications into five separate classes (referred to as “Schedules”) based upon the federal government’s viewpoint of each drug’s potential abuse, dependency, and addiction level.<sup>26</sup> Roughly sixty percent of state PDMPs collect information on Schedules II through V drugs, with the rest primarily collecting Schedules II through IV only.<sup>27</sup>

Schedule I drugs (the most restricted schedule) include non-prescription, illegal drugs, such as heroin, LSD, and cocaine, and are not monitored by many PDMPs because they have no accepted medical use and therefore are not the type of drugs PDMPs first and foremost seek to monitor.<sup>28</sup> Schedules II, III, and IV drugs contain approved prescription medications that have varying degrees of potential for abuse, dependence, and addiction.<sup>29</sup> For example, Schedule II drugs include drugs that have the highest severity of addictive potential, such as codeine, fentanyl (50 to 100 times more powerful than morphine),<sup>30</sup> oxycodone, morphine, and the barbiturates.<sup>31</sup> Opioids also fall under Schedule II drugs.<sup>32</sup> Schedule III drugs have a lower potential for dependence and abuse than Schedule II drugs and include steroids and low-dose codeine.<sup>33</sup> With an even lesser anticipation of addictive outcomes, Schedule IV drugs include the majority of anti-anxiety medications, sedatives, and sleep aids.<sup>34</sup> Finally, Schedule V drugs, which go un-monitored by some PDMPs, have a lower po-

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24. *See Opioid Overdose*, *supra* note 5.

25. 21 U.S.C. §§ 801–904 (2012).

26. 21 U.S.C. § 812 (2012).

27. ALL OF STATES WITH PRESCRIPTION MONITORING PROGRAMS, *supra* note 19, at 10.

28. *See* § 812.

29. *Id.*

30. Margolies, *supra* note 2.

31. § 812.

32. *Id.*

33. *Id.*

34. *See id.*

tential for abuse and addiction and include prescribed drugs for common ailments, such as coughing or diarrhea.<sup>35</sup> Schedule I and Schedule V drugs appear at opposite ends of the spectrum but go unmonitored for different reasons. Because Schedule I drugs are inherently illegal in nature, they are not the “prescribed” drugs that PDMPs seek to monitor, whereas Schedule V drugs’ abuse potential is so low that many states choose to focus their efforts on monitoring the more addictive Schedules II through IV drugs.

### B. Funding of PDMPs

Relative to most states’ total budgets, PDMPs do not require a large sum of money to begin operating effectively. An average PDMP’s startup cost ranges between \$450,000 to \$1,500,000.<sup>36</sup> Some of the program costs may include sources of hardware (servers), the actual software to operate the database, information security mechanisms, connectivity between pharmacies and prescribing physicians, staff, and overhead expenses.<sup>37</sup> States finance their PDMPs through state funds, licensing fees, registration fees, and direct-support organizations.<sup>38</sup> But often even a combination of these efforts still leaves states without all of the funding they need. In an effort to curb prescription drug abuse and provide an incentive to states committed to developing a PDMP, the federal government created two grant programs that support PDMPs – the Harold Rogers PDMP grant and the National All Schedules Prescription Electronic Reporting Act (“NASPER”).<sup>39</sup>

Enacted in 2002, the main goal of the Harold Rogers grant is “to enhance the capacity of regulatory and law enforcement agencies and public health officials to collect and analyze controlled substance prescription data . . . through a centralized database administered by an authorized state agency.”<sup>40</sup> It is a competitive grant and is dispersed by the Department of Justice, the Office of Justice Programs, and the Bureau of Justice Assistance.<sup>41</sup> The grant aids states in the “planning, implementation, and enhancement of their PDMPs,” and states may apply for the Harold Rogers grant for any of these three purposes.<sup>42</sup> States lacking operational PDMPs typically apply for planning grants (of up to \$50,000), states with regulations requiring the implementation of a program like a PDMP may apply for implementation grants (of up to \$400,000), and

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35. *See id.*

36. KRISTIN FINKLEA ET AL., PRESCRIPTION DRUG MONITORING PROGRAMS 8 (Mar. 24, 2014), <https://fas.org/sgp/crs/misc/R42593.pdf>.

37. *See Harold Rogers Prescription Drug Monitoring Program (PDMP)*, GRANTS OFF., <http://grantsoffice.com/GrantDetails.aspx?gid=23731> (last visited Apr. 2, 2018).

38. FINKLEA ET AL., *supra* note 36, at 9.

39. *Id.* at 14, 16.

40. *Harold Rogers Prescription Drug Monitoring Program (PDMP)*, *supra* note 37.

41. *Id.*

42. FINKLEA ET AL., *supra* note 36, at 14.

states that currently have operational PDMPs but wish to enhance them may apply for enhancement grants (of up to \$400,000).<sup>43</sup>

Three years after the creation of the Harold Rogers grant, the NASPER grant emerged and is currently dispersed by the Department of Health and Human Services, the Substance Abuse and Mental Health Services Administration, and the Center for Substance Abuse Treatment.<sup>44</sup> The program was originally an amendment to the Public Health Service Act and now provides funding for states to either establish a PDMP or to improve their existing PDMPs.<sup>45</sup> NASPER has two primary goals: “(1) [to] foster the establishment of state-administered PDMPs that providers can access for the early identification of patients at risk for addiction in order to initiate appropriate interventions, and (2) [to] establish a set of best practices for new PDMPs and improvement of existing PDMPs.”<sup>46</sup> The NASPER grant amount is determined by a formula that provides a base of one percent of the total funding to each state.<sup>47</sup> The rest is distributed based on the number of pharmacies in the state compared to the number of pharmacies in states with approved NASPER applications.<sup>48</sup>

The agencies that administer the funds and the way the funds are dispersed differ between the Harold Rogers grant and the NASPER grant, but the end goal of both programs remains the same – to help support state PDMPs in the fight against prescription drug abuse and addiction. With the average PDMP startup cost ranging from \$450,000 to just over \$1.5 million,<sup>49</sup> states across the country have benefited from grants such as these. Even with PDMP expenses being relatively inconsequential, states may have the opportunity to receive federal financial support when needed.

### *C. Prescription Drug Abuse and the Criminal Justice System*

Over the last few decades, the number of individuals either incarcerated for prescription drug abuse or subjected to another form of criminal justice supervision in the United States has increased to approximately 7.1 million.<sup>50</sup> Roughly half of these individuals qualify for a diagnosis of “drug abuse or dependence.”<sup>51</sup> Most individuals in prison for drug offenses do not receive the help they need, and incarceration as a means of addressing drug abuse has proven to be inadequate when reviewing recidivism rates.<sup>52</sup> Additionally, from

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43. *Id.* at 15.

44. *Id.* at 16.

45. *Id.*

46. *Id.*

47. *Id.* at 17.

48. See *Harold Rogers Prescription Drug Monitoring Program (PDMP)*, *supra* note 37.

49. FINKLEA ET AL., *supra* note 36, at 8.

50. Redonna K. Chandler et al., *Treating Drug Abuse and Addiction in the Criminal Justice System*, 301 JAMA 183, 183 (2009).

51. *Id.*

52. *Id.*

an economic standpoint, the costs associated with promoting a PDMP are negligible when compared to the average costs of incarceration (\$31,307 for one year).<sup>53</sup>

Through monitoring and supervision, a PDMP can provide a way for physicians and prescribers to realize when drug abuse occurs and provide an opportunity to encourage abusers to begin life-saving treatment. The implementation of a statewide PDMP has the unique opportunity to help decrease prescription drug abuse and unclutter the criminal justice system while simultaneously alerting those in a position of power to provide the necessary help someone desperately needs.

#### *D. Liberals, Conservatives, Independents . . . Everyone Is on Board*

Though the federal government is supportive in its efforts to financially aid state PDMPs, involvement at the state level is lacking. When contrasted with the federal government, the states are far better equipped to handle the issues that PDMPs aim to eliminate.<sup>54</sup> For example, states are in closer proximity and can more efficiently address specific issues in their jurisdictions.<sup>55</sup> Additionally, states generally take control over medical and health-related fields when it comes to policymaking, and the prescribing and dispensing of prescription drugs are no exception.<sup>56</sup> Articulated in *Jacobson v. Massachusetts*, the nation's leading health law case decided in the early 1900s, Justice Harlan, writing for the United States Supreme Court, decided that the police powers of the state include the power to implement regulations when public health, safety, and welfare are at risk.<sup>57</sup>

From 2012 to 2017, Missouri stood alone in its resistance to fight prescription drug abuse. The forty-nine other states – liberal, conservative, and moderate – had managed to overcome the ethical, legal, and privacy concerns that Republican Missouri State Senator Rob Schaaf and other critics continued to oppose.<sup>58</sup> Kentucky and Tennessee, both historically conservative states, were not only early adopters of state PDMPs but proponents of *use mandates*,

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53. CBS News, *The Cost of a Nation of Incarceration*, SUNDAY MORNING (Apr. 23, 2012, 5:15 PM), <https://www.cbsnews.com/news/the-cost-of-a-nation-of-incarceration/>.

54. Rebecca L. Haffajee, *Preventing Opioid Misuse with Prescription Drug Monitoring Programs: A Framework for Evaluating the Success of State Public Health Laws*, 67 HASTINGS L.J. 1621, 1638 (2016).

55. *Id.*

56. *Id.* at 1638–39.

57. *Jacobson v. Massachusetts*, 197 U.S. 11, 24–25 (1905).

58. Megan Thielking, *Missouri Is the Only State Not Monitoring Prescription Drug Use. Will It Finally Create a Database?*, STAT (Mar. 7, 2017), <https://www.statnews.com/2017/03/07/missouri-prescription-drug-database/>.

thus requiring prescribers to utilize the database prior to prescribing a controlled substance that harbors potentially addictive or abusive characteristics.<sup>59</sup> Use mandates require that prescribers follow and adhere to their state PDMPs as opposed to merely consult them – not all states mandate the use of PDMPs.<sup>60</sup> Close to half of state PDMPs legally mandate prescriber use of the systems.<sup>61</sup> These mandates did not come without opposition from physicians who thought the query prior to prescribing was burdensome, but twenty-two states so far have overcome this hurdle.<sup>62</sup>

Granted, many state PDMPs could be revamped and enhanced, perhaps by increasing the number of states that mandate prescriber query of the databases before writing a prescription. It is uplifting that as of early 2018, all fifty states *at least* have in effect a program with the end goal of reducing prescription drug and opioid abuse and misuse in the United States.

### III. RECENT DEVELOPMENTS

Bob Twillman,<sup>63</sup> the Executive Director of the Academy of Integrative Pain Management in Kansas City, Missouri, noted in an interview that there are serious prescription drug problems in the St. Louis area.<sup>64</sup> Dr. Twillman stated that these problems are historically due in part to Illinois patients' easy access across the state line because it is difficult to catch someone to build a case if there exists no method by which to effectively catch them.<sup>65</sup> Abuse evidence in Missouri is anecdotal at best – with no way to track abusers, there is no way to catch them. This Part traces the recent developments regarding PDMP legislation in Missouri, the arguments in favor of the legislation, as well as how Missouri positively distinguishes itself regarding privacy concerns with the program.

#### A. Recent Efficacy of PDMPs

In 2006, the Bureau of Justice Assistance reported that when compared to states that do not have operational PDMPs, the states with PDMPs decreased

59. Rebecca L. Haffajee et al., Opinion, *Mandatory Use of Prescription Drug Monitoring Programs*, 313 JAMA 891, 891 (2015).

60. *Id.*

61. *Id.*

62. *Id.* (There exists “early evidence from states that have deployed mandates to demonstrate their potential to reduce opioid abuse.”)

63. For more information about Dr. Bob Twillman, see *AIPM Team*, ACAD. INTEGRATIVE PAIN MGMT., <http://www.integrativepainmanagement.org/page/team2> (last visited Apr. 2, 2018).

64. Telephone Interview with Bob Twillman, Executive Director, Academy of Integrative Pain Management (Feb. 2, 2017).

65. *Id.*

the number of prescription drugs readily available to the public.<sup>66</sup> The Bureau of Justice Assistance report concluded that as a result, PDMPs effectively reduced the odds of prescription drug abuse.<sup>67</sup> For example, it is reported that doctor shopping decreased by seventy-five percent just one year after New York started mandating that prescribers consult New York's PDMP database prior to dispensing prescription medications.<sup>68</sup> Additionally, surveys taken by prescribers across the country have reported that PDMPs have been an instrumental tool in identifying and reducing opioid abuse,<sup>69</sup> which is an integral reason why PDMPs are encouraged by the federal government.<sup>70</sup> According to the Centers for Disease Control and Prevention ("CDC"), "[PDMPs] continue to be among the most promising state-level interventions to improve opioid prescribing, inform clinical practice, and protect patients at risk."<sup>71</sup>

Eighty-six percent of opioid prescriptions are written *without* checking a patient's prescription medication history.<sup>72</sup> As mentioned above,<sup>73</sup> PDMPs are not mandated in all states, releasing prescribers from the obligation to follow them, but there has been evidence of decreased opioid dispensing in states that do mandate the programs.<sup>74</sup> The reality is that many of the prevalent experiences with prescription drug abuse begins – and grows – due to the opioids legally prescribed by patients' treating physicians.<sup>75</sup> But saving lives does not have to be – and should not be – controversial.<sup>76</sup>

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66. Casturi, *supra* note 17, at 460–61 (citing RONALD SIMEONE & LYNN HOLLAND, EXECUTIVE SUMMARY: AN EVALUATION OF PRESCRIPTION DRUG MONITORING PROGRAMS, <https://www.bja.gov/Publications/PDMPExecSumm.pdf> (last visited Apr. 2, 2018)). However, it is important to remember that we do want prescription drugs to remain available to the public for all the good that they can do. There is a reason they are FDA approved. What PDMPs do is simply alert those equipped to hinder potential prescription drug abuse while ideally reducing the flow of prescription drugs to those populations.

67. *Id.*

68. Bram Sable-Smith, *Political Gridlock Blocks Missouri Database for Fighting Drug Abuse*, NPR (Apr. 12, 2016, 3:02 PM), <https://www.npr.org/sections/health-shots/2016/04/12/473870528/political-gridlock-blocks-missouri-database-for-fighting-drug-abuse>.

69. *Id.*

70. *Id.*

71. *Opioid Overdose: What States Need to Know About PDMPs*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/drugoverdose/pdmp/states.html> (last updated Oct. 3, 2017).

72. *Prescription Drug Monitoring Programs Save Lives. Missouri Needs One Now.*, *supra* note 14.

73. See Haffajee et al., *supra* note 59, at 891.

74. *Prescription Drug Monitoring Programs Save Lives. Missouri Needs One Now.*, *supra* note 14.

75. See Jennifer Cartright, *Saving Lives Shouldn't Be Controversial*, SPRINGFIELD NEWS-LEADER (Feb. 15, 2017, 8:46 PM), <http://www.news-leader.com/story/opinion/readers/2017/02/15/saving-lives-controversial/97976574/>.

76. *Id.*

### B. Early Opposition to PDMPs in Missouri

Dr. Twillman noted that he has no doubt that Missouri would have enacted a PDMP before 2017 if it were not for the filibustering effects of Senator Schaaf.<sup>77</sup> Dr. Twillman supports PDMP bills across the country and has testified in New Hampshire and Nebraska and even wrote the majority of the bill for Kansas.<sup>78</sup> In addition to his Executive Director duties, Dr. Twillman currently serves as Chair of the PDMP Advisory Committee for the Kansas Board of Pharmacy.<sup>79</sup>

Dr. Twillman stressed that privacy concerns were the root of why this bill took so long to pass the Missouri Senate.<sup>80</sup> Republican State Representative Holly Rehder,<sup>81</sup> creator of the House legislation, relentlessly urged that Missouri needed this bill to pass sooner rather than later.<sup>82</sup> Representative Rehder stated that Missouri experienced more overdoses, more addictions, and more deaths every week that passed by without a program in place.<sup>83</sup> Alternatively, Senator Schaaf stated that Missouri was in no need of such a program and that PDMPs are unsuccessful altogether.<sup>84</sup> Senator Schaaf has been quoted saying that “more people die of alcohol abuse and the effects of smoking of cigarettes than will ever die of opioid overdose.”<sup>85</sup> When Senator Dave Schatz, carrier of the Missouri Senate version of the House bill, asked Senator Schaaf whether he would ever come around, Schaaf said that he would be willing to support the bill so long as it were in a way “that will protect our liberty.”<sup>86</sup>

The risk of the encroachment on Missouri citizens’ personal liberties is outweighed by the public health benefit achieved by implementing a PDMP. Senator Schaaf described the effects of these lifesaving databases as “the heavy hand of government taking away your liberty.”<sup>87</sup> However, the instances on record of PDMPs threatening the personal liberties of citizens are few and far between, with law enforcement officials, not the “30,000 people with usernames and passwords” (physicians), being the primary culprits.<sup>88</sup>

77. Telephone Interview with Bob Twillman, *supra* note 64.

78. *Id.*

79. *AIPM Team*, *supra* note 63.

80. Telephone Interview with Bob Twillman, *supra* note 64.

81. For more information about Holly Rehder see *Representative Holly Rehder*, MO. HOUSE REPRESENTATIVES, <http://www.house.mo.gov/MemberDetails.aspx?year=2018&code=R&district=148> (last visited Apr. 2, 2018).

82. Alisa Nelson, *Missouri Senator Threatens Filibuster on Proposed Drug Monitoring Program*, MISSOURINET (Apr. 20, 2016), <http://www.missourinet.com/2016/04/20/missouri-senator-threatens-filibuster-on-proposed-drug-monitoring-program/>.

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. Sable-Smith, *supra* note 68.

88. *Id.*

### 1. Florida Drug Enforcement Administration Breach

As written, Missouri's forthcoming statewide PDMP cannot lead to the breaches of privacy that have occurred in other states because Missouri's law will include provisions that protect against such breaches.<sup>89</sup> Though not completely unfounded, Senator Schaaf's concerns about PDMPs encroaching on citizens' liberties are lacking in support. In 2013, over 3000 Florida residents' personal information, including a list of prescription medications dispensed, was revealed to the public during a criminal investigation.<sup>90</sup> At the time, Florida's PDMP allowed full and free access to its database by law enforcement officials, and the Drug Enforcement Administration ("DEA") filtered through Florida's prescription drug database in search of a select few doctors and pharmacies accused of forging prescriptions for painkillers.<sup>91</sup> Numerous drug histories were uncovered as part of the investigation and were subsequently released by the state for investigation.<sup>92</sup> Once the list had circulated, a Daytona Beach attorney realized that his records were included and subsequently filed a lawsuit.<sup>93</sup> Ultimately, the judge dismissed the case due to the absence of an unconstitutional search or seizure and further stated that the patients had a reduced expectation of privacy as the law mandates maintaining patient records.<sup>94</sup> Though ultimately not illegal in nature, it is understandable why the patients were alarmed in response to the breach.

### 2. Utah Privacy Breaches

Like the case in Florida, law enforcement officials in Utah alarmed citizens nationwide when they tapped into the records of almost 500 fire department employees.<sup>95</sup> DEA officials were alerted to the fact that local ambulances were coming up short on opioids.<sup>96</sup> Without a warrant, an official accessed the

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89. Kurt Erickson & Blythe Bernhard, *Greitens Launches Painkiller Database After Missouri Lawmakers Don't*, ST. LOUIS POST-DISPATCH (July 17, 2017), [http://www.stltoday.com/news/local/govt-and-politics/greitens-launches-painkiller-database-after-missouri-lawmakers-don-t/article\\_4b6ff0d0-db7c-5b5f-a008-e6197fd254ac.html](http://www.stltoday.com/news/local/govt-and-politics/greitens-launches-painkiller-database-after-missouri-lawmakers-don-t/article_4b6ff0d0-db7c-5b5f-a008-e6197fd254ac.html).

90. George F. Indest, III, *Florida Judge Rules Government Can Search Prescription Drug Monitoring Database*, LEGAL SOLUTIONS BLOG: PRAC. L. (Feb. 21, 2014), <http://blog.legalsolutions.thomsonreuters.com/practice-of-law/florida-judge-rules-government-can-search-prescription-drug-monitoring-database/>.

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. Mark Greenblatt & Angela M. Hill, *Exclusive Investigation: Your Prescriptions Aren't Private: Law Enforcement Has Ways of Seeing Drug Histories*, DENVER7 (Aug. 29, 2017), <http://www.thedenverchannel.com/longform/so-you-think-prescriptions-are-private>.

96. *Id.*

state's database and scanned the records on file for all employees of the fire department.<sup>97</sup> No arrests were made, but two firefighters were charged with "acquiring controlled substances under false pretenses."<sup>98</sup> The officers responsible for the intrusion of privacy stated that "[they] would not do anything that would go beyond the bounds of what the law allows . . . [and] were acting purely according to the way the state law permitted."<sup>99</sup> As a result of the Utah fire department breach, the state enacted a new law in 2015 that required a search warrant before law enforcement officials could root through the state PDMP's database.<sup>100</sup>

### 3. Missouri Is Different

Utah citizens' concerns about the controversial privacy breach were echoed by Scott Michelman, a Washington, D.C., attorney for Public Citizen, when he stated that "[p]ermitting law enforcement officers to go on fishing expeditions in people's personal information, then mak[ing] their own untrained medical judgments and prosecut[ing] people as a result, has the power to destroy lives."<sup>101</sup> Michelman urged that these types of warrantless searches violate the unreasonable searches or seizures clause of the Fourth Amendment of the United States Constitution.<sup>102</sup>

As written, Missouri's bill is different. Senator Schaaf has stated that "[PDMPs are] an infringement upon people's privacy . . . . Most people don't want the government to have that information and have it on a database in which many people can get it."<sup>103</sup> Contrary to Senator Schaaf's concerns, the PDMP legislation for Missouri includes provisions that require law enforcement officials to obtain a court-issued subpoena or a search warrant to even begin to have access to the substance database.<sup>104</sup> Thus, probable cause is required to gain access to the records (something Utah's statutes did not require).

Representative Rehder argued that because the PDMP is an electronic database of medical information, the same privacy laws govern this medical information.<sup>105</sup> Also, Representative Rehder noted that Missouri is not the first state to encounter these concerns – all forty-nine other states have previously dealt with and overcome the exact privacy issues that Senator Schaaf worries

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97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. Josh Helmuth, *Why Is Missouri the Only State Without Prescription Drug Monitoring?*, KSHB KAN. CITY 2 (Oct. 18, 2016, 5:48 PM), <http://www.kshb.com/news/region-missouri/jackson-county/why-is-missouri-the-only-state-without-prescription-drug-monitoring>.

104. H.B. 1892, 98th Gen. Assemb., 2d Reg. Sess. (Mo. 2016) (§ 195.456.4).

105. Sable-Smith, *supra* note 68.

about.<sup>106</sup> Therefore, Missouri had forty-nine examples from which to extract the very best policies that have been developed over the years.<sup>107</sup> Before Governor Eric Greitens signed the bill into effect, Representative Rehder repeatedly proffered that “Missouri is the only state that doesn’t have this. It’s very shameful . . . . It’s hurting our population so much.”<sup>108</sup>

Though she was at the forefront of the argument, Representative Rehder was not the only Missouri politician trying to pass PDMP legislation. On February 15, 2017, Governor Greitens held a live chat where he publicly addressed his and the state’s concerns regarding the lack of a statewide PDMP.<sup>109</sup> During his live chat, Governor Greitens committed to join the rest of the nation by beginning to create a PDMP database for Missouri.<sup>110</sup> The fact that Missouri’s new governor made PDMP legislation a priority speaks volumes to the necessity of the program and the support behind it.

### C. Senator Schaaf’s PDMP Bill Passes the Senate

In opposition to Representative Rehder’s House bill, Senator Schaaf introduced an alternative, which differed fundamentally from other PDMPs in the United States<sup>111</sup> and has been characterized as a “sham” by its critics.<sup>112</sup> In late February of 2017, Senator Schaaf’s bill passed the Senate and made its way to the House.<sup>113</sup> The House considered both Senator Schaaf’s newly proposed bill as well as Representative Rehder and Senator Schatz’s bill – the bill that was continuously filibustered by Senator Schaaf.<sup>114</sup>

Senator Schaaf’s version of the bill would have forced physicians to submit to the Missouri State Health Department the names of every patient to whom they are considering prescribing painkillers.<sup>115</sup> This is different from other states’ bills, which grant direct access to a patient’s controlled substance prescription history to registered medical professionals.<sup>116</sup> In Senator Schaaf’s version, the state would alert the prescriber about any red flags that may appear in the patient’s medical history, and the prescriber would then decide whether to prescribe the medications or not.<sup>117</sup> Opponents argued that the bill takes the

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106. *Id.*

107. *Id.*

108. *Id.*

109. Kurt Erickson, *Greitens Addresses Prescription Drug Monitoring Push in Live Chat*, ST. LOUIS POST-DISPATCH (Feb. 15, 2017), [http://www.stltoday.com/news/local/govt-and-politics/greitens-addresses-prescription-drug-monitoring-push-in-live-chat/article\\_668811ee-bfae-5dfb-bec8-492aec0a14aa.html](http://www.stltoday.com/news/local/govt-and-politics/greitens-addresses-prescription-drug-monitoring-push-in-live-chat/article_668811ee-bfae-5dfb-bec8-492aec0a14aa.html).

110. *Id.*

111. Thielking, *supra* note 58.

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

otherwise solely medical decision of whether a patient may be at risk for substance abuse out of the hands of those best equipped to handle them – physicians.<sup>118</sup> Representative Rehder stated that to her, “the most important part of a PDMP is doctors having that access to see what their patients are on so they can make those medical decisions based on accurate information” and that “[u]ntil we give our physicians the tools that they need to make the right decisions . . . we’re not going to touch this problem.”<sup>119</sup>

Jeff Howell of the Missouri State Medical Association stated that Senator Schaaf’s bill “[is] unlike anything any other state has done,” and that “[i]n other states, a physician or prescriber can just get on and see what the prescribing history has been.”<sup>120</sup> With Kansas City and St. Louis bordering multiple states, Jeff Howell expressed how important it was for Missouri to follow suit and create a database that conforms to the same guidelines as the rest of the country for the sake of uniformity.<sup>121</sup> Not surprisingly, the Missouri State Medical Association criticized Senator Schaaf’s bill, going so far as to call it a “fake [PDMP] bill,” while fully supporting Representative Rehder and Senator Schatz’s legislation.<sup>122</sup> Senator Schaaf seemed unwilling to compromise, as he notified the St. Louis Post Dispatch of his intentions to further filibuster Representative Rehder and Senator Schatz’s bill, stating that “[he would] just as soon not have a PDMP.”<sup>123</sup>

#### D. Support on All Fronts

It is remarkable that the senators and representatives who were in favor of passing PDMP legislation are politicians who control majorities in both chambers and, most recently, the governorship. Further, the politicians at the forefront of attempts to pass the legislation included conservative Republicans like Representative Rehder and Governor Greitens, who arguably are even more concerned with privacy issues than politicians on the left.<sup>124</sup> The majority in Missouri cleared the first hurdle of gaining bipartisan support, and when asked why Missouri was the only state that had not enacted a PDMP, officials

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118. *Id.* Larry Pinson, who serves on the board of the National Association of State Controlled Substances Authorities, proclaimed his dissatisfaction by arguing that by enacting Senator Schaaf’s legislation, “You are charging [the bureau] with making a medical decision and that doesn’t make any sense to me . . . . How are they going to know if there is a true medical reason for that patient to need a narcotic?” *Id.* (alteration in original).

119. Travis Zimpfer, *Schaaf’s PDMP Bill Passes Through Senate, Rehder Ready to Oppose*, MO. TIMES (Mar. 3, 2017), <http://themissouritimes.com/38474/schaafs-pdmp-bill-passes-senate-rehder-ready-oppose/> (second alteration in original).

120. Thielking, *supra* note 58.

121. *Id.*

122. *Id.*; MO Medical Assn (@MOMedicalAssn), TWITTER (Feb. 22, 2017, 7:36 PM), <https://twitter.com/MOMedicalAssn/status/834562604605521921>.

123. Thielking, *supra* note 58.

124. See Erickson & Bernhard, *supra* note 89.

continued to point to Senator Schaaf's filibustering attempts.<sup>125</sup> Senator Schaaf had combatted bipartisan proponents including former Missouri Attorney General Chris Koster, U.S. Agriculture Secretary and former governor of Iowa Tom Vilsack, and Missouri Senator Claire McCaskill.<sup>126</sup>

In 2016, President Barack Obama asked Secretary Vilsack to lead a task-force in charge of combatting the prescription drug abuse epidemic sweeping the nation, with particular attention to the abuse in rural communities.<sup>127</sup> When questioned about the severity of the problem, Secretary Vilsack stated in a news report that "in a state like Missouri, it definitely is an issue. With a death rate . . . much higher than the national average, it's a serious problem in rural areas."<sup>128</sup> Secretary Vilsack proceeded to note that the President himself realized the necessity for "aggressive effort" to "expand prevention opportunities."<sup>129</sup> When asked why the administration waited so long to combat the prescription drug abuse epidemic, Secretary Vilsack stated that "[t]he only state, unfortunately, in the union that does not have a monitoring program is the state of Missouri. [Missouri] really does need to rectify that, because there's too much opportunity for doctor shopping if you don't have a monitoring system."<sup>130</sup> Secretary Vilsack concluded his interview with this proclamation:

If you don't have a monitoring system, then essentially you are encouraging people to continue to go to multiple prescribers and get multiple prescriptions. You're encouraging and making it harder for states that do have monitoring programs to avoid people crossing over state lines to get access to additional medications. There are ways to deal with whatever privacy concerns folks have in the state legislature about this, but at the end of the day it's a sad statement, I think . . . that [Missouri is] the only state in the country that doesn't have a monitoring program . . . . St. Louis County and St. Louis City have adopted their own ordinances, and the reality is, the time is long past for Missouri to add itself to the other states that do have monitoring programs.<sup>131</sup>

By leaving a hole in the national and intricately created PDMP network, the efforts to fight prescription drug abuse nationwide were undeniably hindered for years by Missouri's reluctance to cooperate. Even a pharmaceutical

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125. Darius Tahir, *Missouri PDMP: Quaint Outlier, or Harbinger of Privacy Backlash?*, POLITICO (Aug. 11, 2016, 10:07 AM), <http://www.politico.com/story/2016/08/missouri-pdmp-quaint-outlier-or-harbinger-of-privacy-backlash-226906>.

126. *Id.*

127. Margolies, *supra* note 2.

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

company in St. Louis that manufactures opioids, Mallinckrodt Pharmaceuticals, stated that it supported Representative Rehder and Senator Schatz's bill to end the opioid epidemic.<sup>132</sup>

Governor Greitens, Representative Rehder, Secretary Vilsack, and countless other politicians from both political parties realized that the time had come to put an end to the unjustified opposition to a PDMP in Missouri. During his live chat on February 15, Governor Greitens lamented that he knew creating this life-saving database was “an incredibly important issue . . . . We can get this done. I know we can get this done.”<sup>133</sup> It is significant that the moderate, liberal, and conservative views all point to the same endgame – to curb prescription drug abuse.

Ultimately, on July 17, 2017, Governor Greitens signed an executive order requiring the Missouri Department of Health and Senior Services to begin creating a statewide PDMP.<sup>134</sup> Secretary Tom Price of the United States Department of Health and Human Services stated that he “commend[ed] Missouri Governor Eric Greitens for taking a strong step in fighting the opioid epidemic by joining other states in establishing a [PDMP]” and that he “commend[ed] Governor Greitens for his leadership in Missouri as we all work to detect and deter the abuse of prescription drugs.”<sup>135</sup> The new statewide PDMP is anticipated to compliment the currently existing St. Louis County PDMP, as the statewide PDMP will monitor prescribers and dispensers of Schedule II to Schedule IV controlled substances while the County PDMP focuses its efforts at the patient level by identifying high-risk patients.<sup>136</sup>

#### IV. DISCUSSION

This Note provides a general overview of the history of PDMPs and the procedures that states undergo to implement them and examines the reasons why Missouri was the only state in the country that failed to enact a program for so long. Next, this Part discusses how the prescription drug epidemic in the United States is a public health concern that warrants intervention by programs such as PDMPs. This Part then examines the overarching benefits of PDMPs and how they outweigh potential ethical concerns. Finally, this Part concludes

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132. Thielking, *supra* note 58.

133. Erickson, *supra* note 109.

134. *Governor Eric Greitens Announces Statewide Prescription Drug Monitoring Program*, OFF. MO. GOVERNOR ERIC GREITENS (July 17, 2017), <https://governor.mo.gov/news/archive/governor-eric-greitens-announces-statewide-prescription-drug-monitoring-program>.

135. *Id.*

136. *Missouri Final State to Implement PDMP*, MDTOOLBOX BLOG, <http://mdtoolbox.com/blog/post/Missouri-Final-State-to-Implement-a-Prescription-Drug-Monitoring-Program?AspxAutoDetectCookieSupport=1> (last visited Apr. 2, 2018).

by discussing some of the privacy concerns that critics continue to boast in opposition to PDMPs.

*A. The Prescription Drug Abuse Epidemic Is a Public Health Concern Like Nothing the United States Has Ever Seen*

This Note began by exploring some of the statistics related to the prescription drug misuse epidemic sweeping the United States. As mentioned earlier, opioids account for the majority of prescription drug-related deaths and resulted in 42,249 deaths in 2016, with the total number of opioid-induced overdoses more than quadrupling since the late 1990s.<sup>137</sup> Though these numbers are alarming, what is more alarming is that although the United States only consists of about five percent of the entire world's population, more than eighty percent of the world's opioid supply is consumed here.<sup>138</sup> It is easy to see why drug overdoses, the majority of which are inflicted by prescription drugs, have become the number one cause of death across the country.<sup>139</sup>

When analyzing the United States' past encounters with national epidemics, diseases such as smallpox, yellow fever, cholera, scarlet fever, and influenza were considered epidemics.<sup>140</sup> Though prescription drug abuse may not seem "epidemic" in most minds, it is an epidemic of greater proportion than the vast majority of prior scenarios. In most cases, the outbreaks of past diseases were rare, but the single connecting factor between all prior epidemics in the United States was that they were, for the most part, preventable.<sup>141</sup>

Take, for example, the HIV/AIDS epidemic of the 1980s to 1990s and the mandatory blood testing that accompanied it. The CDC estimated in August of 2016 that nearly 1.2 million people within the United States have contracted HIV, but as many as one in eight remain unaware of their infection.<sup>142</sup> Though the HIV epidemic hit its peak in the late 1980s and early 1990s and numbers have steadily declined over the years, nearly 50,000 people in the United States are newly infected every year.<sup>143</sup> In 2008, an article by the *Washington Post* went so far as to name HIV "the world's No. 1 health threat," and compulsory testing was warranted.<sup>144</sup>

137. See *Opioid Overdose*, supra note 5.

138. Haffajee, supra note 54, at 1622.

139. *Id.*

140. Healthline Editorial Team, *The Most Dangerous Epidemics in U.S. History*, HEALTHLINE (Sept. 29, 2016), <http://www.healthline.com/health/worst-disease-outbreaks-history#Overview1>.

141. See *id.*

142. CTRS. FOR DISEASE CONTROL & PREVENTION, U.S. DEP'T OF HEALTH AND HUMAN SERVS., CDC FACT SHEET: TODAY'S HIV/AIDS EPIDEMIC 1 (Aug. 2016), <https://www.cdc.gov/nchhstp/newsroom/docs/factsheets/todaysepidemic-508.pdf>.

143. *Id.*

144. Sanford F. Kuvin, Opinion, *Mandatory Testing and Treatment Can End the AIDS Epidemic*, WASH. POST (Dec. 1, 2008), <http://www.washingtonpost.com/wp-dyn/content/article/2008/11/30/AR2008113001691.html>.

This type of compulsory testing in situations where public health is at issue is not a foreign practice to the United States. For example, when there was an outbreak of avian influenza (“Bird Flu”) in the United States in the late 1900s and early 2000s, high-risk areas underwent mandatory testing procedures, which subsequently greatly reduced the possibility of an outbreak.<sup>145</sup> Returning to the example of HIV testing, many of the newly emerging cases of HIV come to fruition due to pregnant HIV-infected mothers giving birth to children.<sup>146</sup> Worldwide, this method of transmittal resulted in nearly 2.8 million infected children in 2004.<sup>147</sup> In the United States, blood testing is available to pregnant mothers to determine whether they are infected, as early treatment has been shown to reduce mother-to-child transmission by almost seventy percent.<sup>148</sup> Over the years, many states have pushed for mandatory testing of pregnant mothers, and other states have introduced legislation making testing of pregnant mothers compulsory.<sup>149</sup>

The prescription drug abuse epidemic is no less imminent, critical, or fatal than Bird Flu or HIV/AIDS. In situations such as this, where an epidemic exists and the means by which it may be subdued are available, difficult decisions must be made. Each state and its legislature must make a judgment call regarding the relative risk associated with the information being disclosed versus the public health benefit that can be reached. Like many of the aforementioned diseases, the prescription drug abuse epidemic is preventable, but victims cannot protect themselves by simply washing their hands, utilizing food safety techniques, or making sure to stay home if they are feeling ill. Many who have fallen down the prescription drug abuse landslide need a helping hand. In many cases, they need to be protected from themselves, and the most effective way to accomplish this is to enact and follow a state PDMP. From a public policy and ethical perspective, PDMPs are not a burdensome violation of privacy but a logical and feasible means to an end of an epidemic.

### *B. Saving Lives, One State at a Time: The Benefits of PDMPs*

The benefits of PDMPs are both compelling and numerous. Relating back to one of the primary goals of PDMPs – facilitating prescribers in dispensing a legitimate and medically necessary amount of controlled substances – PDMPs allow both prescribers and pharmacies access to information that promotes communication between prescribers, pharmacists, and patients regarding a patient’s prescription history.<sup>150</sup> Access to this valuable information makes it

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145. *Id.*

146. Udo Schuklenk & Anita Kleinsmidt, *Rethinking Mandatory HIV Testing During Pregnancy in Areas with High HIV Prevalence Rates: Ethical and Policy Issues*, 97 AM. J. PUB. HEALTH 1179, 1179 (2006).

147. *Id.*

148. *Id.*

149. Karen Zivi, *Contesting Motherhood in the Age of AIDS: Maternal Ideology in the Debate over Mandatory HIV Testing*, 31 FEMINIST STUD. 347, 351 (2005).

150. Haffajee, *supra* note 54, 1634–35.

easier for physicians to avoid potentially double-dosing patients, to refrain from supplying controlled substances to doctor shoppers, and to alert patients of their potential substance abuse problem and subsequently direct them to clinical treatment when necessary.<sup>151</sup> When enough physicians and pharmacies take part in a PDMP program and share access to patient histories, it makes it difficult for abusers and doctor shoppers to effectively “shop” the system for more controlled substances when the prescribers are interconnected.<sup>152</sup>

Over the last decade, there have been increasing efforts in Florida to curb prescription drug abuse and diversion.<sup>153</sup> During the 2000s, Florida was one of the leading states for “rogue pain management clinics” (more commonly referred to as “pill mills”) where controlled substances including opioids were improperly prescribed.<sup>154</sup> The state addressed this problem in 2010 when it enacted legislation requiring mandatory registration of Florida’s pill mills with the state. In 2011, Florida’s PDMP became operational and began collecting dispensing information across the state.<sup>155</sup> The *Journal of the American Medical Association* published a study in which the results were analyzed and compared to the neighboring state of Georgia, which at that time lacked the same level of control procedures.<sup>156</sup> The study “consisted of 2.6 million patients, 431,890 prescribers and 2829 pharmacies” associated with “approximately 480 million prescriptions” in Florida and Georgia.<sup>157</sup> After only one year of the PDMP’s successful implementation, the study saw a decrease of 1.35% in opioid prescriptions, 2.52% in opioid volume, and 5.64% “in mean [morphine milligram equivalent] . . . per transaction” when comparing between actual and predicted outcomes “had the policies not been implemented.”<sup>158</sup> One year of compliance resulted in a moderate decrease in opioid misuse across the state.<sup>159</sup> Unfortunately, once Florida tightened its controlled substance monitoring, Missouri – specifically, St. Louis – with its lack of monitoring, soon became the epicenter of these rogue pain management clinics.<sup>160</sup>

In an effort to strike a balance between decreasing prescription drug abuse and preserving patient access to necessary controlled substances, the American Academy of Hospice and Palliative Medicine (“AAHPM”) recently published a guide produced by its State Issues Working Group to serve as guidelines for

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151. *Id.*

152. *Id.*

153. Lainie Rutkow et al., *Effect of Florida’s Prescription Drug Monitoring Program and Pill Mill Laws on Opioid Prescribing and Use*, 175 JAMA INTERNAL MED. 1642, 1643 (2015).

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.* at 1644.

158. *Id.* at 1644–45.

159. *Id.*

160. Gabrielle Fonrouge, *Missouri Is a Pill Lover’s Paradise*, VICE (July 28, 2014, 3:13 AM), [https://www.vice.com/en\\_us/article/missouri-is-a-pill-lovers-paradise](https://www.vice.com/en_us/article/missouri-is-a-pill-lovers-paradise).

effective PDMP usage.<sup>161</sup> The guide states that the most effective state PDMPs are structured with prescribers and dispensers in mind and that the programs “ensur[e] interoperability and HIPAA-complaint data sharing across . . . state lines,” “includ[e] prescribers and dispensers in the development and ongoing review of a PDMP,” and “foster[] efficient point-of-care access to prescription data and reporting mechanisms.”<sup>162</sup>

Further, AAHPM’s guide urges that PDMPs “should maintain a health care focus,” reiterating the principle mentioned above that PDMPs should not serve as a law enforcement tool because when they do, both health care providers as well as patients “may fear excessive or punitive scrutiny.”<sup>163</sup> The AAHPM stresses that PDMPs “should exist chiefly as a tool for improving patient care and safety,” which can be achieved by “requiring external oversight and approval of law enforcement requests to access PDMP data” and by “providing options for law enforcement access that protect the confidentiality of patients’ sensitive information.”<sup>164</sup>

Finally, the AAHPM’s guide to effective PDMP procedures emphasizes that PDMP objectives should be “reinforced through other policies.”<sup>165</sup> These policies include “dismantling ‘pill mills’ by requiring that pain clinics be physician-owned and that an expert-level prescriber [be] actively involved in the management of daily clinical activities.”<sup>166</sup> This practice was evidently successful in Florida,<sup>167</sup> and there is no justification as to why it would not have the same curbing effect in Missouri. With the increasing number of pill mills in St. Louis, the adoption of policies akin to Florida’s procedure coupled with Governor Greiten’s recent executive order would likely be effective in combatting the opioid crisis in Missouri.

### C. Potential Privacy Problems

Some draw pause with respect to programs like PDMPs because they have the potential, when not properly constructed or administered, to present various legal or ethical obstacles.<sup>168</sup> For example, cases like the Florida<sup>169</sup> and Utah<sup>170</sup> privacy breaches leave some on edge with regards to the overall safety

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161. *Maintaining Legitimate Access to Prescription Medications*, AM. ACAD. HOSPICE & PALLIATIVE MED., <http://aahpm.org/issues/prescriptions> (last visited Apr. 2, 2018).

162. *Guidelines: Prescription Drug Monitoring Programs*, AM. ACAD. HOSPICE & PALLIATIVE MED., [http://aahpm.org/uploads/advocacy/AAHPM\\_Guidelines\\_PDMPs.pdf](http://aahpm.org/uploads/advocacy/AAHPM_Guidelines_PDMPs.pdf) (last visited Apr. 2, 2018).

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

167. See Rutkow et al., *supra* note 153, at 1642.

168. Haffajee, *supra* note 54, at 1621.

169. See *supra* notes 90–94.

170. See *supra* notes 95–100.

of PDMPs; however, as examined above,<sup>171</sup> Missouri's current PDMP legislation is constructed in a way that avoids the potential privacy intrusions experienced in the Florida and Utah cases.<sup>172</sup>

The reality is that few individuals have access to the majority of these programs. For example, forty-nine states allow access to PDMP information by physicians, dispensers, licensing/regulatory boards, and law enforcement officials as "authorized users" of the programs.<sup>173</sup> Also, eighteen states only allow access by law enforcement officials after officials have received a court-issued subpoena or search warrant, thus requiring probable cause to gain access to the records.<sup>174</sup> Therefore, the select individuals who have access to patient information are most commonly medical professionals who understand the importance of privacy laws such as HIPAA.

The overarching goal of PDMPs is *not* to operate as a law enforcement tool but to serve as a clinical instrument to help identify abuse and misuse of controlled substances.<sup>175</sup> The United States has an extensive history of infringing upon individual rights in cases of epidemics,<sup>176</sup> and privacy rights are no exception. With people dying each day from prescription drug overdoses,<sup>177</sup> this public health crisis must be apprehended. Personal privacy is important, but public health is necessary to preserve life within a community.

## V. CONCLUSION

The sole reason Missouri was unable to pass PDMP legislation over the past several years centered around unsupported and flawed reasoning. Critics opposing a PDMP in Missouri argued over the privacy concerns associated with the passage of this legislation. They argued that PDMPs are intrusive and threaten personal liberty. They argued that because the population of Missouri citizens actively abusing drugs is low, there was not a compelling interest to implement a PDMP. However, Missouri's recently-enacted PDMP legislation provides that a court-issued subpoena or a search warrant is required for law enforcement to access Missouri's database, thus providing protective measures for these privacy concerns. With a prescription drug induced death rate higher than the national average, Missouri was in dire need of a PDMP.

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171. *See supra* notes 103–05.

172. *Missouri Final State to Implement PDMP*, *supra* note 136. It is currently unclear whether Missouri's Statewide PDMP will mirror the same construction as the St. Louis County PDMP with respect to potential privacy intrusions, but Governor Greitens has not given any indication as to why it would not. *Id.*

173. NAT'L ALL. FOR MODEL STATE DRUG LAWS, ANNUAL REVIEW OF PRESCRIPTION MONITORING PROGRAMS 4 (Dec. 2014), <http://www.namsdl.org/library/3449DDCF-BB94-288B-049EB9A92BAD73DF/>.

174. *Id.* at 25.

175. *See id.* at 2.

176. *See supra* notes 145–49.

177. *Opioid Overdose*, *supra* note 5.

In situations of national epidemics such as this, the state and the legislative branch must come together to make a tough judgment call. They must exercise judgment regarding the relative risk associated with the data being disclosed in PDMPs and the public health benefit that can and likely will be reached. Policymakers must create and utilize the most reasonable and pragmatic strategies possible to combat prescription drug abuse. PDMP data not only improves public safety by working to reduce drug diversion, but it is also a powerful public health tool that forty-nine other states have learned works. Thankfully, Missouri finally joined the rest of the United States in the fight against prescription drug abuse. Had Governor Greitens not instituted an executive order requiring the implementation of a PDMP for Missouri, citizens would likely have continued to flood into the Show-Me state to “doctor shop until they dropped.”