

PURELY LOCAL TRAGEDIES: HOW PROSECUTING DRUG-INDUCED HOMICIDE IN FEDERAL COURT EXACERBATES THE OVERDOSE CRISIS

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ABSTRACT

The United States is in the midst of an opioid epidemic, which has resulted in resulting hundreds of thousands of overdose deaths. State and local officials are in the best position to enact lifesaving measures. The federal government, however, has largely responded to this crisis through punitive measures, including charging drug users with drug-induced homicide.

When someone suffers a fatal overdose, the Controlled Substances Act allows federal prosecutors to charge the individual(s) who delivered the drugs that caused the overdose. This statute imposes a mandatory minimum of twenty years in prison. Although this statute was enacted to penalize high-level drug dealers, many people charged under it are companions of the deceased and oftentimes drug users themselves. Not only is this unjust, but it threatens to further exacerbate the overdose crisis that has devastated so many communities.

This Note argues that because many of these prosecutions arise from incidents that do not involve traditional drug deals, the Commerce Clause does not give the federal government authority to prosecute co-users who share the drugs that ultimately cause an overdose. Furthermore, by charging co-users with drug-induced homicide, federal prosecutors threaten to derail local efforts to mitigate the overdose crisis.

The opioid epidemic continues to take hundreds of lives each day. Therefore, it is imperative that federal officials pursue the most

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effective means of preventing further fatalities. However, charging drug users with homicide serves only to exacerbate the problem.

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INTRODUCTION

Jenny Werstler was living in a halfway house in Florida until a few days before her death on May 9, 2014—her 20th birthday.¹ Her newfound sobriety was interrupted when a Pennsylvania court, against her parents' wishes, ordered her back to her

1. See Don Sapatkin, *Fastest Rise in Pa. Overdose Deaths: White Women*, PHILA. INQUIRER (Mar. 10, 2016), https://www.inquirer.com/philly/health/20160311_Fastest_rise_in_Pa_overdose_deaths_white_women.html.

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hometown in Chester County for a hearing.² Upon her return, Jenny reached out to Emma Semler, an old friend, and asked her about getting heroin.³ The friends reunited in Philadelphia later that day, and Emma bought heroin which they both injected in the bathroom of a fast food restaurant.⁴ When Jenny asked for a second dose, Emma gave her friend what would ultimately be a fatal hit.⁵

Jenny and Emma met as teenagers in a rehab facility in 2013.⁶ Like Jenny, Emma started using opioids at a very young age—she was just thirteen years old when she was prescribed an opioid after a spinal surgery.⁷ Her father, himself an addict who was occasionally abusive, encouraged her to manage the pain with alcohol and marijuana, and what started as a routine prescription soon devolved into a full-blown heroin addiction.⁸ It was not until Jenny's tragic death that Emma got sober, began working at a treatment center, and took up mentoring other young drug users.⁹

This progress came to a halt in December 2018 when a jury found Emma guilty of distribution and aiding and abetting in distribution,¹⁰ as well as distribution within 1,000 feet of a playground.¹¹ The jury also found that the distribution “result[ed] in death,” which meant that Emma faced a

2. *See id.*

3. *See* Antonia Noori Farzan, *She Shared Heroin with a Friend Who Fatally Overdosed. She'll Now Spend 21 Years in Prison*, WASH. POST (May 30, 2019, 5:46 AM), <https://www.washingtonpost.com/nation/2019/05/30/she-shared-heroin-with-friend-who-fatally-overdosed-shell-now-spend-years-prison/>.

4. *See id.*

5. *See id.*

6. *See id.*

7. *See* Sentencing Memorandum of Defendant Emma Semler at 6, *United States v. Semler*, No. 2:17-CR-00120-001 (E.D. Pa. May 24, 2019).

8. *See id.* at 6–7.

9. *See id.* at 8.

10. *See* 21 U.S.C. § 841(a)(1).

11. *See* 21 U.S.C. § 860; *see also* *Montgomery County Woman Convicted of Distributing Heroin, Killing Friend Sentenced to 21 Years in Prison*, U.S. ATTY'S OFF. E.D. PA. (May 29, 2019), <https://www.justice.gov/usao-edpa/pr/montgomery-county-woman-convicted-distributing-heroin-killing-friend-sentenced-21-years>.

mandatory minimum sentence of twenty years in prison.¹² This significant sentence was mandated by a provision buried within the Controlled Substances Act (CSA), which establishes the United States' federal drug policy.¹³ Emma was ultimately sentenced to twenty-one years in prison.¹⁴

Emma and Jenny had a pre-existing friendship and what transpired between them involved a very small amount of heroin. The events leading up to Jenny's death never crossed state lines—the heroin purchase and use took place within a few blocks of each other in West Philadelphia. This was very much a local tragedy. Per their discretion, Philadelphia prosecutors declined to bring charges under Pennsylvania's drug-induced homicide statute.¹⁵ In fact, this charge is very rarely used in Philadelphia County, in part because of its questionable effectiveness and difficulty to prove.¹⁶ Instead, Emma was charged by federal prosecutors under a federal statute.¹⁷

This Note argues that even as Congress's commerce powers have been greatly expanded, the act of co-users sharing drugs falls beyond the scope of the federal government's authority under the Commerce Clause. However, regardless of whether its commerce power enables the federal government to prosecute these low-level, local drug transactions, U.S. Attorneys should exercise their discretion and decline to bring these charges. Exercising this discretion would represent a small step toward taking a public health approach to the overdose crisis, rather than a punitive one. This would ultimately be more effective in saving lives.

12. See *Montgomery County Woman Convicted of Distributing Heroin, Killing Friend Sentenced to 21 Years in Prison*, *supra* note 11; 21 U.S.C. § 841(b)(1).

13. See § 841(b)(1).

14. See Farzan, *supra* note 3.

15. See 18 PA. CONS. STAT. § 2506(b) (2020).

16. See Aubrey Whelan, *These Pa. Prosecutors Are Charging Heroin Dealers with Killing Their Customers. Grieving Families Are Helping*, PHILA. INQUIRER (May 13, 2018), <https://www.inquirer.com/philly/health/addiction/drug-delivery-resulting-death-pennsylvania-heroin-overdose-opioids-20180511.html>.

17. See Sentencing Memorandum of Defendant Emma Semler, *supra* note 7, at 1–2.

Part I of this Note discusses drug-induced homicide statutes generally, the Anti-Drug Abuse Act's origin story, and the mechanics of the "resulting in death" mandatory minimum sentence. Part II describes the evolution of Congress's commerce powers, which now enable the federal government to regulate intrastate drug activity. Part III argues that the Commerce Clause does not grant the federal government police power over purely local drug transactions in the absence of a sale. Finally, Part IV will argue that regardless of the federal government's authority to prosecute these transactions, a better solution to the opioid epidemic would be for federal prosecutors to exercise their discretion and decline to bring charges, as this would go much further in preventing overdose deaths in the first place.

I. CRIMINALIZING OVERDOSE DEATHS: THE FEDERAL DRUG-INDUCED HOMICIDE STATUTE

A. *Criminal Punishment as a Response to the Overdose Crisis*

The opioid epidemic clearly calls for policy solutions. In 2018, 67,367 people in the United States died from a drug overdose, the majority of which involved opioids.¹⁸ This number represents an 84% increase from 2008.¹⁹ Accidental overdose is now the leading cause of death in Americans under 50.²⁰ In October 2017, then-Secretary of Health and Human Services, Eric Hargan, declared that the opioid epidemic is a public health emergency.²¹ Likewise, President Trump has directed

18. See HOLLY HEDEGAARD, ARIALDI M. MINIÑO & MARGARET WARNER, CTRS. FOR DISEASE CONTROL & PREVENTION, NCHS DATA BRIEF NO. 356, DRUG OVERDOSE DEATHS IN THE UNITED STATES, 1999–2018, at 1 fig.1 (Jan. 2020) (depicting 36,450 overdose deaths in 2008 and 67,367 overdose deaths in 2018).

19. See *id.*

20. *Drug Overdose*, DRUG POL'Y ALL., <http://www.drugpolicy.org/issues/drug-overdose> (last visited Sept. 16, 2020).

21. *HHS Acting Secretary Declares Public Health Emergency to Address National Opioid Crisis*, U.S. DEP'T HEALTH & HUM. SERVS. (Oct. 26, 2017) [hereinafter *HHS Declaration*], <https://www.hhs.gov/about/news/2017/10/26/hhs-acting-secretary-declares-public-health-emergency-address-national-opioid-crisis.html>.

“executive agencies use all appropriate emergency authorities and other relevant authorities” to address this crisis.²²

And yet, the strongest response to this crisis remains punitive. For example, in March 2018, then-Attorney General Jeff Sessions issued a memo directing federal prosecutors to “consider every lawful tool at their disposal” to fight the opioid epidemic, including “using criminal and civil remedies available under federal law to hold opioid manufacturers and distributors accountable for unlawful practices.”²³ Attorney General Sessions also directed federal prosecutors to pursue “capital punishment in appropriate cases,” including those that involve “certain racketeering activities” and “dealing in extremely large quantities of drugs.”²⁴

One of the “lawful tool[s]” at federal prosecutors’ disposal is the federal drug-induced homicide statute.²⁵ This statute makes it unlawful to manufacture, distribute, or dispense nearly any quantity of a controlled substance, and attaches the aforementioned twenty-year mandatory minimum sentence “if death or serious bodily injury results from the use of such substance.”²⁶

Perhaps as a response to the opioid epidemic, the federal government is increasingly charging people with drug-induced homicide.²⁷ Between 2017 and 2019, 338 people were sentenced after being convicted of, or pleading guilty to, drug-induced homicide or serious bodily injury in federal court.²⁸ This

22. *Id.*

23. *Attorney General Sessions Issues Memo to U.S. Attorneys on the Use of Capital Punishment in Drug-Related Prosecutions*, U.S. DEP’T JUST. (Mar. 21, 2018), <https://www.justice.gov/opa/pr/attorney-general-sessions-issues-memo-us-attorneys-use-capital-punishment-drug-related>.

24. *Id.*

25. *Id.*

26. 21 U.S.C. § 841(b)(1). Additionally, twenty-three states and the District of Columbia have enacted their own drug-induced homicide laws. *See Drug Induced Homicide Laws*, PRESCRIPTION DRUG ABUSE POL’Y SYS., [hereinafter PDPS DATA], <http://www.pdaps.org/datasets/drug-induced-homicide-1529945480-1549313265-1559075032> (Jan. 1, 2019).

27. *See PDPS DATA*, *supra* note 26.

28. *See U.S. SENT’G COMM’N, USE OF GUIDELINES AND SPECIFIC OFFENSE CHARACTERISTICS, OFFENDER BASED, FISCAL YEAR 2017*, at 28 (2017) (reporting a total of ninety-five drug-induced homicide/serious bodily injury sentences); U.S. SENT’G COMM’N, *USE OF GUIDELINES AND*

represents a 57% increase in overall convictions from prior years.²⁹ Since 2014, at least 553 people have pled or been found guilty under the federal drug-induced homicide and serious bodily injury statute.³⁰ These numbers do not include anyone who pled guilty to lesser charges, nor do they include anyone charged under comparable state laws.

Notably, many of the people charged with drug-induced homicide are not the kinds of drug dealers typically vilified by policymakers. Instead, approximately half of the people charged with drug-induced homicide, at both the state and federal level, are “co-using friends, family, or romantic partners of the deceased.”³¹

Despite the twenty-year mandatory minimum sentence, the standard for criminal liability in these cases is relatively low, as the government does not need to prove, in most cases, that the defendant acted with a particular mental state.³² Furthermore, drug-induced homicide laws have been critiqued as “vague with respect to whom [they] cover,” and there is often a “tenuous connection between the delivery of the controlled

SPECIFIC OFFENSE CHARACTERISTICS, OFFENDER BASED, FISCAL YEAR 2018, at 28 (2018) (reporting a total of ninety-two drug-induced homicide/serious bodily injury sentences); U.S. SENT’G COMM’N, USE OF GUIDELINES AND SPECIFIC OFFENSE CHARACTERISTICS, GUIDELINE CALCULATION BASED, FISCAL YEAR 2019, at 27 (2019) (reporting a total of 152 drug-induced homicide/serious bodily injury sentences).

29. In contrast, between 2014 and 2016, 214 people were sentenced in federal court for drug-induced homicide or serious bodily injury charges. *See* U.S. SENT’G COMM’N, USE OF GUIDELINES AND SPECIFIC OFFENSE CHARACTERISTICS, OFFENDER BASED, FISCAL YEAR 2014, at 27 (2014) (reporting a total of fifty-four drug-induced homicide/serious bodily injury sentences); U.S. SENT’G COMM’N, USE OF GUIDELINES AND SPECIFIC OFFENSE CHARACTERISTICS, OFFENDER BASED, FISCAL YEAR 2015, at 28 (2015) (reporting a total of seventy-four drug-induced homicide/serious bodily injury sentences); U.S. SENT’G COMM’N, USE OF GUIDELINES AND SPECIFIC OFFENSE CHARACTERISTICS, OFFENDER BASED, FISCAL YEAR 2016, at 29 (2016) (reporting a total of eighty-six drug-induced homicide/serious bodily injury sentences).

30. *See supra* notes 28–29.

31. Leo Beletsky, *America’s Favorite Antidote: Drug-Induced Homicide in the Age of the Overdose Crisis*, 19 UTAH L. REV. 833, 839 (2019).

32. *See* DRUG POL’Y ALL., AN OVERDOSE DEATH IS NOT MURDER: WHY DRUG-INDUCED HOMICIDE LAWS ARE COUNTERPRODUCTIVE AND INHUMANE 9 (2017) [hereinafter DPA REPORT], https://www.drugpolicy.org/sites/default/files/dpa_drug_induced_homicide_report_0.pdf. To be sure, the government must prove that the defendant intentionally distributed the drugs—but not that the defendant was malicious, reckless, or even negligent in causing serious bodily harm or death. *See* 21 U.S.C. § 841(a).

substance and the host of other factors that often contribute to death.”³³

Thus far, there is no evidence that any drug-induced homicide statutes actually achieve what they set out to do: save lives.³⁴ Instead, charging people for their role in an overdose death poses a variety of policy and social concerns.³⁵ For example, there appears to be a significant racial disparity in drug-induced homicide prosecutions: one study found that over half of people charged under these statutes were Black or Hispanic.³⁶ Additionally, the knowledge requirement is often questionable, as “[l]ow-level dealers rarely know the contents of the product in their supply chain or can predict its risk.”³⁷ Furthermore, charging co-users with drug-induced homicide could have the long term effect of actually *causing*—rather than preventing—overdose deaths, as fear of prosecution may cause co-users to hesitate in seeking medical treatment when a friend or loved one has overdosed.³⁸ In fact, “[r]esearch suggests that fear of police contact and legal detriment is actually the *single most important* reason why people who witnessed overdoses do not seek timely emergency medical help.”³⁹

The increase in drug-induced homicide prosecutions, on both the state and federal level, is a result of a desire to punish the people responsible for the opioid epidemic and the disturbingly high number of overdose deaths. Historically, criminalizing drug use has been politically popular,⁴⁰ and attempting to solve

33. DPA REPORT, *supra* note 32.

34. Beletsky, *supra* note 31, at 869.

35. See DPA REPORT, *supra* note 32, at 11; see also Beletsky, *supra* note 31.

36. Beletsky, *supra* note 31, at 874.

37. *Id.* at 877.

38. *Id.* at 862–63.

39. *Id.* See *infra* Part IV for a more detailed discussion of this policy concern.

40. For example, shortly before the CSA was passed, 84% of Americans believed that marijuana should be illegal. See America’s New Drug Policy Landscape, PEW RSCH. CTR. (Apr. 2, 2014), <https://www.pewresearch.org/politics/2014/04/02/americas-new-drug-policy-landscape/>. Likewise, just a few years after the Anti-Drug Abuse Act was passed, “73% of Americans favored a mandatory death penalty for ‘major drug traffickers.’” Drew Desilver, *Feds May Be Rethinking the Drug War, but States Have Been Leading the Way*, PEW RSCH. CTR.: FACT

social problems with criminal penalties is essentially an American tradition.⁴¹ Even as more and more people oppose mandatory imprisonment for non-violent drug offenders,⁴² attitudes toward drug-induced homicide prosecutions vary greatly, even among those who have lost a loved one to an overdose. On one hand, some families of overdose victims may feel that the people who sold or gave their loved ones a fatal dose deserve to be punished.⁴³ However, this attitude is not universal: some of the most ardent opponents of drug-induced homicide laws are those who have lost loved ones to overdoses.⁴⁴ Regardless of attitudes toward prosecuting co-users, low-level users and dealers—who are most often held accountable for the opioid epidemic’s consequences⁴⁵—are not actually responsible for causing the crisis, which has largely been attributed to the pharmaceutical industry and doctors over-prescribing medication.⁴⁶

TANK (Apr. 2, 2014), <https://www.pewresearch.org/fact-tank/2014/04/02/feds-may-be-rethinking-the-drug-war-but-states-have-been-leading-the-way/>.

41. See *infra* note 48 (describing how the infamous “War on Drugs” and the sweeping criminalization of drugs was the product of cultural hysteria around an increase in drug use). See also *infra* Section I.B (describing how the Anti-Drug Abuse Act of 1986 was enacted in reaction to Len Bias’s overdose death).

42. See Desilver, *supra* note 40.

43. See, e.g., Paige Williams, *The Wrong Way to Fight the Opioid Crisis*, NEW YORKER (Feb. 3, 2020), <https://www.newyorker.com/magazine/2020/02/10/a-deadly-mistake> (explaining how the family of one overdose victim advocated for the friend who sold her heroin to be charged and punished for her role in the overdose).

44. See, e.g., Rep. Sara Innamorato (@RepInnamorato), TWITTER (Feb. 10, 2020, 12:45 PM), <https://twitter.com/RepInnamorato/status/1226925248005709826> (“My father’s overdose death was not a homicide. The last person he interacted with was more than likely a friend, a person in crisis themselves.”); see also DPA REPORT, *supra* note 32, at 37–38 (describing a family who lost a daughter to an overdose, and subsequently refused to cooperate with authorities who sought to prosecute the friend who sold her drugs because they did not believe that criminal punishment was an appropriate response).

45. See DPA REPORT, *supra* note 32 at 3.

46. See, e.g., *Opioid Overdose Crisis*, NAT’L INST. ON DRUG ABUSE (May 27, 2020), <https://www.drugabuse.gov/drugs-abuse/opioids/opioid-overdose-crisis> (“How did this happen? In the late 1990s, pharmaceutical companies reassured the medical community that patients would not become addicted to prescription opioid pain relievers, and healthcare providers began to prescribe them at greater rates.”). As such, in 2019, prosecutors in the Southern District of New York filed some of the first-ever criminal charges against pharmaceutical executives for their role in creating the opioid epidemic. See Christian Berthelsen & Jef Feeley, *Ex-Pharma Executives Accused of Pushing Opioids to Boost Their Pay*, BLOOMBERG, <https://www.bloomberg.com/news>

B. *Cultural Panic & the Anti-Drug Abuse Act of 1986*

The federal drug-induced homicide statute long predates the modern opioid epidemic.⁴⁷ In 1971, President Richard Nixon declared a “war on drugs,” and “dramatically increased the size and presence of federal drug control agencies” through the CSA.⁴⁸ During the height of this “war,” Congress enacted the Anti-Drug Abuse Act of 1986.⁴⁹ This legislation substantially amended the CSA by implementing draconian mandatory minimum sentences, including the infamous 100-to-1 sentencing disparity between crack and cocaine.⁵⁰ It also created the “resulting in death” mandatory minimum.⁵¹

However, the Anti-Drug Abuse Act had much more to do with politics than policy. The passage of this legislation was a “political opportunity” for Democrats—who lacked control of the presidency and Senate⁵²—to “outflank Republicans by ‘getting tough on drugs’” before the 1986 midterm elections.⁵³

/articles/2019-04-23/rochester-drug-co-op-s-ex-ceo-charged-with-narcotics-conspiracy (Apr. 23, 2019, 5:50 PM).

47. See Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, § 1002, 100 Stat. 3207, 3207–2.

48. *A Brief History of the Drug War*, DRUG POL’Y ALL., <https://www.drugpolicy.org/issues/brief-history-drug-war> (last visited Sept. 17, 2020). This was partially in response to popular hysteria over the increasing popularity of marijuana and other drugs. However, members of the Nixon administration have confirmed that this was also a political tactic to vilify and disrupt “the antiwar left and black people,” two demographics that threatened Nixon’s re-election efforts. *Id.*; see also German Lopez, *The War on Drugs, Explained*, VOX, <https://www.vox.com/2016/5/8/18089368/> (May 8, 2016, 1:21 PM) (discussing the federal drug scheduling system under the CSA and the lack of high-level research on the potential for misuse and addiction of controlled drugs at every level).

49. Anti-Drug Abuse Act § 1002.

50. See U.S. SENT’G COMM’N, 2011 REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 25 (2011) [hereinafter 2011 REPORT].

51. See § 1002.

52. See Howell Raines, *Reagan Wins by a Landslide, Sweeping At Least 48 States; G.O.P. Gains Strength in House*, N.Y. TIMES (Nov. 7, 1984), <https://www.nytimes.com/1984/11/07/politics/reagan-wins-by-a-landslide-sweeping-at-least-48-states-gop-gains.html>.

53. Eric E. Sterling, *Drug Laws and Snitching: A Primer*, PBS: FRONTLINE, <https://www.pbs.org/wgbh/pages/frontline/shows/snitch/primer/> (last visited Sept. 17, 2019). Sterling offers a unique perspective on this matter, as he served as counsel to the House Judiciary Committee during this era.

The summer before the 1986 elections, the United States was shaken by basketball star Len Bias's death.⁵⁴ The Boston Celtics drafted Bias as the number two NBA pick, but just two days after the draft, he collapsed during a night of celebratory partying.⁵⁵ An autopsy ultimately revealed that he had cocaine in his system when he suffered a cardiac arrest.⁵⁶ Bias's death greatly unsettled Americans, in part because it revealed that illegal drug use was spreading "into middle-class neighborhoods and schools."⁵⁷ All the while, Massachusetts representative Thomas "Tip" O'Neill was the Speaker of the House and "[t]he most important Democratic political leader."⁵⁸ His constituents in Boston were "consumed with anger and dismay" at the sudden loss of their team's first NBA pick.⁵⁹ With the midterm election approaching, "O'Neill realized how powerful an anti-drug campaign would be."⁶⁰

Lawmakers passed the Anti-Drug Abuse Act on October 17, 1986, just weeks before the midterm elections.⁶¹ Congress created and passed the bill without any hearings or testimony from legal or medical experts.⁶² In lieu of legal or medical expertise, lawmakers were compelled by Len Bias's story, which was "on the minds of many people on Capitol Hill" and "cited repeatedly by lawmakers as a key element in setting off the House's antidrug crusade."⁶³

54. See Keith Harriston & Sally Jenkins, *Maryland Basketball Star Len Bias Is Dead at 22; Traces of Cocaine Found in System*, WASH. POST (June 20, 1986), <https://www.washingtonpost.com/wp-srv/sports/longterm/memories/bias/launch/bias1.htm>.

55. *Id.*

56. Susan Schmidt & Tom Kenworthy, *Cocaine Caused Bias' Death, Autopsy Reveals: Dose Said to Trigger Heart Failure; Criminal Inquiry To Be Pressed*, L.A. TIMES (June 25, 1986, 12:00 AM), <https://www.latimes.com/archives/la-xpm-1986-06-25-sp-20106-story.html>.

57. Edward Walsh, *\$1.7 Billion Drug Bill Sweeps House, Senate; Death Penalty Stripped from Legislation*, WASH. POST, Oct. 18, 1986, at A4 [hereinafter Walsh, *\$1.7 Billion Drug Deal*].

58. Sterling, *supra* note 53.

59. *Id.*

60. *Id.*

61. See Walsh, *\$1.7 Billion Drug Deal*, *supra* note 57.

62. Sterling, *supra* note 53.

63. Edward Walsh, *Bias' Death Fueled Antidrug Fervor; Public Concern, Election-Year Sensitivity United Congress on Issue*, WASH. POST, Sept. 14, 1986, at A1.

It is important to highlight that the Anti-Drug Abuse Act was largely driven by anecdotal evidence of this tragic but single overdose death.⁶⁴ Likewise, even at the time, lawmakers admitted that the legislation may not be effective and acknowledged their desire to win the upcoming election motivated their votes for the Act.⁶⁵ For example, in an interview shortly after Congress passed the Act, Representative Charles Rangel, a Republican from New York, admitted that although the congressional package was not likely to solve the drug problem, “at least we can go home and tell our constituents that we tried.”⁶⁶

Although the congressional record for the Anti-Drug Abuse Act of 1986 is sparse, one thing we know is *who* lawmakers sought to hold accountable for overdose deaths like Bias’s.⁶⁷ For example, during a statement on the floor, then-Representative Ed Markey explained that the bill “acknowledge[s] that there are differing degrees of culpability in the drug world,” so it establishes “separate penalties for . . . the biggest traffickers.”⁶⁸ Likewise, Senate Minority Leader Robert Byrd claimed that the Act sought to punish “all the major drug dealers who are preying upon our society,” and that the most significant penalties should be reserved for “the kingpins—the masterminds who are really running these operations.”⁶⁹

Although the Act intended to punish first-time drug offenders as well,⁷⁰ there is nothing in the legislative record that indicates that the lawmakers sought to hold the lowest-level offenders—namely, drug users who share drugs with fellow addicts—accountable for subsequent overdose deaths.

64. Sterling, *supra* note 53.

65. See Walsh, *\$1.7 Billion Drug Deal*, *supra* note 57.

66. *Id.*

67. See, e.g., 2011 REPORT, *supra* note 50, at 24 (describing how Congress sought to severely punish “major traffickers”).

68. 132 CONG. REC. 22,993 (1986) (statement of Rep. Edward Markey).

69. 132 CONG. REC. 27,193 (1986) (statement of Sen. Robert Byrd).

70. See 132 CONG. REC. 27,194 (1986) (statement of Sen. Robert Byrd) (“The minimum sentences would be slightly less than those for the kingpins, but they nevertheless would have to go to jail—a minimum of 5 years for the first offense . . .”).

C. The Statutory Text & Elements to Prove at Trial

Drug offenses and penalties are codified in 21 U.S.C. §§ 841–65.⁷¹ These provisions criminalize a variety of situations ranging from simple possession,⁷² to distributing drugs at a truck stop,⁷³ to maintaining a drug-involved premises.⁷⁴ Unlike some state drug-induced homicide statutes, the federal drug-induced homicide law is not a standalone provision.⁷⁵ Instead, it is a mandatory minimum that applies if “death . . . results” from the distribution and use of a controlled substance.⁷⁶

Nearly two hundred drugs are classified by federal law as “controlled substances.”⁷⁷ This list includes marijuana, cocaine, and heroin, as well as pharmaceuticals like fentanyl.⁷⁸ Section 841 makes it unlawful to “knowingly or intentionally . . . manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance.”⁷⁹ A person who violates this law shall be sentenced to “not less than 20 years or more than life” in prison, at least three years of supervised release, and a significant fine, when “death or serious bodily injury results from the use of such substance.”⁸⁰ Furthermore, a person who is convicted under this provision and has a previous felony drug conviction “shall be sentenced to life imprisonment” if an overdose death occurs.⁸¹

71. 21 U.S.C. §§ 841–865.

72. *See id.* § 844.

73. *See id.* § 849.

74. *See id.* § 856. The purpose of this provision is ostensibly to prohibit crack houses and raves. *See* Zachary A. Siegel, *Joe Biden’s ‘Crack House’ Crusade*, APPEAL (Sept. 11, 2019), <https://theappeal.org/joe-biden-crack-house-statute/>.

75. For example, in Pennsylvania, “drug delivery resulting in death” is a standalone criminal charge. 18 PA. CONS. STAT. § 2506(b) (2020). Likewise, in Kansas, it is unlawful to “[d]istribut[e] . . . a controlled substance causing great bodily harm or death.” KAN. STAT. ANN. § 21-5430 (2020).

76. 21 U.S.C. § 841(b)(1).

77. *See id.* § 812.

78. *See id.*

79. *Id.* § 841(a).

80. *Id.* § 841(b)(1). Additionally, people convicted under this provision are subject to at least three years of supervised release and a significant fine.

81. *Id.*

The statute defines “distribute” as “to deliver . . . a controlled substance.”⁸² “Deliver” is broadly defined as “the actual, constructive, or attempted transfer of a controlled substance . . . whether or not there exists an agency relationship.”⁸³ Therefore, in order for a defendant to be subject to the drug-induced homicide mandatory minimum, the government need only prove that he or she knowingly or intentionally⁸⁴ delivered, either actually or constructively,⁸⁵ a controlled substance to another person and that substance caused the recipient to die or suffer serious bodily injury.⁸⁶

Additionally, the Supreme Court has found that for the purposes of 21 U.S.C. § 841(b)(1), the phrase “results from” requires a “but-for” causality between the defendant’s conduct (i.e., distributing drugs) and the decedent’s death.⁸⁷ The government will not prevail if it can only show that the drugs delivered by the defendant were only a “substantial factor” in causing the death.⁸⁸ For example, if the decedent had multiple potentially fatal substances in their system at the time of death, then the government may not be able to meet its burden.⁸⁹

Despite Congress’s intent, both state and federal drug-induced homicide statutes are predominantly enforced against fellow drug users, rather than large-scale drug dealers and traffickers.⁹⁰ This may come as no surprise, as the Anti-Drug Abuse Act’s history shows that the federal statute was haphazardly enacted for largely political, rather than policy-

82. The full definition of “distribute” is “to deliver (other than by administering or dispensing) a controlled substance.” *Id.* § 802(11).

83. *Id.* § 802(8).

84. *See id.* § 841(a).

85. *See id.* §§ 841(b)(1), 802(8).

86. *See id.* § 841(b)(1).

87. *Burrage v. United States*, 571 U.S. 204, 211 (2014) (finding that the phrase “results from” indicates a but-for causal connection between the defendant’s distribution of the drugs and the decedent’s death).

88. *Id.* at 215–16.

89. *See, e.g., id.* at 207.

90. DPA REPORT, *supra* note 32, at 3.

based, reasons.⁹¹ This, coupled with the relatively low standard for liability and disproportionately high penalties, suggests that federal drug-induced homicide prosecutions are, at best, misguided. But at worst, they are the result of unconstitutional federal overreach.

II. THE OUTER LIMITS OF THE FEDERAL GOVERNMENT'S COMMERCE POWERS

The federal government has authority to regulate nearly any situation involving a controlled substance because Congress has found that “[a] major portion of the traffic in controlled substances flows through interstate and foreign commerce.”⁹² Additionally, “[i]ncidents of the traffic which are not an integral part of the interstate or foreign flow, such as manufacture, local distribution, and possession, nonetheless have a substantial and direct effect upon interstate commerce.”⁹³

This refers to Congress’s commerce powers, which come from the Commerce Clause.⁹⁴ The Commerce Clause empowers Congress to regulate “[c]ommerce with foreign Nations, and among the several States, and with the Indian Tribes.”⁹⁵ In the modern era, the Supreme Court has primarily expanded Congress’s commerce powers, however, in some situations these powers have been limited.⁹⁶ Whether the commerce power has expanded so far as to enable Congress to regulate a purely local, non-economic, non-violent drug offense is an open question. Part III discusses this in greater detail.

91. See Sterling, *supra* note 53.

92. 21 U.S.C. § 801(3).

93. *Id.*

94. See U.S. CONST. art. I, § 8, cl. 3.

95. *Id.*

96. See *United States v. Lopez*, 514 U.S. 549, 559–60 (1995); *United States v. Morrison*, 529 U.S. 598, 618–19 (2000).

A. Emergence of the Modern Doctrine

In the early nineteenth century, Congress's commerce power was quite limited, enabling it to regulate things like roads and waterways that cross state lines, but not intrastate economic activity that did not interfere with other states.⁹⁷ The Supreme Court believed it was "inconvenient" and "certainly unnecessary" for the federal government to have the power to regulate commerce that takes place entirely within a single state.⁹⁸

However, the federal government's commerce powers were significantly expanded during the New Deal era.⁹⁹ At issue in *NLRB v. Jones & Laughlin Steel Corp.* was the National Labor Relations Act of 1935, which prohibits employers from retaliating against workers who form unions.¹⁰⁰ Organizing factory workers typically takes place entirely intrastate.¹⁰¹ Nonetheless, the Court found that the Act was constitutional under Congress's commerce power.¹⁰² Although activities like labor relations "may be intrastate in character when separately considered," it is appropriate for Congress to regulate anything with such "a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions."¹⁰³

Four years later, in another labor case, the Court found that it was within Congress's commerce power to prohibit goods produced by people paid below the federal minimum wage from entering interstate commerce.¹⁰⁴ This is because even

97. See *Gibbons v. Ogden*, 22 U.S. 1, 195 (1824).

98. *Id.* at 194.

99. See generally *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) (upholding the National Labor Relations Act of 1935 as consistent with Congress's commerce power); *United States v. Darby*, 312 U.S. 100 (1941) (upholding the Fair Labor Standards Act as consistent with Congress's commerce power).

100. *Jones & Laughlin Steel Corp.*, 301 U.S. at 22.

101. See *id.* at 28 (stating that all of the factual evidence around the unionizing parties concerned the employees at just one plant in Aliquippa, Pennsylvania).

102. See *id.* at 36–37, 46–49.

103. *Id.* at 37.

104. *Darby*, 312 U.S. at 117–22.

wholly intrastate activities—like manufacturing—have a substantial effect on interstate commerce when the product may be sold out of state.¹⁰⁵ Likewise, in *Wickard v. Filburn*, the Court recognized that even local activities involving “trivial” amounts of commercial goods, in the aggregate, can affect a national market that Congress seeks to regulate.¹⁰⁶

During the Civil Rights era, Congress enacted legislation prohibiting racial discrimination.¹⁰⁷ While standalone acts of discrimination are seemingly local, in a set of cases, the Court found that Congress’s commerce powers granted it the authority to enact and enforce the Civil Rights Act.¹⁰⁸ Congress had a rational basis for finding that discrimination in public accommodations adversely affects interstate commerce because its effect on commerce has “a real and substantial relation to the national interest.”¹⁰⁹ In the aggregate, racial discrimination discourages people of color from moving, or even traveling, to certain locales.¹¹⁰ Likewise, the Court found that even a small, rural restaurant had the capacity to affect interstate commerce because a portion of the goods it purchased had originated in other states.¹¹¹

Thus, Congress now has the power to regulate intrastate activities that are closely and substantially related to interstate commerce.¹¹² The power to regulate this category of activity has enabled Congress to enact a multitude of criminal statutes,

105. *Id.* at 119–20.

106. *Wickard v. Filburn*, 317 U.S. 111, 127–28 (1942). This case involved a farmer who grew wheat in excess of the federally mandated wheat quota. Notably, he did not sell the excess wheat but instead used it on his farm.

107. See Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 42 U.S.C.). In addition to race, the Civil Rights Act also prohibits discrimination based on color, religion, sex, and national origin.

108. See *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964); *Katzenbach v. McClung*, 379 U.S. 294 (1964).

109. *Heart of Atlanta*, 379 U.S. at 255; see also *McClung*, 379 U.S. at 297 (requiring a “close and substantial relation between local activities and interstate commerce”).

110. See *Heart of Atlanta*, 379 U.S. at 275–76 (Black, J., concurring); *McClung*, 379 U.S. at 299.

111. *McClung*, 379 U.S. at 298–99.

112. See, e.g., *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937); *United States v. Lopez*, 514 U.S. 549, 559 (1995).

including the CSA.¹¹³ The Supreme Court has addressed the scope of the federal government's authority to regulate criminal conduct several times in a series of modern cases.¹¹⁴

B. *Interstate Commerce and Violent Crime*

One limitation of the commerce powers is that they do not enable Congress to regulate "mere possession" when an act is entirely non-economic.¹¹⁵ *United States v. Lopez* involved the Gun-Free School Zones Act of 1990, which did not regulate any commercial activity, but instead made it a federal offense to simply possess a gun in or near a school.¹¹⁶ The Supreme Court held that this Act exceeded Congress's commerce authority because the regulated conduct did not "substantially affect[]" interstate commerce.¹¹⁷ Although Congress may regulate activities that are economic, or at least, economic in nature, possessing a weapon "is not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated."¹¹⁸

Five years later, the Court considered Congress's authority to regulate violent crime in *United States v. Morrison*.¹¹⁹ This case involved a provision of the Violence Against Women Act of 1994 (VAWA) that allowed victims of gender-based violence to sue their assailants in federal court regardless of whether local authorities had filed criminal charges.¹²⁰

113. See *Gonzales v. Raich*, 545 U.S. 1, 13–15 (2005).

114. See *Lopez*, 514 U.S. 549; *United States v. Morrison*, 529 U.S. 598 (2000); *Raich*, 545 U.S. 1.

115. See *Lopez*, 514 U.S. at 562 (citing *United States v. Bass*, 404 U.S. 336, 339 n.4 (1971)).

116. *Id.* at 551.

117. *Id.* at 561.

118. *Id.* After the *Lopez* decision, Congress amended the Gun-Free School Zones Act. Now, a person violates the Act only if the gun they possessed in a school zone traveled through interstate commerce. See Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, 110 Stat. 3009 (1996).

119. See *Morrison*, 529 U.S. 598.

120. See *id.* at 606.

When enacting VAWA, Congress relied on substantial research that connected gender-based violence to interstate commerce.¹²¹ It found that gender-based violence deters people (especially women) from traveling, seeking employment, or engaging in business transactions.¹²² It also leads to medical costs and diminishes national productivity, thereby substantially affecting interstate commerce.¹²³ However, the *Morrison* Court found that given the Constitution's enumerated powers, this reasoning was unworkable.¹²⁴ Troubling as it may be, gender-based violence does not involve economic activity.¹²⁵ Furthermore, the Court had already rejected the "cost of crime" and "national productivity" arguments because they rely on the tenuous aggregation of non-economic activities.¹²⁶

After finding that intrastate gender-based violence does not substantially affect interstate commerce, the Court "reject[ed] the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce."¹²⁷ Additionally, the Court noted that criminal punishment for violent offenses—and the "vindication of [] victims"—belongs within the states' police power, "which the Founders denied the National Government and reposed in the States."¹²⁸

C. Interstate Commerce & Controlled Substances

In 2005, the Supreme Court addressed Congress's authority to legislate the intrastate manufacture of drugs under 21 U.S.C. § 841 in *Gonzales v. Raich*.¹²⁹ In 1996, California voters passed the Compassionate Use Act, which enabled its residents to grow

121. *See id.* at 615.

122. *See id.*

123. *Id.*

124. *Id.* (citing *United States v. Lopez*, 514 U.S. 549, 564 (1995)).

125. *See id.* at 613.

126. *Id.* at 612–13.

127. *Id.* at 617.

128. *See id.* at 618.

129. *Gonzales v. Raich*, 545 U.S. 1 (2005).

and consume marijuana for medical purposes.¹³⁰ Pursuant to this legislation, Angel Raich had two caregivers grow marijuana for her, which they provided at no charge.¹³¹ Without this, she would suffer “excruciating pain [that] could very well prove fatal” due to a chronic condition.¹³²

Likewise, in conjunction with conventional medical treatment, Diane Monson lawfully grew a few marijuana plants in her home to treat a variety of symptoms, until county sheriffs and Drug Enforcement Administration (DEA) agents searched her home.¹³³ Although the local authorities found that her cultivation and use of the marijuana was legal under California law, the DEA agents seized and destroyed the plants pursuant to its authority under the CSA.¹³⁴

In its analysis, the Court considered the primary purpose of the CSA, which is “to conquer drug abuse and to control the legitimate and illegitimate traffic in controlled substances.”¹³⁵ As such, under its commerce power, Congress may regulate drug activity that “ha[s] a substantial effect on interstate commerce”—even when that activity is “purely local”—if the “total incidence” of the activity “poses a threat to a national market.”¹³⁶

Monson and Raich, of course, were not participating in a drug market in the traditional sense—they and their companions were simply growing marijuana for their own legitimate medical consumption.¹³⁷ However, Commerce Clause jurisprudence has established that “Congress can regulate purely intrastate activity that is not itself ‘commercial,’ in that it is not produced for sale, if it concludes that failure to regulate

130. *Id.* at 5.

131. *Id.* at 7.

132. *Id.*

133. *See id.* at 7.

134. *Id.*

135. *Id.* at 12 (citing 21 U.S.C. § 8101(1)–(6)).

136. *Id.* at 17 (citing *Perez v. United States*, 402 U.S. 146, 151–55 (1971); *Wickard v. Filburn*, 317 U.S. 111, 128–29 (1942)).

137. *See id.* at 7.

that class of activity would undercut the regulation of the interstate market in that commodity.”¹³⁸ If Congress has a rational basis for believing that a seemingly insignificant, purely local, non-commercial activity may, “when viewed in the aggregate,” substantially affect interstate commerce, it may regulate that activity.¹³⁹

Although the home-production and consumption of marijuana appear to be purely local, the Court distinguished the CSA from the regulations it found unconstitutional in *Lopez* and *Morrison*.¹⁴⁰ The Court noted that gun possession and gender-based violence are not economic activities.¹⁴¹ In reaching this conclusion, the Court broadly defined “economic” as “the production, distribution, and consumption of commodities.”¹⁴² According to the Court, the connection between growing marijuana at home and the national economy is less tenuous than the regulated activities in *Lopez* and *Morrison* because enabling even a few people to grow and consume marijuana technically “increase[s] the supply . . . in the California market.”¹⁴³ The growth of the marijuana market is precisely what the CSA attempts to prevent.¹⁴⁴ Therefore, the Court held that the Commerce Clause authorizes Congress to prohibit even small-scale, purely local, marijuana cultivation, even when this activity is permissible under state law.¹⁴⁵

III. THE COMMERCE CLAUSE DOES NOT AUTHORIZE THE FEDERAL GOVERNMENT TO PROSECUTE CO-USERS FOR DRUG-INDUCED HOMICIDE

Raich makes clear that under its commerce powers, Congress indeed has the authority to grant the federal government

138. *Id.* at 18.

139. *Id.* at 19.

140. *See id.* at 23.

141. *See id.* at 25.

142. *Id.*

143. *Id.* at 31.

144. *See id.* at 19.

145. *See id.* at 31–33.

jurisdiction to prosecute drug distribution cases. But Congress's commerce power still has outer limits. For example, as *Lopez* and *Morrison* establish, this power does not extend so far as to give the federal government jurisdiction over a crime that involves a non-economic, non-violent, purely local activity.¹⁴⁶ In the context of drug-induced homicide prosecutions, an incident of "co-users"¹⁴⁷ sharing drugs does not necessarily fall within the scope of economic activity that Congress may regulate. This is in part because sharing drugs is not the kind of "distribution" that Congress intended to criminalize when it enacted the CSA.¹⁴⁸ Therefore, the Commerce Clause does not grant the federal government jurisdiction to prosecute these crimes.

A. *The Meaning of "Economic" Post-Raich*

Modern Commerce Clause jurisprudence holds that Congress may regulate all economic activity that affects interstate commerce.¹⁴⁹ *Lopez* and *Morrison* tell us what kind of behaviors are *not* economic. Merely possessing a particular item in a particular place is not economic.¹⁵⁰ Nor is committing an act of violence against someone, even when that person belongs to a class protected by constitutional anti-discrimination laws.¹⁵¹ So what kind of conduct *is* economic?

As mentioned in Section II.C, the *Raich* majority defined "economic" as "the production, distribution, and consumption of commodities."¹⁵² Justice Stevens drew this definition from

146. See *United States v. Lopez*, 514 U.S. 549, 549 (1995); *United States v. Morrison*, 529 U.S. 598, 613 (2000).

147. For the purposes of this discussion, the term "co-users" refers to friends, partners, colleagues, and acquaintances who are both addicted to opioids and consume drugs together. In these relationships, if money is exchanged at all, it is done so simply to compensate a friend for procuring drugs, and not for a profit. Co-users are distinct from "upper echelon drug manufacturers and distributors" who profit from consumers' addiction. See DPA REPORT, *supra* note 32, at 3.

148. See *Raich*, 545 U.S. at 12–13.

149. Read together, *Lopez*, *Morrison*, and *Raich* indicate this.

150. See *Lopez*, 514 U.S. at 549.

151. See *Morrison*, 529 U.S. at 598.

152. 545 U.S. at 25.

Webster's Third New International Dictionary, which was published in 1966.¹⁵³ This definition was immediately criticized by Justice O'Connor, who chided the majority for defining "economic activity in the broadest possible terms."¹⁵⁴ The consequence of adopting this overly broad definition is a kind of federal power that O'Connor argues would have been unfathomable to the Framers. "If the majority is to be taken seriously," she argues, "the Federal Government may now regulate quilting bees, clothes drives, and potluck suppers throughout the 50 States."¹⁵⁵

On one hand, two companions sharing intravenous drugs may not have been on Justice O'Connor's mind when she bemoaned the federal government's newfound power to regulate local potlucks. Admittedly, there is a significant difference between sharing a casserole and sharing heroin. But on the other hand, a local, non-pecuniary sharing of drugs is exactly what occurred during the events that led to this decision, given that Angel Raich's caregiver grew marijuana on her behalf and gave it to her for free.¹⁵⁶

While sharing drugs, food, or any other thing falls soundly within the 1966 *Webster's* definition of "economic" that the *Raich* majority adopted, other definitions of the term are narrower and seem to preclude this conduct. Echoing O'Connor and lamenting the Court's broad definition, Professor Martin Carcieri suggests that the Court should have "consulted at least one more authority" than just *Webster's* when deciding *Raich* and expanding Commerce Clause jurisprudence.¹⁵⁷ Carcieri provides the example of *Roget's Thesaurus*, which, by listing several synonyms for the term, provides "a fuller, more accurate picture of the word's meaning."¹⁵⁸

153. *Id.* at 25–26.

154. *Id.* at 69 (O'Connor, J., dissenting).

155. *Id.*

156. Martin D. Carcieri, *Gonzales v. Raich: Congressional Tyranny and Irrelevance in the War on Drugs*, 9 U. PA. J. CONST. L. 1131, 1137 (2007); see also *Raich*, 545 U.S. at 7.

157. Carcieri, *supra* note 156, at 1154.

158. *Id.*

Roget's entry for the adjectival form of "economy" includes "thrifty, frugal, un wasteful, prudent, provident, saving, economizing, spare, sparing, scrimping, skimping."¹⁵⁹ Together, these synonyms indicate that "economic" activity is that which seeks to maximize gains and minimize losses.¹⁶⁰ Put another way, conduct that does not result in any commercial value—neither a return nor a loss—cannot be economic in nature. At the very least, for conduct to be economic, it requires an actor to enter into some kind of marketplace: "much solitary activity, especially in one's home, would be non-economic by the *Roget's*-derived definition."¹⁶¹ Thus, producing and consuming marijuana at home, possessing a gun near a school, and becoming violent with an intimate partner are not economic activities, as none involve engaging in a marketplace.¹⁶² Unlike brandishing a gun in a robbery, which *does* involve conduct that maximizes gains, these activities fall beyond the scope of Congress's commerce power.¹⁶³

Other definitions of the term indicate that even sharing commodities with another person could be considered non-economic. For example, *Century Dictionary* defines "economic" as "[p]ertaining to pecuniary means or concerns; relating to or connected with income and expenditure . . ."¹⁶⁴ *Oxford's* definition is "relating to economies or economics," where "economics" is defined as "the branch of knowledge concerned with the production, consumption, and transfer of wealth."¹⁶⁵ So, even activity that involves multiple people consuming a commodity together can be non-economic, so long as there is no "transfer of wealth" or other pecuniary exchange.

159. *Id.* (quoting *Economic*, ROGET'S INTERNATIONAL THESAURUS §849.9 (3d ed. 1962)).

160. *See id.*

161. *Id.* at 1155.

162. *See id.*

163. *See id.* at 1154–55.

164. *Economic*, CENTURY DICTIONARY (1904).

165. *Economic*, OXFORD DICTIONARY OF ENGLISH (3d. ed. 2010); *economics*, OXFORD DICTIONARY OF ENGLISH (3d ed. 2010).

This approach more closely aligns with what the Framers had in mind when drafting the Commerce Clause. Quoting his own concurrence in *Lopez*, Justice Thomas in *Raich* argues that “[t]he Clause’s text, structure, and history all indicate that, at the time of the founding, the term “commerce” consisted of selling, buying, and bartering, as well as transporting for these purposes.”¹⁶⁶ Indeed, one eighteenth century dictionary defined “commerce” as “[i]ntercourse; exchange of one thing for another; interchange of any thing; trade; traffick.”¹⁶⁷ Likewise, James Madison’s notes from the Constitutional Convention use the term only in the context of foreign and domestic trade.¹⁶⁸ Furthermore, a study of founding-era newspapers indicates that “commerce” meant “trade or exchange, including shipping” and was “routinely distinguished from agriculture and manufacturing.”¹⁶⁹ This study concluded that the “commonplace public meaning of commerce from 1728–1800 was ‘trade and exchange,’ as well as transportation for this purpose.”¹⁷⁰

Of course, the Framers and their contemporaries were not envisioning a world where nearly everything could be purchased with a click of a button and quickly delivered from across the world without use of a ship. Nor could they have imagined the War on Drugs and subsequent opioid epidemic. However, even when we grant that the nature of modern life requires a broader view of what Congress should be empowered to regulate, the Constitution requires that there be some kind of limit on the federal government’s regulatory power. People simply sharing and consuming a commodity, even an illicit one, is outside of that limit.

166. *Gonzales v. Raich*, 545 U.S. 1, 58 (2005) (Thomas, J., dissenting) (quoting *United States v. Lopez*, 514 U.S. 549, 585 (1995) (Thomas, J., concurring)).

167. Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101, 113 (2001) (quoting *commerce*, 1 A DICTIONARY OF THE ENGLISH LANGUAGE (6th ed. 1785)).

168. *Id.* at 114.

169. Randy E. Barnett, *New Evidence of the Original Meaning of the Commerce Clause*, 55 ARK. L. REV. 847, 858 (2003).

170. *Id.* at 862.

B. *Co-Using Drugs Is Not "Distribution"*

Even if we accept the broad definition of "economic" adopted by the Court in *Raich*, sharing drugs without any monetary exchange still does not fall into the category of "distribution" that the federal government may prosecute under its commerce powers.

As discussed in Part I, the CSA defines "distribute" as "to deliver," which is defined as "the actual, constructive, or attempted transfer of a controlled substance . . . whether or not there exists an agency relationship."¹⁷¹ To be sure, several circuit courts of appeals have interpreted the term quite broadly, concluding that sharing a small amount of drugs with friends and romantic partners does indeed constitute distribution, and the federal government may thus prosecute this conduct under 21 U.S.C. § 841(a).¹⁷²

However, the CSA itself seems to anticipate the social sharing of drugs, and essentially exempts this conduct from otherwise harsh punishments.¹⁷³ That is, 21 U.S.C. § 841(b)(4) states that "any person who violates subsection (a) of this section by distributing a small amount of marijuana for no remuneration shall be treated as [if it were simple possession]."¹⁷⁴ In stark contrast to the high mandatory minimum sentences imposed by section 841, this offense is just a misdemeanor punishable by "a term of imprisonment of not more than 1 year," a \$1,000 fine, or both.¹⁷⁵

The reason for this provision is simple: when the CSA was passed, Congress was aware of ordinary social dynamics and did not intend to harshly punish people who experiment with drugs, namely marijuana, with their friends. Senator Ted

171. 21 U.S.C. § 802(8), (11).

172. *See, e.g.*, *United States v. Boidi*, 568 F.3d 24, 29 (1st Cir. 2009); *United States v. Washington*, 41 F.3d 917, 919 (4th Cir. 1994); *Jacob v. Holder*, 335 F. App'x. 370, 374 (5th Cir. 2009); *United States v. Mancuso*, 718 F.3d 780, 797–98 (9th Cir. 2013).

173. *See* 21 U.S.C. § 841(b)(4).

174. *Id.*

175. *Id.* § 844(a).

Kennedy, for example, was particularly concerned with “those who are users but not pushers—for our many young people today who have grown up in a drug culture and are experimenting with drugs.”¹⁷⁶ After the amendment that created this “exception” was introduced, Senator Kennedy explained that its purpose was to “provide that persons who distribute a small quantity of marihuana, without sale or remuneration, would be subject to the penalties or possession, rather than the heavier penalties for manufacture and heavy trafficking.”¹⁷⁷ Cognizant of typical cultural dynamics, he went on to state that:

Many youngsters may be in a situation where they are with friends, where they give a marihuana cigarette or a small quantity of marihuana to one or two others—not as professional pushers, not to make a profit, but in a casual and informal way. It would be an unrealistic overreaction to treat persons convicted of such activity in the same way as large-scale pushers of heroin are treated.¹⁷⁸

Echoing Senator Kennedy, supporters of the amendment acknowledged that this provision is “compassionate,”¹⁷⁹ particularly in a society where experimenting with drugs is common.¹⁸⁰ In voicing his support for the provision, Senator Hughes emphasized that people who share marijuana with their friends should not be “subject to penalties for trafficking and distribution.”¹⁸¹

The legislative record shows that when enacting the CSA, Congress recognized that there is a difference between people who recreationally use drugs—particularly young people—and

176. 116 CONG. REC. 35,478 (1970) (statement of Sen. Ted Kennedy).

177. *Id.* at 35,555.

178. *Id.*

179. *See id.* (statement of Sen. Thomas Dodd).

180. *Id.* (statement of Sen. Peter Dominick).

181. *Id.* (statement of Sen. Harold Hughes).

“pushers” who distribute for profit. Despite the fact that federal courts have subsequently accepted that users sharing drugs amounts to distribution,¹⁸² the CSA itself treats this ordinary occurrence as mere simple possession, rather than distribution.¹⁸³

The exception that Senator Kennedy and his colleagues advocated for only applies to marijuana. Furthermore, even post-*Raich*, the Supreme Court has suggested that simple possession of other kinds of drugs and sharing without remuneration are also distinct from the kind of distribution that the CSA seeks to punish as a felony.¹⁸⁴ The Supreme Court has recognized that conduct involving a small amount of drugs is “incoheren[t] with any commonsense conception of illicit trafficking.”¹⁸⁵ This issue has arisen repeatedly in cases involving the government attempting to deport immigrants who had committed drug offenses that were felonies at the state level but would have been misdemeanors if prosecuted in federal court.¹⁸⁶

For example, in *Lopez v. Gonzales*, the defendant was a legal permanent resident who had been convicted in a state court for “aiding and abetting another person’s possession of cocaine.”¹⁸⁷ Writing for an eight-to-one majority, Justice Souter compared this conduct to the small amount of marijuana exception created by 21 U.S.C. § 841(b)(4), and explained that this was evidence that Congress did not intend to treat helping a friend obtain

182. See cases cited *supra* note 172.

183. 21 U.S.C. § 841(b)(4).

184. See *Lopez v. Gonzales*, 549 U.S. 47, 53 (2006); *Carachuri-Rosendo v. Holder*, 560 U.S. 563, 570–71 (2010); *Moncrieffe v. Holder*, 569 U.S. 184, 188–89 (2013).

185. *Lopez*, 549 U.S. at 53 (internal quotation marks omitted). This language was repeated by the Court four years later in a similar case. See *Carachuri-Rosendo*, 560 U.S. at 573.

186. Under the Immigration and Nationality Act, the government may deport a non-citizen who has been convicted of an aggravated felony. See 8 U.S.C. § 1227(a)(2)(A)(iii). However, if that person was convicted in state court, the government can only deport them if their conduct would have amounted to a felony if they had been charged at the federal level. See, e.g., *Lopez*, 549 U.S. at 60. This line of cases addresses several situations where under the respective state laws, simple possession of drugs is a felony.

187. *Lopez*, 549 U.S. at 51.

cocaine as felonious distribution or trafficking.¹⁸⁸ Interestingly, Justice Souter explicitly acknowledged that “[c]ommerce . . . was no part of Lopez’s . . . offense of helping someone else to possess, and certainly it is no element of simple possession.”¹⁸⁹ Despite its holding in *Raich* just eighteen months prior, the Court appeared to recognize that in the absence of a monetary exchange, conduct involving a small amount of drugs falls outside of the scope of “commerce” that the federal government may regulate.¹⁹⁰

IV. THE FEDERAL GOVERNMENT SHOULD DEFER TO THE STATES IN ITS RESPONSE TO THE OVERDOSE CRISIS

The opioid epidemic is tangible evidence that the CSA has failed. Stringent regulation of foreign and domestic drug markets, lengthy mandatory minimum sentences, and subverting state efforts to decriminalize certain forms of drug consumption have not prevented the overdose deaths of over 300,000 Americans in the past five years.¹⁹¹

Furthermore, it is possible that the CSA’s far-reaching regulations, punitive solutions, and the War on Drugs contributed to the conditions that created the opioid epidemic in the first place. Opioid consumption and overdose deaths are sometimes considered a byproduct of despair caused by deteriorating economic conditions and increasing social

188. *See id.* at 59.

189. *Id.* at 54.

190. Justice Thomas was the sole dissenter in *Lopez v. Gonzales*. In his dissent, he pointed out the inconsistency between this and the findings in *Raich*. *See Lopez*, 549 U.S. at 64 n.2 (Thomas, J., dissenting).

191. *See* HEDEGAARD ET AL., *supra* note 18 (recording 300,695 overdose deaths in the United States from 2014 through 2018); *see also* Zachary A. Siegel, *We’ve Been Fighting the Drug War for 50 Years. So Why Aren’t We Winning?*, APPEAL (June 4, 2018), <https://theappeal.org/weve-been-fighting-the-drug-war-for-50-years-so-why-arent-we-winning/> (explaining that the United States’ response to criminalizing drug use has never been effective in solving the actual issues associated with drugs, exemplifying the clear need do to something different).

stratification.¹⁹² The War on Drugs has, at least in part, contributed to these conditions.¹⁹³

Regardless of whether the federal government has authority to prosecute drug-induced homicides involving co-users, it should exercise its discretion and decline to do so. Or, at the very least, when a state or local prosecutor declines to pursue these charges as a matter of public policy, federal prosecutors should refrain from subverting this effort by filing their own charges pursuant to 21 U.S.C. § 841(b)(1).

A. *States as Laboratories*

The circumstances preceding *Raich* were quite unique: although growing and consuming marijuana was often criminalized by state governments, through a ballot measure, California voters decided to legalize this conduct for medical purposes.¹⁹⁴ The Court found that through its concurrent jurisdiction over California residents, the federal government could continue to prosecute people who engaged in this conduct, despite the clearly articulated will of the voters.¹⁹⁵

This aspect of the case seemed to particularly bother Justice O'Connor, who was joined in her dissent by Chief Justice Rehnquist and Justice Thomas.¹⁹⁶ Her dissent argued that "[o]ne of federalism's chief virtues . . . is that it promotes innovation by allowing for the possibility that 'a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.'"¹⁹⁷ Acting within its police powers to ensure the

192. See, e.g., Scott Burris, *Where's Next for Opioids and the Law? Despair, Harm Reduction, Lawsuits, and Regulatory Reform*, 133(1) PUB. HEALTH REP. 29, 29–30 (2018); see also Beletsky, *supra* note 31, at 849.

193. See, e.g., Bryce Pardo & Peter Reuter, *Narcotics and Drug Abuse: Foreshadowing of 50 Years of Change*, 17 CRIMINOLOGY & PUB. POL'Y 419, 427 (2018).

194. See *Gonzales v. Raich*, 545 U.S. 1, 43 (2005) (O'Connor, J., dissenting).

195. See *id.* at 29 (majority opinion).

196. *Id.* at 42 (O'Connor, J. dissenting).

197. *Id.* (quoting *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)).

welfare of its citizenry, California legislators and voters decided to experiment with legalizing medical marijuana.¹⁹⁸ *Raich*, which expands the limits of Congress's commerce power, is an example of federal overreach that "stifles an express choice by some States, concerned for the lives and liberties of their people" ¹⁹⁹

Although she personally would not have supported the legalization of medical marijuana, for Justice O'Connor, that was beside the point.²⁰⁰ Instead, "whatever the wisdom of California's experiment with medical marijuana, the federalism principles that have driven our Commerce Clause cases require that room for experiment be protected in this case."²⁰¹

Justice O'Connor's dissent highlights an important feature of federalism. Shared sovereignty is not merely a means of protecting individual liberty.²⁰² Federalism also enables states to enact policies related to health, welfare, and safety that are tailored to their citizens' particular needs.²⁰³ The ability for state and local governments to make these kinds of decisions is especially important in times of crisis, when complicated problems call for experimentation and creativity in order to determine effective solutions.²⁰⁴ However, post-*Raich*, the federal government's expansive commerce power vastly limits

198. *Id.* at 42–43.

199. *Id.* at 57.

200. *Id.*

201. *Id.*

202. *See, e.g.*, *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring) ("Federalism was our Nation's own discovery. The Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other.").

203. *Raich*, 545 U.S. at 57 (O'Connor, J., dissenting).

204. *See, e.g.*, Spencer Buell, *Is Massachusetts Gearing Up for a #MassExit?*, BOS. MAG. (Dec. 3, 2019, 11:47 AM), <https://www.bostonmagazine.com/news/2019/12/03/secession-state/> (discussing Massachusetts' plan to launch safe injection sites in response to the opioid crisis and describing other ways in which the state has responded to prior public health crises, such as the needle-exchange programs during the AIDS epidemic).

states' ability to experiment with social policy, especially as it pertains to drugs.²⁰⁵

Amid the overdose crisis, several state and local governments have attempted to serve as laboratories experimenting with safe-injection facilities.²⁰⁶ These facilities enable opioid users to consume drugs with clean needles, in a sterile environment, and under medical supervision.²⁰⁷ Should they overdose, they are promptly treated.²⁰⁸ Safe-injection facilities in Canada, Europe, and Australia have been effective in reducing overdose deaths.²⁰⁹

In the United States, several major cities, including Boston, New York, Philadelphia, San Francisco, and Seattle have considered opening safe-injection facilities.²¹⁰ Unfortunately, despite support from local officials, one of the most significant barriers to this is resistance from the federal government.²¹¹ For example, in Philadelphia, U.S. Attorney William McSwain moved for a preliminary injunction against a safe-injection facility run by a non-profit organization and endorsed by local

205. In 2013, Deputy Attorney General James Cole issued a memo to all U.S. Attorneys clarifying the federal government's priorities when it comes to enforcing the CSA's prohibition on marijuana. See Memorandum from Deputy Attorney General James M. Cole to All United States Attorneys (Aug. 29, 2013), <https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>. This memo recognized that many states have legalized marijuana to some extent. *Id.* at 1. It instructed U.S. attorneys to avoid bringing federal charges for marijuana use in states where it is legal, as long as those states have robust "regulatory and enforcement systems." *Id.* at 3. However, in 2018, then-Attorney General Jeff Sessions rescinded President Obama's 2013 memo. Laura Jarrett, *Sessions Nixes Obama-Era Rule Leaving States Alone that Legalize Pot*, CNN (Jan. 4, 2018, 5:44 PM), <https://www.cnn.com/2018/01/04/politics/jeff-sessions-cole-memo/index.html>. Currently, all but eight states have either legalized or decriminalized marijuana, at least for medical purposes. *Map of Marijuana Legality by State*, DISA, <https://disa.com/map-of-marijuana-legality-by-state> (last visited Oct. 11, 2020).

206. See Burris, *supra* note 192, at 31.

207. Elana Gordon, *What's the Evidence that Supervised Drug Injection Sites Save Lives?*, NPR, <https://www.npr.org/sections/health-shots/2018/09/07/645609248/> (Feb. 21, 2019).

208. *Id.*

209. See Jennifer Ng, Christy Sutherland & Michael R. Kolber, *Does Evidence Support Supervised Injection Sites?*, 63 CAN. FAMILY PHYSICIAN 866, 866 (2017) (reporting that a safe injection site in Vancouver reduced overall overdose deaths and ambulance calls); see also Cara Tabachnick, *Safe Spaces for Users*, STAN. SOC. INNOVATION REV., Spring 2019, at 1, 8 (describing the success of a safe-injection facility in Barcelona).

210. Burris, *supra* note 192, at 31.

211. See *United States v. Safehouse*, 408 F. Supp. 3d 583, 614 (E.D. Pa. 2019).

officials, arguing that it would violate the prohibition on crack houses pursuant to 21 U.S.C. § 856.²¹² Even after that argument failed, the federal government successfully moved for a stay, indefinitely preventing a safe-injection facility from opening in the city.²¹³

Public health crises often call for creative solutions that serve a community's particular needs. In matters of life and death, the federal government must enable state and local governments to pursue—even experiment with—solutions that could ultimately prevent further fatalities.

B. State Police Powers and Public Health

As discussed in Part I, the current opioid epidemic is a public health crisis and has been declared as such by the Trump Administration.²¹⁴ Public health problems call for public health solutions, and this kind of policy-making has traditionally been left to the states.²¹⁵ Although the particularities of this modern issue may have been outside of the colonial-era imagination, a large-scale and deadly crisis such as the opioid epidemic is precisely what the Framers had in mind when drafting the Constitution and reserving police powers to the states.²¹⁶

212. *Id.* at 585. The District Court ultimately found that prohibiting quasi-medical facilities authorized by local officials is not what Congress intended when enacting the CSA. *Id.* at 614.

213. *See United States v. Safehouse*, 2020 U.S. Dist. LEXIS 110549, at *35 (E.D. Pa. June 24, 2020).

214. *See HHS Declaration*, *supra* note 21.

215. *See, e.g., James G. Hodge, Jr., The Role of New Federalism and Public Health Law*, 12 J.L. & HEALTH 309, 323–24 (1997/1998).

216. The author recognizes that as of this writing, the United States is in the midst of another large-scale and deadly public health crisis—the COVID-19 pandemic—which has cost at least 304,960 Americans their lives. *Global: United States of America*, WORLD HEALTH ORG., <https://covid19.who.int/region/amro/country/us> (Dec. 18, 2020, 9:53 AM). It is clear that the federal government's decision to leave pandemic response to the states, with minimal support, has greatly exacerbated the crisis. Alex Fitzpatrick, *Why the U.S. Is Losing the War on COVID-19*, TIME (Aug. 13, 2020, 11:19 AM), <https://time.com/5879086/us-covid-19/> (discussing how the federal government refused to give ventilators from the federal stockpile to states and how when some hospitals ordered their own supplies, federal officials seized them). The federal government's response to COVID-19 demonstrates that in certain situations—especially situations involving a highly contagious, airborne virus—relying solely on states' police powers can make a public health crisis demonstrably worse. *See, e.g., Beth Duff-Brown, Federalism Meets*

Describing the powers granted to the federal government by the Constitution, James Madison explained that “[t]he powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.”²¹⁷ As such, state police powers have typically included “matters which are reasonably related to the promotion and maintenance of the health, safety, morals, and general welfare of the public.”²¹⁸

At the time of the founding, maintaining public health was considered one of the government’s primary functions, and policy decisions were made by state and local governments.²¹⁹ As early as 1631, individual colonies enacted measures to prevent the spread of disease and regulate sanitation.²²⁰ Even now, state and local governments retain the power to quarantine, mandate vaccinations, regulate waste management, control water and air quality, and enact measures to ensure that residents maintain safe and healthy living environments.²²¹ The Supreme Court continues to recognize that the Constitution entrusts states with latitude to “guard and protect” public health.²²²

the COVID-19 Pandemic: Thinking Globally, Acting Locally, STAN. L. SCH. BLOGS (Apr. 6, 2020), <https://law.stanford.edu/2020/04/06/federalism-meets-the-covid-19-pandemic-thinking-globally-acting-locally/> (arguing that COVID-19 has revealed “the dark side of federalism,” because this system “encourage[d] a patchwork response to epidemics.”); Jennifer Selin, *How the Constitution’s Federalism Framework Is Being Tested by COVID-19*, BROOKINGS INST. (June 8, 2020), <https://www.brookings.edu/blog/fixgov/2020/06/08/how-the-constitutions-federalist-framework-is-being-tested-by-covid-19/> (discussing how during the pandemic, America’s federalist structure has made it difficult for citizens to determine which political leaders to hold accountable).

217. THE FEDERALIST NO. 45, at 241 (James Madison) (George W. Carey & James McClellan eds., Gideon ed., 2001); *see also* Hodge, Jr., *supra* note 215, at 309, 318–19 (echoing Madison’s language while discussing state police powers).

218. Hodge, Jr., *supra* note 215, at 319.

219. *Id.* at 323–24.

220. *Id.* at 325–26.

221. *Id.* at 324–25.

222. *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613 (2020) (Roberts, C.J., concurring) (denying an application for an injunction which would have limited California’s ability to issue restrictions in response to COVID-19).

This is because, as Madison promised, the United States was designed as a dual-power structure, where states have power over the policies that directly affect the welfare of their citizens. It continues to ring true that state and local officials are better positioned to understand the problems affecting their citizens, and thus, the solutions.²²³ Indeed, the Trump administration has repeatedly emphasized that it is the states' responsibility—not the federal government's—to manage public health crises.²²⁴

However, "contrary to the vision of the founders of the Union," the twentieth century saw a rise in centralization and federal intervention in matters of public health.²²⁵ This included the passage of the Food, Drug, and Cosmetic Act, the Social Security Act, and increased federal regulation of research and disease control.²²⁶

To be sure, despite what the Framers may have envisioned for our federalist system, an increasingly connected and mobile society does call for federal oversight on matters related to health and safety. However, even in modern times, the Supreme Court has continued to maintain that it is vital for states to retain their inherent police powers,²²⁷ including the power to regulate public health.²²⁸ For example, in another case

223. See, e.g., Desilver, *supra* note 40.

224. See Quint Forgey, 'We're Not a Shipping Clerk': Trump Tells Governors to Step up Efforts To Get Medical Supplies, POLITICO, <https://www.politico.com/news/2020/03/19/trump-governors-coronavirus-medical-supplies-137658> (Mar. 19, 2020, 3:30 PM) (responding to questions about producing supplies needed to treat COVID-19, President Trump stated that "Governors are supposed to be doing a lot of this work, and they are doing a lot of this work The Federal government is not supposed to be out there buying vast amounts of items and then shipping. You know, we're not a shipping clerk"); Aaron Blake, *The Trump Administration Just Changed its Description of the National Stockpile to Jibe with Jared Kushner's Controversial Claim*, WASH. POST: THE FIX (Apr. 3, 2020, 12:18 PM), <https://www.washingtonpost.com/politics/2020/04/03/jared-kushner-stands-trump-proceeds-offer-very-trumpian-claim-about-stockpiles/> (reporting that when asked about access to the federal government's medical supplies stockpile, President Trump's son-in-law, Jared Kushner, stated that "the notion of the federal stockpile was it's supposed to be *our* stockpile It's not supposed to be states' stockpiles that they then use").

225. Hodge, Jr., *supra* note 215, at 331.

226. *Id.* at 332, 335.

227. See, e.g., *United States v. Lopez*, 514 U.S. 549, 567 (1995); see also *United States v. Morrison*, 529 U.S. 598, 617–18 (2000).

228. See, e.g., *Lopez*, 514 U.S. at 594 (Thomas, J., concurring) ("Moreover, while suggesting that the Constitution might not permit States to regulate interstate or foreign commerce, the

involving the scope of the CSA, the Court emphasized that the “structure and limitations of federalism . . . allow the States ‘great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons.’”²²⁹

Engaging in efforts to make drug use safer and reduce overdose deaths falls well within states’ police powers to protect the lives and welfare of their citizens. State and local governments across the country have enacted a variety of harm reduction policies to mitigate the harmful effects of drug use. For example, forty-six states have enacted some version of Good Samaritan laws, which offer drug users certain protections from criminal liability in state court when they seek medical assistance for someone who has overdosed.²³⁰

Likewise, at least 2,500 municipalities now require police officers to carry naloxone, a medication that reverses the effects of an overdose.²³¹ Additionally, forty-seven states, plus the District of Columbia, have issued standing orders for naloxone, which means that anyone can access it without a prescription.²³² These measures are all the result of state or local officials acting within their authority to enact policies for the sake of their citizens’ health, often in response to activists and organizers who are most familiar with the opioid epidemic and its effects.²³³

Court [in *Gibbons v. Ogden*] observed that ‘inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State’ were but a small part ‘of that immense mass of legislation . . . not surrendered to a general government.’”

229. *Gonzales v. Oregon*, 546 U.S. 243, 270 (2006) (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996)).

230. *Good Samaritan Overdose Prevention Laws*, PRESCRIPTION DRUG ABUSE POL’Y SYS., <http://pdaps.org/datasets/good-samaritan-overdose-laws-1501695153> (July 1, 2018).

231. See Mattie Quinn, *Most Police Still Don’t Carry the Drug that Reverses an Opioid Overdose*, GOVERNING: FUTURE STATES & LOCALITIES (May 2019), <https://www.governing.com/topics/public-justice-safety/gov-naloxone-police-officers-cities.html>.

232. *State Naloxone Access Rules and Resources*, SAFE PROJECT, <https://www.safeproject.us/naloxone-awareness-project/state-rules/> (last visited Sept. 21, 2020).

233. See, e.g., Bobby Allyn, *Former Gov. Ed Rendell Says ‘Arrest Me First’ for Backing Supervised Injection Facility*, WHYY (Oct. 2, 2018), <https://whyy.org/articles/former-gov-ed-rendell-says-arrest-me-first-for-backing-safe-injection-facility/>.

C. Prosecutorial Discretion as a Public Health Solution

While many state and local officials have responded to the needs of their citizens by enacting harm reduction policies, federal officials continue to rely on the punitive measures enacted by the CSA in response to this public health crisis. This can have the effect of subverting state and local governments, which not only upsets the balance of federalism guaranteed by the Constitution, but could also lead to more fatalities. The federal government can only do so much to address the opioid epidemic and reduce the number of overdose deaths, but the least it can do is exercise its prosecutorial discretion and refrain from pressing charges against low-level offenders, especially in cases of drug-induced homicide involving co-users.

Exercising prosecutorial discretion in these cases is not only compassionate, but a logical treatment of statutes that do not actually deter the acts that they criminalize. As a theory of punishment, deterrence is only effective if the people committing the criminalized acts are aware that their actions are illegal and are motivated by fear of punishment.²³⁴ In many drug prosecutions, especially drug-induced homicide, this is not necessarily, or even frequently, the case.

First and foremost, people who sell or share controlled substances rarely know that it contains anything that might make it deadly, such as fentanyl.²³⁵ This is especially true of co-users who are also consuming the potentially fatal doses.²³⁶ But even professional dealers have no incentive to sell a product that could kill their customers.²³⁷ Furthermore, many individuals who may technically fall under the CSA's definition of a "distributor" do not think of themselves as drug dealers, and thus they are not aware that they are committing a crime other than simple possession.²³⁸

234. See Beletsky, *supra* note 31, at 876–77.

235. See *id.*

236. See *id.* at 877.

237. See *id.*

238. See *id.* at 876.

Finally, deterrence depends upon potential lawbreakers being rational actors in the traditional economic sense. However, co-users and even many drug dealers are not “rational” insofar as they are more motivated by their need to consume drugs than by fear of prosecution or a lengthy prison sentence.²³⁹ When prosecutors decline to bring drug-induced homicide charges, they should do so knowing that this exercise of discretion does not undermine deterrence as a policy rationale.

Furthermore, Congress may have intended for the “death results” mandatory minimum to further penalize high-level dealers who prey on users,²⁴⁰ but the standard of liability for these charges essentially has the opposite effect. After the Supreme Court’s 2014 decision in *Burrage v. United States*, which requires the government to prove that the defendant’s distribution was a but-for cause of the decedent’s death, federal prosecutors must show that there was a causal connection between the defendant and the deceased.²⁴¹

The decision in *Burrage* increased the standard of liability for these charges, and, theoretically, could have led to fewer overall federal drug-induced homicide prosecutions.²⁴² However,

239. See *id.* at 877.

240. See, e.g., 132 CONG. REC. 27193–94 (1986) (statement of Sen. Robert Byrd).

241. See *Burrage v. United States*, 571 U.S. 204, 213–14, 216 (2014).

242. To be sure, there has been a rise in federal drug-induced death or serious bodily injury convictions since *Burrage* was decided in 2014. See U.S. SENT’G COMM’N, USE OF GUIDELINES AND SPECIFIC OFFENSE CHARACTERISTICS: OFFENDER BASED, FISCAL YEAR 2013, at 25 (2013) (reporting a total of 32 drug-induced homicide/serious bodily injury sentences); U.S. SENT’G COMM’N, USE OF GUIDELINES AND SPECIFIC OFFENSE CHARACTERISTICS: OFFENDER BASED, FISCAL YEAR 2014, at 27 (2014) (reporting a total of 54 drug-induced homicide/serious bodily injury sentences); U.S. SENT’G COMM’N, USE OF GUIDELINES AND SPECIFIC OFFENSE CHARACTERISTICS: OFFENDER BASED, FISCAL YEAR 2015, at 28 (2015) (reporting a total of 74 drug-induced homicide/serious bodily injury sentences); U.S. SENT’G COMM’N, USE OF GUIDELINES AND SPECIFIC OFFENSE CHARACTERISTICS: OFFENDER BASED, FISCAL YEAR 2016, at 29 (2016) (reporting a total of 86 drug-induced homicide/serious bodily injury sentences); U.S. SENT’G COMM’N, USE OF GUIDELINES AND SPECIFIC OFFENSE CHARACTERISTICS: OFFENDER BASED, FISCAL YEAR 2017, at 28 (2017) (reporting a total of 95 drug-induced homicide/serious bodily injury sentences); U.S. SENT’G COMM’N, USE OF GUIDELINES AND SPECIFIC OFFENSE CHARACTERISTICS: OFFENDER BASED, FISCAL YEAR 2018, at 28 (2018) (reporting a total of 92 drug-induced homicide/serious bodily injury sentences); U.S. SENT’G COMM’N, USE OF GUIDELINES AND SPECIFIC OFFENSE CHARACTERISTICS:

“[t]he analysis of [*Burrage* and subsequent] cases suggests that the application of drug-induced homicide provisions is constrained by evidentiary concerns only to tightly proximate individuals,” such as co-using friends and partners.²⁴³ Consequently, post-*Burrage*, federal drug-induced homicide charges do not necessarily have the effect of undercutting large-scale drug operations as Congress intended when it passed the CSA and the Anti-Drug Abuse Act.²⁴⁴

There is also the practical matter of cost. According to the Federal Bureau of Prisons, it costs an average of \$37,499 per year to incarcerate someone in a federal prison.²⁴⁵ Given that 21 U.S.C. § 841(b)(1) requires a twenty-year mandatory minimum sentence for those convicted of drug-induced homicide, the federal government will pay nearly \$750,000 per person convicted under this charge. This means that the federal government will spend over \$410 million to incarcerate the 552 people who have been convicted of drug-induced homicide since 2014.²⁴⁶

GUIDELINES CALCULATION BASED, FISCAL YEAR 2019, at 27 (2019) (reporting a total of 152 drug-induced homicide/serious bodily injury sentences).

243. Beletsky, *supra* note 31, at 878.

244. See discussion *supra* Section I.B (explaining that Congress intended to impose harsh sentences on major drug traffickers and hold them accountable for deaths caused by overdose).

245. This figure represents the average annual cost of incarceration per person in fiscal year 2018. Annual Determination of Average Cost of Incarceration Fee, 84 Fed. Reg. 63,891, 63,891 (Nov. 19, 2019).

246. See U.S. SENT’G COMM’N, USE OF GUIDELINES AND SPECIFIC OFFENSE CHARACTERISTICS: OFFENDER BASED, FISCAL YEAR 2014, at 27 (2014) (reporting a total of 54 drug-induced homicide/serious bodily injury sentences); U.S. SENT’G COMM’N, USE OF GUIDELINES AND SPECIFIC OFFENSE CHARACTERISTICS: OFFENDER BASED, FISCAL YEAR 2015, at 28 (2015) (reporting a total of 74 drug-induced homicide/serious bodily injury sentences). U.S. SENT’G COMM’N, USE OF GUIDELINES AND SPECIFIC OFFENSE CHARACTERISTICS: OFFENDER BASED, FISCAL YEAR 2016, at 29 (2016) (reporting a total of 86 drug-induced homicide/serious bodily injury sentences); U.S. SENT’G COMM’N, USE OF GUIDELINES AND SPECIFIC OFFENSE CHARACTERISTICS: OFFENDER BASED, FISCAL YEAR 2017, at 28 (2017) (reporting a total of 95 drug-induced homicide/serious bodily injury sentences); U.S. SENT’G COMM’N, USE OF GUIDELINES AND SPECIFIC OFFENSE CHARACTERISTICS: OFFENDER BASED, FISCAL YEAR 2018, at 28 (2018) (reporting a total of 92 drug-induced homicide/serious bodily injury sentences); U.S. SENT’G COMM’N, USE OF GUIDELINES AND SPECIFIC OFFENSE CHARACTERISTICS: GUIDELINES CALCULATION BASED, FISCAL YEAR 2019, at 27 (2019) (reporting a total of 152 drug-induced homicide/serious bodily injury sentences).

Meanwhile, the organizations that are most capable of actually preventing drug use, treating addiction, and preventing overdose deaths “operate in an environment of extreme scarcity.”²⁴⁷ For example, the cost of naloxone—one of the only solutions guaranteed to prevent an overdose death—has risen drastically over the past decade, to hundreds of dollars per dose.²⁴⁸ When public funds are actually used to purchase naloxone, it is usually given to law enforcement officers and other first responders, rather than drug users and their friends and family, who are the “people most likely to be at overdose events at a time of the emergency.”²⁴⁹ Additionally, although it is possible to purchase naloxone without a prescription in nearly every state,²⁵⁰ “most citizens are unaware of these programs, insurance companies rarely provide coverage for naloxone, and the price remains prohibitive.”²⁵¹

This is the American policy paradox: the federal government is very willing to spend money on prosecution and incarceration, but much more reluctant to fund the initiatives that have actually been proven to prevent overdose deaths. Morgan Godvin, who was charged with drug-induced homicide by federal prosecutors after selling a dose of heroin to her best friend and co-user Justin, poignantly highlighted this paradox in a piece for the *Washington Post*:

Society offered no compassionate resources to
Justin while he was alive Only after his death
did the government indicate that it valued his life.

247. Beletsky, *supra* note 31, at 882.

248. See Haley Sweetland Edwards, *The Drug Cascade*, TIME (June 22, 2017, 6:46 AM), <https://time.com/4828108/the-drug-cascade/>. The most dramatic example of this is the version produced by Hospira (now Pfizer), which “increased the list price of its 10-milliliter injectable naloxone pack by 2,300%, from \$9 to \$220.” *Id.* The price increase corresponds with the increase in demand caused by rising overdose rates, which has created an opportunity for pharmaceutical companies to profit from the opioid epidemic that they helped create. See *id.*

249. Beletsky, *supra* note 31, at 882.

250. See *State Naloxone Access Rules and Resources*, *supra* note 229.

251. Michael Hufford & Donald S. Burke, *The Costs of Heroin and Naloxone: A Tragic Snapshot of the Opioid Crisis*, STAT (Nov. 8, 2018), <https://www.statnews.com/2018/11/08/costs-heroin-naloxone-tragic-snapshot-opioid-crisis/>.

The federal government poured resources into convicting five people for his accidental overdose . . . sentencing us to 60 total years in prison for Justin's death.²⁵²

This begs the question: what would America look like if the hundreds of millions of dollars that the government spends prosecuting and incarcerating co-users for drug-induced homicide was instead used to fund the measures that are actually effective in preventing the underlying substance abuse and overdoses? How many people would still be with us today if we properly funded public health initiatives, rather than prisons?

Disturbingly, drug-induced homicide prosecutions at both the state and federal level could have the chilling effect of increasing the number of overdoses that become fatal. Although many first responders are now capable of reversing opioid overdoses, this is only possible if co-users or bystanders quickly call for help. Unfortunately, witnesses to heroin overdoses "report calling 911 less than half the time."²⁵³ Fear of law enforcement is one of the primary reasons for this low—and fatal—reporting rate: "Witnesses of overdoses report they avoid contacting 911 because of concerns about police contact and a cascade of legal consequences," including criminal charges for drug possession or violating probation or parole requirements.²⁵⁴ Indeed, "[r]esearch suggests that fear of police contact and legal detriment is actually *the single most important* reason why people who witnessed overdoses do not seek timely emergency medical help."²⁵⁵

Although many states have responded to this troubling phenomenon by passing Good Samaritan laws, which limit the

252. Morgan Godvin, Opinion, *My Friend and I Both Took Heroin. He Overdosed. Why Was I Charged with His Death?*, WASH. POST (Nov. 26, 2019, 6:00 AM), https://www.washingtonpost.com/outlook/my-friend-and-i-both-took-heroin-he-overdosed-why-was-i-charged-for-his-death/2019/11/26/33ca4826-d965-11e9-bfb1-849887369476_story.html.

253. Beletsky, *supra* note 31, at 863.

254. *Id.* at 862.

255. *Id.* at 862–63.

legal consequences that so many overdose witnesses tend to fear, these laws are undermined by drug-induced homicide prosecutions. Good Samaritan laws “only apply to a limited set of drug possession violations, typically involving small-scale drug possession.”²⁵⁶ For example, both Pennsylvania and Delaware have standalone drug-induced homicide statutes.²⁵⁷ Fortunately, both states also have Good Samaritan statutes that protect people who seek medical treatment for an overdose victim from criminal liability for certain charges.²⁵⁸ However, in the event that the overdose is ultimately fatal, neither state’s Good Samaritan statute protects the caller from being charged with drug-induced homicide.²⁵⁹ But, even if a state’s Good Samaritan law was so comprehensive as to provide immunity from drug-induced homicide prosecution, a person may still be held criminally liable under federal law because there is no federal version of a Good Samaritan law.²⁶⁰

These well-intended laws are also limited insofar as “the vast majority of people who use drugs, the public, and even many police officers may not be aware of [them].”²⁶¹ This lack of awareness is due in part to the lack of media attention that these laws receive.²⁶² This is in contrast to drug-induced homicide prosecutions, which are more likely to be publicized.²⁶³ Thus, whatever positive effects Good Samaritan laws may have are undermined by drug-induced homicide prosecutions at both the state and federal level.

Although it is debatable, even if Congress’s commerce power is expansive enough to enable the federal government to

256. *Id.* at 881.

257. *See* 18 PA. CONS. STAT. § 2506(b) (2020); DEL. CODE ANN. tit. 16, § 4752B (2020).

258. *See* 35 PA. CONS. STAT. § 780-113.7 (2020); DEL. CODE ANN. tit. 16, § 4769 (2020).

259. Both Good Samaritan statutes protect people who report a drug overdose from being charged with possessing or purchasing controlled substances or drug paraphernalia, but not more serious felonies such as distribution or, of course, drug-induced homicide. *See* 35 PA. CONS. STAT. § 780-113.7; DEL. CODE ANN. tit. 16, § 4769.

260. Beletsky, *supra* note 31, at 881.

261. *Id.*

262. *See id.* at 880.

263. *Id.*

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prosecute co-users for drug-induced homicide, federal prosecutors should be more willing to take a harm-reduction approach to the opioid epidemic. These prosecutions are costly, ineffective at deterring further low-level drug distributions, and ultimately have the effect of making people reluctant to seek medical treatment when faced with an otherwise reversible overdose.

CONCLUSION

Fatal drug overdoses cut lives short, devastate families, and disrupt communities. Hardly anyone has been unaffected by the overdose crisis, and it is absolutely necessary for officials to take steps to prevent further casualties. However, after hundreds of thousands of deaths, it is crucial to only pursue policies that actually save lives, rather than those which exacerbate the risk. Unfortunately, this has not been the federal government's response, at least not within the Department of Justice. While federal prosecutors charge the companions of overdose victims with drug-induced homicide, drug users continue to live in fear of arrest, and without the resources necessary to prevent and reverse an overdose.

Federalism is rarely a solution to social problems and public health crises, but in this case, it could be. Although Congress's commerce powers have been greatly expanded over the past several decades, the Supreme Court continues to acknowledge that there are certain governmental functions that ought to be left to the states.²⁶⁴ That which is not economic, and thus cannot affect interstate commerce, should remain beyond the reach of federal regulation. When a person dies after injecting drugs received from a friend, it is tragic, not economic.

The United States cannot punish its way out of the overdose crisis. Instead, federal officials should look to the state and local leaders who have endeavored to enact harm-reduction measures on a large scale, and provide funding and other

264. *See, e.g.,* United States v. Morrison, 529 U.S. 598, 617 (2000).

support where necessary. Only then will we begin to see true recovery from the devastating opioid epidemic.