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Safe Consumption Sites and the Perverse Dynamics of Federalism in the Aftermath of the War on Drugs

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Articles

Safe Consumption Sites and the Perverse Dynamics of Federalism in the Aftermath of the War on Drugs

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ABSTRACT

In this Article, I explore the complicated regulatory and federalism issues posed by creating safe consumption sites for drug users—an effort which would regulate drugs through use of a public health paradigm. This Article details the difficulties that localities pursuing such sites and other non-criminal-law responses have faced as a result of both federal and state interference. It contrasts those difficulties with the *carte blanche* local and state officials typically receive from federal regulators when creatively adopting new punitive policies to combat drugs. In so doing, this Article identifies systemic asymmetries of federalism that threaten drug policy reform. While traditional accounts of federalism suggest that our constitutional culture provides a fertile ground for experimentation and evidence-based decision-making, the realities of drug policy and the legacy of mass incarceration tell a different story: overlapping regulatory authority

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enables punitive creativity but disempowers or negates creative pubic-heath and harm-reduction programs, such as needle exchanges and safe consumption sites. This Article concludes by warning that, if we are going to turn our states and localities into true laboratories of democracy to develop solutions to the current opioid crisis, we will need to take political, cultural, and doctrinal steps to disrupt the asymmetries of our drug policy federalism.

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INTRODUCTION

Every generation brings with it a perceived illicit substance use epidemic, and opioids are the noted drugs of the 2010s.[1] Opioid use dominates current debates around how to combat substance use disorders, and policymakers at all levels of government are attempting to find a path out of overdose and addiction. Some of those approaches have involved criminal prosecution,[2] which has been at the center of the familiar story of drug policy over the past century. Others have promoted education, treatment, and harm-reduction techniques. Part of the difficulty in finding effective solutions arises from the concurrent jurisdiction issue: because federal and state governments maintain concurrent jurisdiction over criminal drug offenses, the federal government must stand down for a state to experiment with alternative approaches. Further, for a locality within a state to effect non-criminal-law drug policy, all three levels of government would need to agree to a non-criminal-law ap-

1. For my takes on some of these episodes, see Deborah Ahrens, *Methademic: Drug Panic in an Age of Ambivalence*, 37 FLA. ST. U. L. REV. 810 (2010); Deborah Ahrens, *Drug Panics in the Twenty-First Century: Ecstasy, Prescription Drugs, and the Reframing of the War on Drugs*, 6 ALB. GOV'T L. REV. 397 (2013).

2. *See infra* Section III for an overview of two types of criminal prosecution that states are using to address opioid substance use disorder.

proach. When a locality wants to, for example, set up a supervised consumption site that would permit people to use injected drugs with medical supervision to assist in case of overdose, that locality must contend with two potential layers of opposition, both with the power to prosecute.

While most criminal law is still governed by the state, federal criminal law has expanded considerably over the past century.[3] Laws criminalizing drug distribution and sales account for some of that expansion, and drug offenses have been a particular focus of federal law enforcement.[4] Up until the late 1990s, this expansion did not cause much conflict between the local, state, and federal governments—while individual offices might squabble over appropriate approaches to specific cases, laws and prosecutors generally combated perceived drug use epidemics with the application of criminal justice.

However, by the late twentieth century, some jurisdictions had, for various reasons, decided that prosecution was an inappropriate approach for at least some types of drug-related offenses. As I and a number of other scholars have documented elsewhere, states and localities started by softening laws or prosecution policies around marijuana.[5] Many jurisdictions effectively decriminalized possession of small amounts of marijuana as early as the 1970s, and in 1996, California became the first state to legalize the use of marijuana for medical purposes.[6] In 2012, Washington and Colorado legalized marijuana for broader recreational purposes.[7]

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3. This expansion has engendered considerable criticism. *See, e.g.*, Michael A. Simons, *Prosecutorial Discretion and Prosecution Guidelines: A Case Study in Controlling Federalization*, 75 N.Y.U. L. REV. 893, 895–97 (2000) (summarizing criticism of increased federal criminal law); Kathleen F. Brickey, *Criminal Mischief: The Federalization of American Criminal Law*, 46 HASTINGS L.J. 1135, 1148–58 (1995) (describing the federal government's war on drugs as the "single most significant contributor" to a self-perpetuating cycle in which federal incarceration expands, and courts and agencies spend more time on federal criminal cases).

4. *See* Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236 (codified as amended in scattered sections of 21 U.S.C.); Brickey, *supra* note 3, at 1148–58.

5. Deborah Ahrens, *Retroactive Legality: Marijuana Convictions and Restorative Justice in an Era of Criminal Justice Reform*, 110 J. CRIM. L. & CRIMINOLOGY _ (forthcoming 2020).

6. California legalized marijuana for medical use in 1996 via a voter initiative, Proposition 215; about 55 percent of voters approved the proposition. *See* California Proposition 215, The Medical Marijuana Initiative (1996), BALLOTPEDIA, https://bit.ly/37zq2B1 [https://perma.cc/7PUM-VJRY] (last visited Feb. 17, 2020).

7. *See* Aaron Smith, *Marijuana Legalization Passes in Colorado, Washington*, CNN MONEY (Nov. 8, 2012, 11:46 PM), https://cnn.it/2V0np8S [https://perma.cc/DNS2-8NLM] (indicating both states approved legalizing recreational marijuana by ballot initiative).

States and localities have not generally expanded that legalization approach to cover other illicit drugs, but they have attempted to deal with perceived epidemics of drug use with non-criminal-law tools. When methamphetamine became the perceived drug scourge in the mid-2000s, states expanded drug education and experimented with civil and regulatory approaches to combat drug production and distribution. For example, retailers were required to keep registries of persons purchasing pseudoephedrine-based drugs and/or to hold those drugs behind the counter or in a locked cabinet.[8] States took some similar approaches to dealing with a burgeoning population of persons abusing opioids, like setting up secure drop-boxes for unused and expired prescription medications.[9]

Federal authorities have not always been supportive of these state and local initiatives to find new paths for addressing the use of intoxicants.[10] The early years of medical marijuana legalization attracted federal law enforcement efforts,[11] and, while federal law enforcement currently refrains from prosecuting state-licensed marijuana dispensaries, the current presidential administration rescinded an Obama-era memo pledging restraint.[12] However, the administration has been less passive in its approach to localities that currently are considering harm-reduction approaches to the perceived opioid epidemic, such as supervised consumption sites.[13]

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8. *See* Ahrens, *Methademic*, *supra* note 1, at 872–73.

9. *See* Ahrens, *Drug Panics in the Twenty-First Century, supra* note 1, at 426–27.

10. *See infra* notes 122–32 and accompanying text.

11. *See infra* note 123 and accompanying text.

12. *See* Memorandum from Jefferson B. Sessions, III, Att'y Gen. of the United States to All United States Att'ys, Marijuana Enforcement (Jan. 4, 2018), https://bit.ly/3bRnVMn [https://perma.cc/684R-SB4R]; Laura Jarrett, *Sessions Nixes Obama-Era Rules Leaving States Alone that Legalize Pot*, CNN (Jan. 4, 2018, 5:44 PM), https://cnn.it/2Pm4bXF [https://perma.cc/XQZ5-EZA8]. I discuss the Obama administration's Cole Memorandum in greater depth *infra* note 132 and accompanying text.

13. Various sources and advocates use different titles for these sites, although all generally mean to refer to the same sort of facility-supervised consumption sites, supervised injection sites, safe consumption sites, safe injection sites, and overdose prevention sites. This Article uses the term "safe consumption sites" to be consistent throughout, and because that title is more representative of how these sites are described generally, which will hopefully make it easier for people interested in the topic to find this Article. Terminology may matter, however, and it is possible that advocates should shift the common language—polling suggests that public support for these venues is higher where the locations are described as overdose prevention sites. *See* Colleen L. Barry et al., *Language Matters in Combatting the Opioid Epidemic: Safe Consumption Sites Versus Overdose Prevention Sites*, 108 AM. J. PUB. HEALTH 1157, 1157 (2018). For a discussion of the federal government's intervention in local efforts to establish safe consumption sites, see *infra* notes 52–75 and accompanying text.

At the same time, many states and localities are strengthening the criminal prosecution tools forged during prior perceived epidemics and are applying criminal law in "creative" ways to effectuate incarceration. States prosecute pregnant and parenting women for passing drugs to fetuses in utero, often under traditional child-abuse statutes.[14] States prosecute spouses, children, and friends who hand drugs to their friends and loved ones under drug distribution statutes; where the friends and loved ones overdose and die, states prosecute them for homicide.[15] Some of these prosecutions occur pursuant to laws originating from the War on Drugs era. But many occur pursuant to existing, non-drug-specific statutes under circumstances that differ in degree and kind from the offenses the laws were developed to combat.[16] This creativity is not novel—criminal statutes are often sufficiently broad as to plausibly and appropriately include behavior outside of the core originally contemplated. But such creativity does demonstrate a significant problem with developing effective drug policy. Creativity in the direction of more policing, prosecution, conviction, and incarceration can take place without being effectively overruled by another level of government. On the other hand, creativity in the direction of harm reduction or legalization is inherently fragile; it faces at the least the threat and sometimes the reality that another level of government will use available criminal law to override the policy choices of states or localities.

Stifling non-criminal-law alternatives makes it difficult for states and localities to develop effective approaches for combatting substance use disorders. For opioid use disorders specifically, opioids are used routinely and effectively in medical care and are therefore likely to retain their legal availability. This perceived opioid epidemic has also pitted state and local governments against one another as localities attempt to experiment with non-prosecution approaches,[17] further demonstrating the difficulty of developing non-criminal law approaches as creative criminal law approaches can continue unchecked.

Drug policy is—by choice or by necessity—entering an era of experimentation and fragmentation. Given the debacle of the-one-size-fits-all mass incarceration approach that characterized the prior era, our current tentativeness reflects a welcome humility and

14. *See infra* Section IIIA.
15. *See infra* Section IIIB.
16. *See id.*
17. For how these dynamics play out in the context of safe consumption sites, see Section II *infra.*

portends a more deliberative future. This Symposium Article, however, strikes a note of caution. While traditional accounts of our federalism suggest that our constitutional culture provides a fertile ground for experimentation and evidence-based decision-making,[18] the realities of drug policy and the legacy of mass incarceration tell a somewhat different story; overlapping regulatory authority enables punitive creativity but disempowers or negates creative pubic-heath and harm-reduction programs, such as needle exchanges and safe consumption sites.[19] If we are going to turn our states and localities into true laboratories of democracy[20] to develop solutions to our current opioid crisis, we will need to take political, cultural, and doctrinal steps to break up the asymmetries of our drug policy federalism.

I. THE CURRENT CRISIS

Opioids obviously are neither a newly created substance nor a newly conceived public policy problem. Concerns about opium use kick-started the entire legislative approach to drug control in the early twentieth century.[21] Criminalization of drug trade and use expanded throughout the century at the state level.[22] The federal criminalization of drugs expanded immensely when the Nixon administration drafted the Controlled Substances Act ("CSA") in the 1970s.[23] Both state and federal drug law grew more punitive in the 1980s and 1990s, largely in response to a perceived epidemic of crack cocaine and related racial panic about crack cocaine's perceived users.[24] During that era, state legislatures and Congress created new drug and drug-related laws, increased available punishments for existing laws, and established mandatory minimum

18. For some of these traditional accounts, see works cited *infra* notes 113–17.

19. For my fullest discussion of these issues, see *infra* Section IV.

20. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) ("To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system 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.").

21. As I have discussed elsewhere, and as historians of drug policy have documented, early drug policy in the United States responded to a perceived epidemic of opium use; this epidemic was characterized in part as one generated by immigrants from China who would, among other things, seduce white women into entering opium dens. *See* Ahrens, *Methademic*, *supra* note 1, at 849.

22. *See id.* at 850.

23. *See* Pub. L. No. 91-513, 84 Stat. 1236 (1970) (codified as amended in scattered sections of 21 U.S.C.); *see* also Brickey, *supra* note 1, at 1148–58 (discussing implications of CSA for federal criminal authority).

24. *See* Ahrens, *Methademic*, *supra* note 1, at 852–57.

punishments for a number of offenses.[25] But by the time these laws were adopted, crack cocaine use already was on the decline.[26] Now, jurisdictions are using the laws they adopted in response to other drug panics to respond to a number of newer perceived drug use epidemics, including during the current crises centered around opioid use.[27]

The opioid crisis has been framed differently than other alleged epidemics of drug use—rather than linking a prohibited drug with a racial or cultural minority, media sources and politicians have portrayed opioid substance use disorder as a problem afflicting white communities.[28] Perhaps for this reason, all levels of government have expressed more openness to the possibility of using public-health-oriented, harm-reduction approaches to dealing with what they perceive as community crisis.[29]

While the public perception that a particular substance is popular usually has lagged actual usage numbers,[30] the number of opioid-related overdoses continues to increase as national focus and concern intensifies.[31] Jurisdictions have put into place a variety of

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25. *See id*. at 856–57.

26. *See id.* at 854.

27. *See infra* notes 58–59, 86–89, 106–09 and accompanying text.

28. *See, e.g.*, Anjali Om, *The Opioid Crisis in Black and White: The Role of Race in Our Nation's Recent Drug Epidemic*, 40 J. OF PUB. HEALTH 614, 614–15 (2018) (arguing that government characterizations of and responses to opioid use disorders are colored by racism); Ashley Whelan, *Former Gov. Ed Rendell is Leading Nonprofit to Open a Safe-Injection Site in Philadelphia*, PHILA. INQUIRER (Oct. 3, 2018), https://bit.ly/2SMixSX (explaining his motivation for joining board to open safe consumption site, former Pennsylvania governor cited the overdose death of a prominent lawyer friend's son who had developed an opioid use disorder following a lacrosse injury); Rick Jones, *Crack Opioids, and the Modest Reparation of Clemency*, THE CHAMPION (Nov. 2017), https://bit.ly/33ze4H1 [https://perma.cc/9JT4-BL2S] (contrasting the framing of crack cocaine use, inner-city blight, and "crack babies" with current portrayals showing families and nice homes). That said, current portrayal of opioid substance use disorder still contains a racial element; President Donald Trump, in speaking publicly on illicit opioid use, placed heavy blame on Mexico and "sanctuary cities." *See* President Donald J. Trump, Remarks by President Trump on Combatting the Opioid Crisis, THE WHITEHOUSE (Mar. 19, 2018, 2:53 PM), https://bit.ly/38IUDxs [https://perma.cc/AB3N-8Z7Q].

29. *See, e.g.*, *Opioid Overdose: Promising State Strategies*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://bit.ly/2HEgmL0 [https://perma.cc/NC8Y-7RGK] (last updated July 16, 2019); Joseph P. Williams, *A Fight to Do No Harm*, U.S. NEWS (Jan. 24, 2019, 10:17 AM), https://bit.ly/38GeBJe [https://perma.cc/C954-Z69Z].

30. *See* Ahrens, *Methademic, supra* note 1, at 854.

31. *See generally* Holly Hedegaard et al., *NCHS Data Brief No. 329: Drug Overdose Deaths in the United States, 1999–2017*, CTRS. FOR DISEASE CONTROL & PREVENTION (Nov. 2018), http://bit.ly/2uANTD4 [https://perma.cc/TT2X-RHT8]; K. Mack et al., *Illicit Drug Use, Illicit Drug Use Disorders, and Drug Overdose*

policies that may or may not ameliorate the harms of substance use; it is unclear whether overdose statistics would be even higher in the absence of those policy measures. But as overdoses continue to climb, communities are seeing collateral health issues, such as HIV transmission related to shared syringe use and other usage-related infections. In response, communities are exploring possible harm-reduction approaches to opioid use, including the establishment of safe consumption sites for persons who engage in injection drug use.[32] Communities are also exploring medication-assisted treatment,[33] broadly supplying Naloxone,[34] and supporting syringe/needle-exchange programs.[35]

II. THE SUPERVISED CONSUMPTION SITE APPROACH

In January of 2017, Seattle became the first city in the United States to announce it intended to open a legal[36] supervised consumption site.[37] A number of other localities have followed suit in

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Deaths in Metropolitan and Nonmetropolitan Areas—United States, 17 AM. J. TRANSPLANTATION 3241, 3246 (2017); Michael E. Schatman & Stephen J. Ziegler, *Pain Management, Prescription Opioid Mortality, and the CDC: Is the Devil in the Data*?, 10 J. OF PAIN RESEARCH 2489, 2489 (2017).

32. *See infra* Section II.

33. *See, e.g.*, Emily Boerger, *House Passes Senate's Comprehensive Opioid Bill*, MORNING WIRE (Apr. 18, 2019), http://bit.ly/2SpmKMj [https://perma.cc/ZU4R-2SV2].

34. *See Naloxone Program Case Studies*, HARM REDUCTION COALITION, https://bit.ly/2QBGGdE [https://perma.cc/54BN-AAWN] (last visited Dec. 27, 2019) (noting that about 200 communities nationwide have established take-home naloxone programs).

35. The CDC's information page on syringe/needle exchange programs offers support for the effectiveness of the programs and notes that the decision whether or not to establish such programs is made at the state or local level. *See Syringe Services Programs (SSPs) FAQs*, CTRS. FOR DISEASE CONTROL & PREVENTION (May 23. 2019), https://bit.ly/2xO4N23 [https://perma.cc/C88X-R66Z].

36. Safe consumption sites already operate in the United States without legal safeguards. *See*, *e.g.*, Alex H. Kral, *Addressing the Nation's Opioid Epidemic: Lessons from an Unsanctioned Supervised Injection Site in the U.S.*, 53 AM. J. PREVENTIVE MED. 919, 919–22 (2017) (studying participation at an unsanctioned supervised consumption site at an undisclosed location in the United States); *"Dozens and Dozens" of Underground Safe Injection Sites in Seattle*, MY NORTHWEST (Nov. 1, 2018, 3:43 PM), https://bit.ly/2vlsU78 [https://perma.cc/T3N6-386R] (describing three different organized, underground types of sites in Seattle).

37. *See* David Gutman, *Seattle, King County Move to Open Nation's First Safe Injection Sites for Drug Users*, SEATTLE TIMES (Jan. 27, 2017, 1:32 PM), https://bit.ly/2Hh6abg. Sites had been recommended by a county task force convened to study solutions to opioid use disorders in the area and enjoyed support from the mayor and county supervisor. *Id.*; *see also* Vernal Coleman, *Open "Safe Places" in Seattle, King County for Heroin Use, Task Force Says*, SEATTLE TIMES (Sept. 15, 2016, 10:10 AM), https://bit.ly/3bzJ65x; Casey Jaywork, *Sheriff: Safe Drug Sites Users Would 'Not be Arrested by Any of My Deputies'*, SEATTLE WEEKLY (Mar. 31, 2016, 1:30 AM), https://bit.ly/37SRbyW [https://perma.cc/HZ9Y-5ZTE]. Seat-

the past two years; some local governments have proposed to establish publicly-funded sites, while others have announced that they intend to permit nonprofit organizations to establish sites.[38] At least six states to date—Maryland, California, Colorado, Massachusetts, New York, and Vermont—have introduced legislation that would permit localities to establish sites, although no state has yet signed a bill into law.[39] Much of the battle over supervised consumption sites mirrors that of syringe- or needle-exchange programs in the 1980s and 1990s.[40]

Supervised consumption sites do not supply illegal drugs to patrons.[41] Rather, the sites provide a way for people to consume drugs they already have purchased under circumstances where it is less likely they will experience harm.[42] Generally sites will supply sterile injection materials (particularly syringes), offer supervision to reduce the chance of overdose, administer Naloxone during an overdose, provide advice about safer consumption methods, test the content of the illicit drugs, and provide information about and referrals to treatment programs; the provision of these services and supplies is not premised on a patron agreeing to enter treatment or become abstinent.[43] While the Seattle site proposal discussed in

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tle's sheriff announced that local law enforcement would not arrest people who used safe consumption sites. *Id.*

38. *See infra* note 51 and accompanying text.

39. *See* Melissa Santos, *Fight Over Safe Injection Site in Seattle Threatens Opioid Treatment Bill*, CROSSCUT (Apr. 19, 2019), https://bit.ly/31PaJTp [https://perma.cc/383V-NMRG].

40. *See, e.g.*, David L. Kirp & Ronald Bayer, *The Politics*, in DIMENSIONS OF HIV PREVENTION: NEEDLE EXCHANGE 79–80 (Jeff Stryker & Mark D. Smith eds., 1993) (noting that then-drug-czar Bob Martinez authored a federal report on needle exchanged that argued that "[t]here is no getting around the fact that distributing needles facilitates drug use and undercuts the credibility of society's message that using drugs is illegal and morally wrong"); Aubrey Whelan, *Safe Injection Site Uproar Reminds Rendell of Needle Exchange Fight 27 Years*, PHILA. INQUIRER (Jan. 25, 2018), https://bit.ly/3c1vAI2 [https://perma.cc/TCB6-6GYY] (quoting former Pennsylvania governor and Philadelphia mayor Ed Rendell with respect to current safe injection site that his administration went through "the exact same stuff" in establishing a legal syringe exchange program in 1992). For a historical snapshot of the evolution of law governing syringe and needle exchange programs, see Scott Burris & Mitzi Ng, *Deregulation of Hypodermic Needles and Syringes as a Public Health Measure: A Report on Emerging Policy and Law in the United States*, 12 GEO. MASON U. CIV. RTS. L.J. 69, 84–95 (2001).

41. *See, e.g.*, Larissa Morgan, *The Regulatory Battle Over Safe Injection Sites*, REG. REV. (Oct. 8, 2019), https://bit.ly/37Cu63q [https://perma.cc/835F-N6HE].

42. *See* Sharon Larson et al., *Supervised Drug Consumption: Evidence-Based Public Health*, HARM REDUCTION COAL. (Dec. 2017), https://bit.ly/37E854d [https://perma.cc/2EL4-PLYA].

43. *See, e.g.*, Leo Beletsky et al., *The Law (and Politics) of Safe Injection Facilities in the United States*, 98 AM. J. OF PUB. HEALTH 231, 232 (2008); Elana Gordon, *Lessons from Vancouver—U.S. Cities Consider Supervised Injection Facil-*

this Article has contemplated the use of vans,[44] supervised consumption sites are generally bricks-and-mortar venues.[45] Supervised consumption sites serve several related purposes: reducing the odds of overdose and death, preventing the spread of infection (particularly HIV and hepatitis C), connecting individuals to treatment, and removing drug consumption and related waste (such as used syringes) from public spaces.[46]

While jurisdictions in the United States have only considered implementing supervised consumption sites over the past few years, such sites are not new in a global context. The first supervised consumption sites were established in the 1980s,[47] and now, more than a hundred exist worldwide—primarily in Europe, Canada, and Australia.[48] In fact, there is a well-publicized and studied supervised consumption site in Vancouver, British Columbia[49] less than 150 miles away from the proposed site in Seattle. Empirical studies of the efficacy of supervised consumption sites suggest the sites attract users, reduce overdoses, and promote health care access without increasing crime or drug trafficking in surrounding neighborhoods.[50]

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ities, WHYY (July 5, 2018), https://bit.ly/2V5VTqs [https://perma.cc/J4A5-H4CD]; Sharon Larson et al., *Supervised Drug Consumption: Evidence-Based Public Health*, HARM REDUCTION COAL. 26–27 (Dec. 2017), https://bit.ly/37E854d [https://perma.cc/2EL4-PLYA].

44. *See* Deedee Sun, *Seattle Moving Forward With 'Fixed Mobile' Safe Injection Site*, KIRO 7 NEWS (June 6, 2018, 6:46 PM), https://bit.ly/3a8Ufce [https://perma.cc/R9HK-J856].

45. *See* Beletsky, *supra* note 43, at 232.

46. *See* Gordon, *supra* note 43.

47. The first supervised consumption site was established in 1986 in Bern, Switzerland. *See Do Safe-Injection Sites Work?*, THE ECONOMIST (Oct. 10, 2019), https://econ.st/39Pw69Y [https://perma.cc/57RF-HHQS] (noting that the site was established to grapple with HIV transmission).

48. *See* Mattie Quinn, *A Safe Space: Is the U.S. Ready for Its First Supervised Injection Site for Drug Users?* GOVERNING (May 2019), https://bit.ly/2SROHg1 [https://perma.cc/S56N-PDL2].

49. This location, Insite, was the first supervised consumption site in Canada (launched in 2003). *See* Thomas Kerr et al., *Supervised Injection Facilities in Canada: Past, Present, and Future*, 14 HARM REDUCTION J. 28 (2017). The site has reduced overdose deaths in the area by 35 percent, according to scholars at the University of British Columbia. Brandon D.L. Marshall et al., *Reduction in Overdoes Mortality After the Opening of North America's First Medically Supervised Safer Injecting Facility: A Retrospective Population-Based Study*, 377 THE LANCET 1429, 1429 (2011).

50. *See generally* Chloe Potier et al., *Supervised Injection Services: What Has Been Demonstrated? A Systematic Literature Review*, 145 DRUG & ALCOHOL DEPENDENCE 48 (2014) (reviewing 75 empirical studies of supervised consumption sites and summarizing ways in which sites have proven effective).

But no such sites currently exist in the United States despite efforts on the part of several localities and nonprofits to establish them in major cities.[51] The failure does not stem from lack of funding or commitment; rather, there are no supervised consumption sites to date because, as this Article reviews, other levels of government have intervened to prevent localities and nonprofits from setting up services.

The most prohibitive intervention has been by the federal government, which has impeded localities from setting up sites and scared states out of supporting them. The federal government has expressed that opioid use is a public health emergency,[52] yet the Trump administration has opposed the establishment of safe consumption sites and has actively intervened to prevent localities from establishing them.[53] This opposition is not a foregone conclusion—when communities began considering safe consumption sites, many supporters believed the federal government would ignore them much like legal marijuana.[54] This optimism, however, proved unfounded.

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51. Seattle, Philadelphia, San Francisco, Boston, New York City, Denver, and Burlington (VT) are all in various stages of establishing safe consumption sites over the past few years. *See* Dominic Fracassa, *California Bill Allowing San Francisco Safe Injection Site Reintroduced*, S.F. CHRON. (Feb. 4, 2019, 8:44 PM), http://bit.ly/2HqqQNR [https://perma.cc/WRC2-7MGA] (noting that San Francisco's ongoing attempt to established a safe consumption site had been stymied in 2018 by the then-Governor's decision to veto authorizing legislation); Natalia V. Navarro, *Denver City Council Approves Possible Safe Injection Facility*, CPR NEWS (Nov. 28, 2018, 7:28 AM), http://bit.ly/39A1WaG [https://perma.cc/6RY4-7M2R] (noting that Denver City Council approves two-year pilot program but that the program is contingent on state legislative approval); Jess Aloe, *As Heroin Overdoses Rise, Safe Injection Site Considered in Burlington*, BURLINGTON FREE PRESS (July 16, 2018, 12:37 PM), http://bit.ly/2wfwBvu [https://perma.cc/H8FF-TFAE] (noting that Burlington City Council considering safe injection sites); Christopher Robbins, *NYC Plans Safe Injection Facilities for Park Slope, Washington Heights, Midtown, and Longwood*, GOTHAMIST (May 4, 2018, 2:57 PM), http://bit.ly/2SvFie3 [https://perma.cc/9FKM-FEXB] (noting that Mayor Bill de Blasio announced plan for city to create four-facility safe consumption site pilot program). So far, efforts to create safe consumption sites have concentrated in the West and Northeast; although rising numbers of opioid overdoses are spurring southern states to implement some harm-reduction programs like syringe exchanges, regional advocates are divided on whether or not safe consumption sites would be politically realistic. Max Blau, *Southern States Slowly Embracing Harm Reduction to Curb Opioid Epidemic*, STATELINE (Apr. 15, 2019), https://bit.ly/2wrJZx8 [https://perma.cc/CRF4-UENC].

52. Greg Allen & Amita Kelly, *Trump Administration Declares Opioid Crisis a Public Health Emergency*, NPR MORNING EDITION (Oct. 26, 2017, 5:02 AM), https://n.pr/3bHCQso [https://perma.cc/R3NV-VWQJ].

53. *See infra* notes 55–72 and accompanying text.

54. In Seattle, for example, the sheriff expressed he believed the federal government was unlikely to prosecute people for operating safe consumption sites.

The federal government engaged in probably the highest-profile intervention in Philadelphia. There, the U.S. Attorney for the Eastern District of Pennsylvania sought to prevent Safehouse, a nonprofit organization that includes former Philadelphia mayor and Pennsylvania governor Ed Rendell on its board,[55] from opening a supervised consumption site in the city's Kensington neighborhood.[56] While Safehouse had built support from a variety of local stakeholders, including the city's current mayor, district attorney, and health department,[57] the Department of Justice argued that the so-called federal "crack house statute" prohibited the operation of such a site.[58] This questionable argument[59] ultimately did not persuade the federal district judge who heard the case.[60] But the reality of—and specter of—federal prosecution has kept safe consumption sites from becoming a reality in the United States.

See Sheriff Urquhart Expects White House to Attack Pot Before Safe Injection Sites, KIRO 7 NEWS (Feb. 27, 2017, 10:04 AM), http://bit.ly/2UXQPEn [https://perma.cc/585F-ZHQQ].

55. *See* Whelan, *supra* note 28.

56. *See* Jeremy Roebuck & Aubrey Whelan, *U.S. Attorney Sues to Stop Supervised Injection Sites in Philadelphia*, PHILA. INQUIRER (Feb. 6, 2019, 9:30 AM), https://bit.ly/33zRK02 [https://perma.cc/53G9-UEST].

57. *See* Nina Feldman, *Trump Administration Is in Court to Block Nation's 1st Supervised Injection Site*, NPR (Sept. 6, 2019, 5:48 PM), https://n.pr/2SQES0N [https://perma.cc/DN7D-AUFM].

58. Because this is how people generally refer to it, this piece will refer to the pertinent legislation as "the federal crack house statute." The federal crack house statute makes it unlawful to "knowingly open, lease, rent, use, or maintain any place, whether permanently or temporarily, for the purpose of manufacturing, distributing, or using any controlled substance" or to manage or control any place, whether permanently or temporarily, either as an owner, lessee, agent, employee, occupant, or mortgagee, and knowingly and intentionally rent, lease, profit from, or make available for use, with or without compensation, the place for the purpose of unlawfully manufacturing, storing, distributing, or using a controlled substance.

21 U.S.C. § 856 (2012). In response to panic about ecstasy use at rave events in the early 2000s, Congress amended the statute to cover temporary entertainment venues. Prosecutorial Remedies and Other Tools Against the Exploitation of Children Today Act of 2003 (PROTECT Act), Pub. L. No. 108-21, § 608, 117 Stat. 650, 691 (2003). The PROTECT Act's coverage of temporary venues—to the extent the crack house statute applies to any safe consumption sites—might be necessary to cover mobile vans such as those Seattle has considered. *See supra* note 44 and accompanying text.

59. For the definitive article explaining why the federal crack house statute does not apply to safe consumption sites, see Alex Kreit, *Safe Injection Sites and the Federal "Crack House" Statute*, 60 B.C. L. REV. 413, 467 (2019) (arguing that a provision of the federal crack house statute immunizes officials who are enforcing state and local laws relating to controlled substances and that this provision protects operators of government-run safe consumption sites).

60. *See* United States v. Safehouse 408 F. Supp. 3d 583, 586–87 (E.D. Pa. 2019).

The "federal crack house" statute is an excellent example of law originally adopted in response to a different perceived drug use epidemic to combat a substantially different problem: Congress adopted the law in 1986 to prevent landlords from supplying buildings to facilitate illicit drug use.[61] Nevertheless, the federal government has argued safe consumption sites represent the sort of harm that the federal crack house statute contemplates—parties facilitating drug use through providing a venue in which it can occur.[62] The district court recently held that the "federal crack house" statute did not cover safe consumption sites like Safehouse, arguing Congress did not consider safe consumption sites when it adopted the legislation decades ago.[63] The district court engaged in painstaking review of statutory construction to reach the conclusion that Safehouse would not make a supervised consumption site available "for the purpose" of unlawful drug activity. Rather, the court determined that, although Safehouse would know that drugs would be consumed on the premises, facilitating drug use is not a significant purpose for the proposed site.[64] Instead, the significant purposes of the site would be to provide sterile supplies and administer emergency medical assistance.[65] Although the district court ruled in favor of Safehouse, the government may still appeal and has expressed its intention to use criminal law tools to prevent a safe consumption site from succeeding.[66]

The interplay between the local and federal governments in Seattle has been similar, although the state/local dynamics are somewhat different. After Seattle announced that it would try to become the first city to host a supervised consumption site in the United States, local politicians, police, and prosecutors bought in.[67] However, several nearby suburban communities banned the con-

61. *See supra* note 59, at 430.
62. *See supra* note 57.
63. *See Safehouse*, 408 F. Supp. 3d at 586–87.
64. *See id.* at 590–91, 595–98.
65. *Id.* at 614.
66. *See* Clary Estes, *Philadelphia's Supervised Injection Site is Safe for Now*, FORBES (Nov. 1, 2019, 5:00 AM), https://bit.ly/2PgTkxS [https://perma.cc/672S-TVF5] (noting the U.S. Attorney plans to appeal district court ruling).
67. *See, e.g.*, Vernal Coleman, *Threat of Federal Enforcement Complicates Seattle's Proposed Safe Injection Site*, SEATTLE TIMES (Aug. 31, 2018, 7:11 AM), https://bit.ly/2vaSg83 (indicated the site has support for site from Seattle's city attorney and mayor). Not all local residents support safe consumption sites; one King County resident attempted by initiative to prevent the county from spending public funds on safe consumption sites. *Id.* The state supreme court ultimately held that the initiative could not be placed on the county ballot, as it fell outside the scope of local initiative power. *See* Protect Public Health v. Freed, 192 Wn. App. 2d. 477, 486–87 (Wash. 2018).

struction of safe-consumption sites within their borders.[68] The U.S. Attorney for the Western District of Washington suggested he would file a "federal crack house" statute lawsuit (analogous to that pursued in Philadelphia) should Seattle attempt to launch a supervised consumption site. The U.S. Attorney would similarly argue that the site would violate federal law, although he conceded in initial interviews that he was unfamiliar with the mechanics of such sites.[69]

Both of these U.S. Attorneys acted consistent with the stated position of the Department of Justice: in August of 2018, then-deputy Attorney General Rod Rosenstein reminded states and localities that such sites violate federal law by condoning drug use and failing to ameliorate the harms of substance use disorders.[70] Federal prosecutors have issued similar reports and threats in other jurisdictions proposing safe consumption sites.[71]

As of this publication, it is unclear when and if Seattle, Philadelphia, or other localities may decide to proceed even in the face of federal opposition.[72] The U.S. Attorney for the Eastern District of Philadelphia remains committed to preventing Safehouse from

68. *See* Olga Khazan, *Why Can't Addicts Just Quit?*, ATLANTIC (Nov. 13, 2017), https://bit.ly/2wvDVDw [https://perma.cc/7VAG-NNPS].

69. *See* Mike Carter, *Seattle's New U.S. Attorney Says He Won't Allow City to Open Safe Injection Site*, SEATTLE TIMES (Apr. 3, 2019, 5:49 PM), https://bit.ly/324EGze. ("While Moran acknowledges he hasn't studied the issue, he said that the idea of allowing people to inject toxic substances in a government-sanctioned site, regardless of the availability of medical professionals, 'is fraught with peril,' and would violate federal law.").

70. *See* Rod J. Rosenstein, *Fight Drug Abuse, Don't Subsidize It*, N.Y. TIMES (Aug. 27, 2018), https://nyti.ms/2HAfhUs [https://perma.cc/S9MY-BDNT] (arguing that supervised consumption sites increase crime in surrounding neighborhoods, encourage people to continue to use injected drugs, fail to facilitate treatment, and create "a taxpayer-sponsored haven to shoot up").

71. *See, e.g.*, Press Release, U.S. Attorney's Office for the District of Vermont, Statement of the U.S. Attorney's Office Concerning Proposed Injection Sites (Dec. 13, 2017), https://bit.ly/38DOmTs [https://perma.cc/MY6C-E2UH] (arguing that a safe consumption site would stimulate the local market for opioids and "encourage and normalize heroin injection").

72. Seattle was considering proceeding with its proposed sites even before the Safehouse decision and continues to consider opening sites in its wake. *See* Kipp Robertson, *Seattle Monitors Philadelphia Case After Judge OKs Safe Injection Site*s, KING5 NEWS (Oct. 4, 2019, 10:48 AM), https://bit.ly/39Uckdy [https://perma.cc/VVG5-AV9U]; David Kroman, *Seattle Officials Vow to Move Forward with Safe Injection Sites, Despite U.S. Attorney Threat*, CROSSCUT (Apr. 5, 2019), https://bit.ly/2SzLP7d [https://perma.cc/TRM2-DR8A] (reporting that Seattle City Council members suggest that a Seattle site should open despite federal threats, arguing that the U.S. Attorney's opposition is "not reason enough to walk away from a proven public health policy").

opening a site.[73] Even in the absence of permission to prosecute under the "federal crack house" statute, the federal government retains criminal legal tools that would enable it to stymie the success of any safe consumption site.

The breadth of federal criminal law, combined with the relatively small amount of actual federal enforcement, provides federal law enforcement with an exceptional amount of discretion.[74] Federal law enforcement agents generally do not prosecute individual drug users or lower-level community dealers—perhaps because they do not implicate federal interests and because of limited enforcement resources. While possession and distribution of illicit drugs are crimes that the states and the federal government could prosecute based on most fact patterns, the federal government generally has not prioritized ordinary drug distribution and possession cases. Usually the decision to prosecute is left to the states.[75]

Not all inter-governmental tension over safe consumption sites has involved federal challenges to local initiatives. State governments also have opposed local safe consumption site initiatives,[76] although this opposition often has stemmed from fear that the federal government will intervene to shut down sites.[77] In Washington, as the state considered legislation to address opioid substance use disorders, some legislators attempted to amend the bill to prohibit any localities within the state from permitting the establishment of safe consumption sites; the legislation ultimately prohibited state

73. *See supra* note 66 (reporting that the U.S. Attorney plans to appeal district court ruling, and Deputy Attorney General Jeffrey Rosen warns that "[a]ny attempt to open illicit drug injection sites in other jurisdictions while this case is pending will continue to be met with immediate action"); Christine Vestal, *Philadelphia Could Become the First U.S. City to Host a Safe Injection Site for Drug Users*, USA TODAY (Nov. 18, 2019, 9:47 AM), https://bit.ly/2HsUzWI [https://perma.cc/R8QD-82RV].

74. *See, e.g.*, Daniel C. Richman, *Federal Criminal Law, Congressional Delegation, and Enforcement Discretion*, 46 UCLA L. REV. 757, 765 (1999).

75. *See* Brickey, *supra* note 3, at 1154.

76. *See, e.g.*, Janie Har, *Brown Rejects Supervised Injection Site for San Francisco*, KQED NEWS (Sept. 30, 2018), https://bit.ly/38Bhx9Y [https://perma.cc/S2TV-RL6F] (reporting Governor Brown vetoed state legislation to authorize pilot supervised consumption sites in San Francisco). Governor Brown further announced that "[f]undamentally[,] I do not believe that enabling illegal drug use in government sponsored injection centers—with no corresponding requirement that the user undergo treatment—will reduce drug addiction." *Id.*

77. When public health advocates in Philadelphia banded together to create Safehouse in 2018, Pennsylvania's governor and attorney general announced that they could not support the site because of the potential for prosecution under the federal crackhouse statute. *See* Bobby Allyn, *As Philly Moves Closer to Supervised Injection Site, Gov. Wolf Remains Opposed*, WHYY (Oct. 8, 2018), https://bit.ly/2P27J0M [https://perma.cc/57DL-ESAN].

funds from being used either by safe consumption sites or entities partnering with safe consumption sites.[78] Several localities in Washington have banned safe consumption sites within their borders.[79]

The governors of California and Vermont both vetoed state legislation that would have permitted the establishment of safe consumption sites. To some extent, those vetoes stemmed from concern officials in localities that established safe consumption sites would be subject to federal prosecution.[80] So far Governor Andrew Cuomo has failed to authorize New York City's proposed safe consumption sites.[81] Thus, while formal federalism is still a bar to safe consumption site establishments, the federal government is not the only layer of government suppressing creative efforts. The federal threat, as well as some separate concerns, motivate states to prevent localities from experimenting as well.

The federal government, states, and localities all maintain some level of jurisdiction over substance use through criminal ordinances and statutes. Therefore, if a state or local government wishes to experiment with a public-health-oriented solution to substance use disorders, all levels of government have to agree that a non-criminal alternative is appropriate. Every level of government needs to agree not to prosecute.

III. THE OTHER SIDE OF THE COIN: "CREATIVE" PROSECUTIONS AND THE OPIOID CRISIS

Concurrent federal jurisdiction means that all levels of government must agree to stand down from prosecution in order for a non-criminal solution to be implemented. But that same concurrence permits various levels of government to experiment with legal approaches to combating substance use, as long as those ap-

78. *See supra* note 33.

79. *See* Kroman, s*upra* note 72 (noting that several cities near Seattle—Federal Way, Bellevue, Renton, Kent, and Auburn—have passed ordinances banning safe consumption sites).

80. *See* Melody Gutierrez, *California Bill to Create "Safe Injection Sites" in San Francisco Clears Assembly*, L.A. TIMES (May 23, 2019, 5:38 PM), https://lat.ms/2uJ2oVu [https://perma.cc/T6QL-YZVM] (noting that then-governor Brown vetoed similar legislation in 2018 due to concerns about federal prosecution); Mike Faher, *Safe Injection Sites "Not a Viable Option," Governor's Counsel Says*, VT. DIGGER (Oct. 15, 2018), https://bit.ly/2UXjhWT [https://perma.cc/J8P3-HSPJ] (noting concern about federal prosecutions as a reason why the governor did not support supervised consumption sites).

81. *See* Alexander Lekhtman, *Pressure Mounts on N.Y. Gov. Cuomo to Authorize Safe Consumption Sites*, FILTER MAG. (Oct. 10, 2019), https://bit.ly/39j5HAF [https://perma.cc/C9WY-AZ24].

proaches are criminal law approaches. This is not the first perceived epidemic in which the states and localities have taken novel criminal law approaches to curtail the harms of substance use. In fact, several of the tools described in this section were crafted in response to former perceived substance use epidemics. Some of those tools had fallen into disuse but have been re-activated in light of more recent social developments. Most of this activity has been documented in either academic literature or news articles, but it is useful to summarize it in order to see the ways in which criminal law can be created or stretched to cover novel situations. While there may be other areas in which state and local agents have engaged in prosecutorial creativity, or where legislatures have generated new criminal law to offer prosecutors additional tools for addressing substance use, this Article focuses on two areas: punishing women for drug use while pregnant and charging ostensible drug dealers with homicide offenses.[82]

A. Prosecutions of Pregnant (and Parenting) Women

State prosecutors have, for the past few decades, used criminal law to punish women who use illicit substances while pregnant.[83] Sometimes, prosecutions represent the creative application of traditional criminal statutes to pregnant women, characterizing developing fetuses as victims of child abuse or homicide.[84] Otherwise, these prosecutions utilize newer laws adopted specifically to address pregnant women who use illegal drugs.[85]

The perceived crack cocaine epidemic spawned a significant number of changes in substantive criminal law and accompanying punishments.[86] One change I have documented in-depth elsewhere is expanded prosecution of mothers, particularly of women while pregnant.[87] A major moral panic surrounding crack cocaine use

82. As I discuss *infra* at notes 106–11, the associates, friends, and family members prosecuted for these homicide offenses fall within the broad technical category of "dealer" as defined at law but often are not professional dealers as contemplated by legislatures.

83. *See* Deborah Ahrens, *Incarcerated Childbirth and Broader "Birth Control": Autonomy, Regulation, and the State*, 80 MO. L. REV. 1, 13–14 (2015); Lynn M. Paltrow & Jeanne Flavin, *Arrests of and Forced Interventions on Pregnant Women in the United States, 1973–2005: Implications for Women's Legal Status and Public Health*, 38 J. HEALTH POL. POL'Y & L. 299, 246–48 (2013); *Criminalizing Pregnancy: Policing Pregnant Women Who Use Drugs in the USA*, AMNESTY INT'L (2017), https://bit.ly/2xtuZPo [https://perma.cc/7QZP-3TFX].

84. *See infra* notes 91–92 and accompanying text.

85. *See infra* note 94 and accompanying text.

86. *See* Ahrens, *Methademic*, *supra* note 1, at 856–57.

87. *Id.* at 858–59.

was the notion of the so-called "crack baby"—a baby born to a woman who had a cocaine substance use disorder that is limited for life by the effects of cocaine on development within the womb.[88] In retrospect, these fears were wildly overblown and unfounded, particularly when the effects of cocaine use by pregnant women were isolated from the effects of poverty and distinguished from the more widespread effects of tobacco and alcohol use.[89] Nevertheless, the law responded. Many district attorney's offices began applying existing homicide and child-abuse statutes to women who experienced stillbirth or had babies who tested positive for cocaine.[90] These cases raised issues related to proximate causation. It was often difficult or even impossible for medical experts to determine to what extent a person's substance use led to negative fetal outcomes;[91] and, by the time a perceived epidemic of methamphetamine use arose in the mid-2000s, legal advocates and medical experts mobilized to try to persuade prosecutors and legislators against expanding criminal law and creating or amending new statutes.[92]

Despite those efforts to better educate prosecutors and prevent such prosecutions, prosecutors have been leveraging existing homicide and child-abuse statutes against women who use opioids while

88. *See, e.g.*, Dana Hirschenbaum, *When Crack is the Only Choice: The Effect of a Negative Right of Privacy on Drug-Addicted Women*, 15 BERKELEY WOMEN'S L.J. 327, 327–28 (2000) (describing efforts communities made to combat this perceived issue).

89. *See* Susan Okie, *The Epidemic that Wasn't*, N.Y. TIMES (Jan. 26, 2009), https://nyti.ms/2Hmc3DX [https://perma.cc/N5CG-N3PL].

90. *See, e.g.*, Laura E. Gomez, MISCONCEIVING MOTHERS: LEGISLATORS, PROSECUTORS, AND THE POLITICS OF PRENATAL DRUG EXPOSURE 78 (1997). One public hospital in South Carolina, with heavy involvement from law enforcement, began a systematic program in which women suspected of cocaine use during pregnancy were subject to drug screening at the hospital; factors that hospital personnel used to screen women for testing included low-birthweight babies and lack of prenatal care. Women who tested positive were subject to arrest and prosecution. The Supreme Court held that the program violated the fourth amendment rights of women subjected to testing; the fact that law enforcement dominated program design and women experienced arrest meant that the regime did not fit within the "special needs" category. *See* Ferguson v. City of Charleston, 532 U.S. 67, 84 (2001); *see also* McKnight v. State, 661 S.E.2d 354, 357 (S.C. 2008) (overturning McKnight's homicide conviction for child abuse, after she used crack cocaine and her infant was still born, based on ineffective assistance of counsel).

91. *See, e.g.*, *McKnight*, 661 S.E.2d at 357–61 (detailing the many ways in which McKnight's counsel failed to address possible causation issues in representing her for her homicide by child abuse charge).

92. *See, e.g.*, Doris Marie Provine, UNEQUAL UNDER LAW: RACE IN THE WAR ON DRUGS 165–66 (2007); *Meth and Myth: Top Doctors, Scientists and Specialists Warn Mass Media on "Meth Baby" Stories*, STOP THE DRUG WAR (July 29, 2005), https://bit.ly/38t8Cr4 [https://perma.cc/3QC4-SX4D].

pregnant, even though such statutes often were not drafted with fetuses in mind.[93] Legislatures have also drafted new statutes criminalizing opioid use while pregnant.[94] In contrast, obstetricians support providing women who use opioid with supportive therapy during pregnancy.[95] Several major medical associations have released statements opposing the prosecution of pregnant women who use illicit drugs.[96] Prosecutions also appear to increase, not decrease, the number of babies who are born with neonatal abstinence syndrome.[97] In other words, while there is empirical support for the idea that safe consumption sites reduce the collateral harms of opioid substance use disorder, prosecuting women who use opioids during pregnancy seems to increase them. Nevertheless, because of the perverse federalism dynamics detailed in this Article, states and localities are free to experiment with punitive solutions to opioid misuse.

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93. *See* Erica Hensley & Michelle Liu, *Delivering Justice*, MISS. TODAY (May 12, 2019), https://bit.ly/39wXxFt [https://perma.cc/EE3M-WMJW] (documenting prosecutions of pregnant women for felony child abuse where they tested positive for opioids and other drugs and describing this as a "novel interpretation of the law"); Matt Payne, *District Attorney, County Entities Actively Target Pregnant Drug-Abusers*, DAILY ARDMOREITE (Dec. 4, 2017, 11:00 AM), https://bit.ly/2ORof3S [https://perma.cc/GG6R-KGRP] (explaining a county prosecutor charging women who used opioids while pregnant with child neglect); *see also* Alex Wigglesworth, *Her Baby Was Stillborn Because of Meth, Police Say. Now She's Charged with Murder*, L.A. TIMES (Nov. 8, 2019, 12:31 PM), https://lat.ms/2OVKrcS [https://perma.cc/4DKC-8XUM] (explaining a murder prosecution where a woman gave birth to a stillborn baby and used methamphetamine while pregnant). This article quotes National Advocates for Pregnant Women director Lynn M. Paltrow as saying that she was "seeing an increasing number of women who are arrested for experiencing miscarriages and stillbirths[.]" *Id.*

94. *See* Melissa Healy, *When Pregnant Women Who Use Opioids are Treated like Criminals, Their Babies Suffer*, L.A. TIMES (Nov. 14, 2019, 5:00 AM), https://lat.ms/2uHakq7 [https://perma.cc/J9RX-NFSV] (noting that, in response to the opioid epidemic, 13 states have created new laws criminalizing using illicit drugs while pregnant).

95. *See* Comm. on Obstetric Prac., *Opioid Use Disorder and Pregancy*, AM. COLL. OF OBSTETRICIANS AND GYNECOLOGISTS (Aug. 2017), https://bit.ly/33Cc8NY [https://perma.cc/N2PT-3A9K].

96. For a collection of such statements, including from the American Medical Association and the American College of Obstetrics and Gynecologists, see *Medical and Public Health Group Statements*, NAT'L ADVOCATES FOR PREGNANT WOMEN (June 2018), https://bit.ly/3buA1uD [https://perma.cc/7AAN-75KL].

97. *See* Laura J. Faherty et al., *Association of Punitive and Reporting State Policies Related to Substance Use in Pregnancy with Rates of Neonatal Abstinence Syndrome*, JAMA NETWORK (Nov. 13, 2019), https://bit.ly/2SBGZW7 [https://perma.cc/7YH6-QJRK].

B. Homicide Prosecutions

Homicide is a second area where states have utilized strategies from prior perceived drug epidemics or have used existing criminal law to creatively prosecute people.[98] State prosecutors increasingly file homicide charges where a person dies from a drug overdose.[99] In the past few years, state level overdose-related prosecutions appear to have at least doubled,[100] and in some jurisdictions, the rates have multiplied much faster.[101] Prosecutors often express frustration about the number of overdose deaths, and they reason that homicide prosecutions are a way to hold someone accountable for the death.

There are two primary types of overdose-related homicide prosecutions. First, many prosecutors simply use traditional homicide statutes to prosecute people who give friends or family members opioids where the user overdoses and dies. A significant percentage of people who use opioids non-medically receive them from friends or relatives.[102] In such cases, the prosecutor proceeds on an unintentional homicide theory; the charge might be involuntary manslaughter (due to negligence with respect to the person's death), implied malice murder (where the defendant acted with depraved indifference to human life), or even felony murder (where the predicate felony would be drug distribution).[103] Although not

98. For an overview of drug-induced homicide statutes and prosecutions, see Leo Beletsky, *America's Favorite Antidote: Drug-Induced Homicide in the Age of the Overdose Crisis*, 2019 UTAH L. REV. 833 (2019). For an excellent summary of the issues in drug-induced homicide prosecutions, see Valena E. Beety et al., *Drug-Induced Homicide: Challenges and Strategies in Criminal Defense*, 70 S.C. L. REV. 707 (2019).

99. *See* Rosa Goldensohn, *They Shared Drugs. Someone Died. Does that Make Them Killers?*, N.Y. TIMES (May 25, 2018), https://nyti.ms/3bg4ATJ [https://perma.cc/XND8-KDZS] (describing cases where people were charged with murder after sharing a fentanyl patch with a fiancé; buying heroin that turned out to be fentanyl with a girlfriend; sharing drugs purchased on the internet with an older brother; and using drugs with a girlfriend).

100. *Id.*; *see also* Beletsky, *supra* note 98, at 837 (estimating that such prosecutions have in fact at least tripled).

101. *See supra* note 99 (noting that "murder by overdose" cases have quadrupled in Minnesota over the past decade and that Pennsylvania went from 4 to 171 cases from 2011 to 2018 after legal changes made overdose homicides easier to prosecute).

102. *See* Raminta Daniulaityte et al., *Sources of Pharmaceutical Opioids for Non-Medical Use Among Young Adults*, 46 J. PSYCHOACTIVE DRUGS 198, 204 (2014) (noting that about 40% of participants in survey had obtained opioids for free from friends or relatives).

103. *See supra* note 99.

all attempts to prosecute under these theories have succeeded,[104] the ability to bring charges at all undoubtedly produces pleas. Further, being prosecuted for a homicide offense is itself an extraordinary experience. The drug distribution relied upon by prosecutors can include circumstances where money is exchanged. But distribution also includes situations where individuals simply share his or her stash with a friend or family member or where an individual serves as the point person to procure drugs for a group of people intending to share in the bounty.[105] While homicide statutes were not drafted with the distribution of drugs in mind (as homicide is a traditional common-law offense, and there was no such thing as an illegal drug until the twentieth century), this is a creative tool that states and localities have employed without federal interference. Governments may be limited by other provisions of criminal law or by court interpretations of that law but not by the intercession of other layers of government.

Relatedly, in twenty states (and under federal law), prosecutors have specific drug-induced homicide statutes, otherwise known as "Len Bias laws."[106] While these statutes were drafted primarily to address the harms caused by persons central to the illicit drug trade, the State is often including people who distribute drugs by giving them to friends and family or buying them on behalf of those associates.[107] States are not stretching the legal definition of "distribution" in doing so—it includes situations where a friend hands

104. *See, e.g.*, Walmsley v. State, 131 N.E. 3d 768, 773–74 (Ind. Ct. App. 2019) (dismissing the charge where the prosecutor charged a man with felony murder after he injected his wife with heroin); State v. Shell, 501 S.W.3d 22, 29–32 (Mo. Ct. App. 2016) (reversing voluntary manslaughter conviction because court determined the defendant did not have a duty to seek medical care for the friend who overdosed on heroin that he provided).

105. Drug distribution statutes generally do not require that a person who is charged be a person who sells illicit substances as a professional; distribution broadly covers people who transfer drugs to others. *See, e.g.*, Long v. United States, 623 A.2d 1144, 1151 (D.C. 1993) (holding that distribution covers circumstance where one person uses money pooled from friends to purchase drugs for a group with intent to give the friends drugs once purchased); Rosa Goldensohn, *You're Not a Drug Dealer? Here's Why the Police Might Disagree*, N.Y. TIMES (May 25, 2018), https://nyti.ms/2SGVOGN [https://perma.cc/ULE6-M7LS] (providing an overview of drug-sharing circumstances considered to be distribution in criminal law). Many jurisdictions do have a joint-user defense that applies when two people purchase drugs together for joint use, although both people may need to be present. *See, e.g.*, State v. Morrison, 902 A.2d 860, 866–71 (N.J. 2006) (upholding dismissal of distribution and drug-induced homicide charges in case where trial court determined defendant was a joint user).

106. *See* Beety, *supra* note 98, at 710–11 (noting that almost half of states have such statutes).

107. *See supra* note 99; Beletsky, s*upra* note 98, at 869–75.

over drugs without payment.[108] Prosecutors are exercising discretion, however, to prosecute people by inaccurately describing joint users as drug distributors.[109] Good Samaritan laws offer some limited protections to persons present at the scene of an overdose—forty states recognize that prosecuting individuals who are present may deter them from seeking assistance when a person overdoses or might cause them to abandon the person entirely. However, these laws usually only protect people from being charged with possession of an illegal drug or provide an affirmative defense to prosecution for possession.[110] Good Samaritan laws generally do not shield people from punishment where a prosecutor seeks to bring homicide charges.[111]

The perverse pressures of federalism therefore favor criminalization. There is not an easy doctrinal way around this problem. And, to the extent that we might be tempted to aggressively argue that the federal government should defer to state and local interests, that approach might have less desirable effects in other police areas. The federal government can, of course, voluntarily desist from enforcing existing criminal law. Criminal law does not self-execute—it reflects the discretionary decisions of the persons entrusted to enforce it.[112] There are certainly times we might be concerned that prosecutors are exercising that discretion questionably, particularly where the discretion is exercised in ways that discriminate against traditionally disfavored subgroups.

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108. *Cf.* 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://wapo.st/3bCDuXS [https://perma.cc/6LXC-LG32] (describing similar federal prosecution for distribution of heroin resulting in death under a federal statute with a 20-year mandatory minimum sentence; the defendant purchased and used heroin with the victim and left her in a KFC restroom).

109. *See* Beety, *supra* note 98, at 738–39 (noting that the majority of persons charged in drug-induced homicide cases are fellow users, rather than people generally involved in the illegal drug trade).

110. *See* Nicole Schill, Note, *The Fatal Shortcomings of Our Good Samaritan Overdose Statutes and Proposed Model Statute*, 25 CARDOZO J. EQUAL RTS. & SOC. JUST. 123, 126, 139 (2018). Such statutes generally do not provide immunity against or a defense to prosecution for distribution offenses. *See id*. at 145.

111. Only Vermont and Delaware provide more comprehensive immunity. *See Good Samaritan Fatal Overdose Prevention Laws*, DRUG POL'Y ALL., https://bit.ly/2SH3o47 [https://perma.cc/Z48N-6YLN] (last visited Mar. 4, 2020).

112. *See, e.g.*, ANGELA J. DAVIS, ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR 18 (2007) (stating that prosecutors have vast discretionary power that is largely unreviewed).

IV. THE PERVERSE DYNAMICS OF FEDERALISM IN THE AFTERMATH OF THE WAR ON DRUGS

Advocates for robust federalism have long offered a stylized list of arguments in favor of state and local autonomy.[113] First, federalism is said to maximize the number of people who can realize their preferences as natural local majorities adopt different rules and policies, and dissenters vote with their feet to join more appealing communities.[114] Second, federalism serves to encourage participatory democracy, as decisions affecting people's lives are made closer to home and in smaller groups.[115] Third, federalism is meant to diffuse power, thereby reducing the risk of tyranny and creating conditions in which liberty can flourish.[116] Finally, as Justice Brandeis famously suggested, federalism allows states to serve as laboratories of democracy. They may pilot programs that, if effective, can be expanded more broadly.[117]

The dynamics of drug regulation under contemporary federalism doctrine make the achievement of each of these objectives impossible. Some of federalism's ostensible objectives are expressly undercut by the actual operation of federalism in this arena. For example, the ability of two (and sometimes three or more) levels of government to independently impose criminal sanctions upon drug-related behavior, and to use those criminal laws to unilaterally veto harm-reduction approaches to drug policy, ensures that large swathes of the country who want to reduce criminal penalties, decriminalize certain drugs, and shift drug policy paradigm cannot actualize their preferences. This is so even in areas where those swathes constitute a substantial majority of the population.[118] Similarly, the independent authority of each level of government to impose incarcerative sentences and thwart popular reform efforts means that, in the drug policy context, federalism undercuts rather

113. *See, e.g.*, Gregory v. Ashcroft, 501 U.S. 452, 458–60 (1991); Erwin Chemerinsky, *The Assumptions of Federalism*, 56 STAN. L. REV. 1763, 1768–69 (2006); *see also generally* Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903 (1994) (laying out arguments in great detail while also sharply and humorously critiquing them).

114. *See generally, e.g.*, Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956) (offering a classic example).

115. *See, e.g.*, DAVID SHAPIRO, FEDERALISM: A DIALOGUE 91–92 (1995).

116. For James Madison's version of this argument, see THE FEDERALIST NO. 51 (James Madison). For a modern scholarly take, see Andrzej Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism after Garcia*, 1985 SUP. CT. REV. 341, 380–95 (1985).

117. *See* New State Ice Co. v. Liebmann, 285 U.S. 262, 310–11 (1932) (Brandeis, J, dissenting).

118. *See generally* Section II *supra*.

than enhances liberty—whether liberty is defined as individual freedom from excessive restraint[119] or as a collective ability to actively pursue a particular vision of the good life.[120]

Other objectives of federalism are not so much undercut as they are warped by the dynamics of drug regulation. As discussed throughout this Article, drug policy federalism allows those who want to impose creative prosecutorial approaches the ability to experiment. But federalism snuffs out all states' attempts to serve as laboratories for harm-reduction and other non-criminal approaches to drug policy.[121] Similarly, small local groups who favor aggressive use of existing laws to prosecute drug offenders or oppose the creation of safe consumption sites in their neighborhoods have the ability to influence drug policy-making at the local level. Ultimately, those who advocate for alternative approaches are required to organize and/or persuade at the national level.[122]

As this Article has noted, safe consumption sites are hardly the first battlefield for federal versus state or local interests in the arena of drug criminalization.[123] When states began legalizing marijuana for medical use in 1996, the federal government prosecuted businesses and individuals who sold and possessed marijuana, although resource constraints made it difficult or impossible for the federal government to stamp out medical marijuana.[124] At this point, the federal government appears to have reached a fragile decision not to prosecute marijuana offenses in jurisdictions that have legalized its use.[125]

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119. *See generally, e.g.*, THE FEDERALIST No. 51 (James Madison); JOHN STUART MILL, ON LIBERTY (1859).

120. *See, e.g.*, STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION (2005).

121. *Compare* Section II *supra* (documenting difficulty of adopting creative approaches that focus on harm reduction) *with* Section III *supra* (documenting ease with which localities pursue creative prosecutorial strategies).

122. For the consequences of failing to win support at the national level, see Sessions, *supra* note 12 (revoking Obama-era guidance protecting state-authorized marijuana buyers and sellers from federal prosecution); *see also supra* note 57 (noting Justice Department actions to block proposed safe-consumption site under federal law).

123. *See supra* note 11 and accompanying text.

124. *See* Alex Kreit, *Reflections on Medical Marijuana Prosecutions and the Duty to Seek Justice*, 89 DENV. L. REV. 1027, 1033–41 (2012) (documenting federal enforcement efforts in medical marijuana context); Robert A. Mikos, *On the Limits of Supremacy: Medical Marijuana and the States' Overlooked Power to Legalize Federal Crime*, 62 VAND. L. REV. 1421, 1482 (2009).

125. *See infra* note 12 and accompanying text.

But the federal government has made a markedly different decision thus far on safe consumption sites.[126] It is reasonably clear that federal courts may end up going the *Safehouse*[127] route. Courts may decide to constrain the federal government from enforcing the "federal crack house" statute against states and localities that wish to establish safe consumption sites—such a decision would be based on interpreting the statute in a way that does not cover such sites.[128] However, courts are not going to prevent the federal government from using provisions of the CSA to prosecute people who plan to enter safe consumption sites to use drugs they have purchased elsewhere.[129] It is too early to be confident that other federal courts will indeed follow the *Safehouse* court's lead. Still, it is possible that federal courts will, at the least, prevent federal prosecutors from wielding the "federal crack house" statute to stop states and localities from establishing safe consumption sites in the first place. This would hopefully provide states and localities with the encouragement they need and with relief from concerns about federal prosecution for sites the states authorize or fund.[130]

Federal executive restraint may be a problematic strategy for other reasons but would be a less conditional path forward. One way in which the perverse federalism problem could be curtailed (familiar territory for DOJ) is through the adoption of federal prosecution principles or guidelines that are consistent with permitting state experimentation with safe consumption sites.[131] The Obama Administration's Cole memorandum[132] offers a reasonable

126. *See supra* notes 52–75 and accompanying text.

127. United States v. Safehouse, 408 F. Supp. 3d 583 (E.D. Pa. 2019).

128. *See id.*

129. *See* George D. Brown, *Counterrevolution?—National Criminal Law After Raich*, 66 OHIO ST. L.J. 947, 972–73 (2005) (noting that the Court in Gonzalez v. Raich, 545 U.S. 1 (2005) held that a state's decision to legalize medical marijuana did not displace pertinent provisions of the federal CSA, meaning that states cannot override federal criminal law).

130. *See supra* notes 55–59 (explaining that some states are reluctant to authorize safe consumption sites in whole or in part because of the threat of prosecution under the federal crack house statute).

131. The executive branch may be best situated to address the problems with expansive federal criminal law, as the judiciary has been reluctant to do so because of the Commerce Clause, and as Congress may be constrained by the broad way in which it drafts statutes and by electoral incentives. *See* Simons, *supra* note 3, at 930.

132. Memorandum from James M. Cole, Deputy Att'y Gen., to all United States Attorneys, Guidance Regarding Marijuana Enforcement (Aug. 29, 2013), https://bit.ly/3a0n1vf [https://perma.cc/HB22-59MC]. This memorandum followed an announcement in 2009 by then-Attorney General Eric Holder that the Department of Justice would not prosecute federal marijuana offenses against persons complying with state medical marijuana laws. *See* Memorandum from David W.

blueprint for federal decision making in the prosecution of crimes with concurrent state jurisdiction. The memorandum makes clear that the federal government retains the ability to prosecute drug offenses where federal law criminalizes the underlying behavior. But the memorandum also assured state and local jurisdictions that, absent particular federal interests as outlined in a handful of specific categories, the federal government would not prosecute cannabis offenses in states that had determined to legalize its use.[133]

Implementing similar federal DOJ guidelines could constrain federal prosecution to situations where federal interests are substantial.[134] Here, the state and local interest in operating safe consumption site is considerable. First, and most importantly, safe consumption sites are empirically supported.[135] If states and localities are to serve as "laboratories of democracy," it makes less sense for them to run experiments resulting in greater harm; that is neither the intent nor the reality of supervised consumption sites. Second, if the states and localities were operating in an area primarily considered a federal sphere, it would not make sense for the federal government to refrain from enforcement. Here, states and localities—bearing the burden of dealing with the harms of substance use disorders—clearly are trying to protect the health and welfare of their citizens, which is something primarily considered a state function.[136]

Further, federal prosecution guidelines have downsides: they may be difficult for the DOJ to enforce against regional prosecutors, and they do not bind future administrations.[137] Safe consumption sites would not open with the security of no future prosecution or injunction. Importantly, the smaller scale of supervised consumption sites (which would make the sites easier to prosecute) may lower the risk of establishing programs—there are fewer resources invested in these programs, and they are not envisioned as revenue generators.

There are also legislative routes to resolving the federalism issues. Such solutions would resolve issues directly in ways that would not be as vulnerable to particular presidential administra-

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Ogden, Deputy Att'y Gen., to Selected U.S. Attorneys, Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana (Oct. 19, 2009), https://bit.ly/2PhdFDe [https://perma.cc/7BMG-738L].

133. *See* Cole Memorandum, *supra* note 132.

134. *See id*.

135. *See supra* notes 43, 49, and works cited therein.

136. *See supra* notes 113–17 and accompanying text.

137. *See* Robert A. Mikos, *A Critical Appraisal of the Department of Justice's New Approach to Medical Marijuana*, 22 STAN. L. & POL'Y REV. 633, 634 (2011).

tions or election cycles. Congress can determine not to appropriate money for prosecutions related to safe consumption site operations where sites comply with state law, as it has done with respect to marijuana prosecutions.[138] Congress could not only withhold money from "federal crack house" statute prosecutions of supervised consumption facilities but could also bar the federal government from using federal funds to thwart state supervised consumption regimes. Congress can go a step further and enact legislation that would forbid federal prosecutors from targeting safe consumption sites in states that have made them legal. The Strengthening the Tenth Amendment Through Entrusting States ("STATES") Act, for example, represents a sensible approach if utilized in the opioid context. This act—sponsored by Senators Elizabeth Warren and Cory Gardner—would exempt from federal law enforcement any individuals or corporations that are in compliance with state cannabis law in possession, production, distribution, or sales (even where those entities would otherwise be in violation of federal law).[139] The STATES Act has not yet passed as of this publication, but, as a bill with bipartisan sponsors, it represents Congress's willingness to permit states to retain/regain authority to address drug use within their borders. Similar legislation could exempt from the CSA and the "federal crack house" statute (to the extent that courts ultimately hold it applies) safe consumption sites that are compliant with state law.

If anything, the arguments in favor of permitting states and localities to experiment with safe consumption sites are more persuasive than those in favor of permitting them to legalize marijuana. The scale of the enterprise contemplated is much smaller than the billion-dollar recreational marijuana industry. States that have legalized recreational sales boast large numbers of marijuana retailers.[140] States that permit medical use of marijuana also offer long

138. *See* Maura Dolan, *Feds Can't Spend Money to Prosecute People Who Comply with State Medical Pot Laws, Court Rules*, L.A. TIMES (Aug. 16, 2016, 1:20 PM), http://lat.ms/2P3r8OX [https://perma.cc/FQ5W-JXA9] (noting that Congress has barred the federal government from spending money in a manner that would foil state medical marijuana laws).

139. *See* Sen. Elizabeth Warren & Sen. Cory Gardner, *The STATES Act*, ELIZABETH WARREN, https://bit.ly/31XLcra [https://perma.cc/DR3Y-5BP4] (last visited Dec. 29, 2019).

140. *See, e.g.*, Thomas Mitchell, *Colorado Cannabis Dispensary Counter: Growth from 2014 to 2018*, WESTWORD (Denver) (Jan. 15, 2018, 8:12 AM), https://bit.ly/2HsBVOH [https://perma.cc/VP59-C5SQ] (noting that Colorado had 509 retail cannabis dispensaries as of 2018).

lists of available outlets.[141] In contrast, most states where supervised consumption sites are being considered envision one or two pilot locations in the state's largest urban centers.[142] While states have an incentive to expand legal cannabis because of the tax revenue legalization states currently enjoy, there is no serious argument that states wish to encourage opioid use (or misuse) through the establishment of safe consumption sites. Rather, states and localities are responding to extraordinary, concerning overdose numbers with a public policy supported by empirical evidence that it will reduce the number of deaths and ameliorate the amount of collateral harm associated with opioid use.

One significant countervailing argument is that legalized marijuana regimes typically involve extensive state regulation and oversight, which diminishes a federal need to be involved in state affairs. Even if marijuana poses a less compelling threat to public health than do opioids (although this may not be reflected in either historic federal drug enforcement priorities or the classification of marijuana as a schedule one drug under the CSA), states have developed legal regimes to oversee the cannabis enterprise. The movement towards safe consumption sites is less uniform and centralized; in Philadelphia, the proposed safe consumption site is being initiated by a nonprofit organization while the state merely permits it to proceed.[143] To the extent the federal government worries about ad hoc local efforts undermining federal drug policy, the lack of structure might fuel concern.

The federal government—and state governments wishing to exercise authority over local affairs—also has fewer practical constraints on its ability to prosecute safe-consumption-site-related offenses than it has had with respect to marijuana offenses. The federal government's efforts to use its authority to interfere with marijuana legalization were foiled, at least in part, because of the

141. The Washington State Department of Health, for example, lists at least 186 retailers in Washington state. *See Marijuana Retail Stores with Medical Endorsement List*, WASH. STATE DEPT. OF HEALTH (Dec. 2019), https://bit.ly/31ZQMJG [https://perma.cc/F9UY-J5BC]; *see also* Rick Aaron, *Utah to Get 14 Cannabis Dispensaries, but Where Will They Be Located?*, ABC4 NEWS (Sept. 17, 2019, 5:27 PM), https://bit.ly/39H4gMW [https://perma.cc/J22R-L8TR]. Utah, which has more recently authorized medical dispensaries only, will have 14 outlets by the time such dispensaries are legal in March of 2020. *Id.*

142. *See, e.g.*, Dominic Fracassa, *California Bill Allowing San Francisco Safe Injection Site Reintroduced*, S.F. CHRON. (Feb. 4, 2019, 8:44 PM), https://bit.ly/2SSrsky [https://perma.cc/H84H-7TSN] (noting that state legislation to permit safe consumption site contemplates a single site in San Francisco).

143. *See supra* notes 55–56 and accompanying text.

proliferation of marijuana distributors.[144] Marijuana legalization enjoys broad public approval;[145] safe consumption sites rest on a more fragile foundation of support.[146] Still, when the federal government was involving itself in state medical marijuana efforts in the late 1990s, public support for legalizing marijuana was similarly underwater.[147] Prosecution has not yet eliminated the harms of opioid use disorder, and while past drug epidemics were largely linked in the public imagination to disfavored subgroups, now there appears to be more awareness that substance use disorder cuts across race and class.[148] The Trump administration is already under fire for failing to take sufficient action to combat opioid use disorders.[149] Between the departure of personnel like Jeff Sessions, who seemed more intent on re-waging the war on drugs,[150] the initiation of impeachment proceedings[151] that may absorb the DOJ, and public discontent with the administration's opioid efforts, it is possible that the administration could be persuaded to stand down from opposing safe consumption sites. Whether or not the current administration's law-and-order turn constrains an impetus to limit

144. *See supra* note 59, at 439.

145. At this point, two-thirds of Americans support legalizing marijuana. *See* Andrew Daniller, *Two-Thirds of Americans Support Marijuana Legalization*, PEW RES. CTR. (Nov. 14, 2019), https://pewrsr.ch/2uTDMJo [https://perma.cc/EV5S-Z8CG] (noting that at this point only 8% of Americans think marijuana should be illegal for use in all circumstances).

146. Twenty-nine percent of Americans approve of creating safe consumption sites in their communities. *See* Emma E. McGinty et al., *Public Support for Safe Consumption Sites and Syringe Service Programs to Combat the Opioid Epidemic*, 111 PREV. MED. 73, 74 (2018).

147. In 1999, only 31 percent of Americans supported legalizing marijuana. *See supra* note 145.

148. *See supra* note 5 and accompanying text.

149. *See, e.g.*, Ashley Parker & Felicia Sonmez, *Trump Defends Administration's Response to Opioid Crisis: "We Will Never Stop Until Our Job Is Done"*, WASH. POST (Apr. 25, 2019, 10:53 AM), https://wapo.st/32aC171 [https://perma.cc/LJP7-V65J] (noting that the administration had been criticized for supplying insufficient funding to treatment programs); Alexander Mallin, *Despite Gains, Trump Administration Response to Opioid Crisis Still Faces Criticism*, ABC NEWS (Mar. 4, 2018, 1:08 PM), https://abcn.ws/39LtidT [https://perma.cc/8D2E-2PJ3].

150. *See* Rakesh Sharma, *What Does the Departure of Jeff Sessions Mean for the Cannabis Industry*, INVESTOPEDIA (June 25, 2019), https://bit.ly/2wruiWJ [https://perma.cc/222X-KMJF] (noting that cannabis stocks surged after Session's departure because of his positions on cannabis); Peter Baker et al., *Jeff Sessions is Forced Out as Attorney General as Trump Installs Loyalist*, N.Y. TIMES (Nov. 7, 2018), https://nyti.ms/2V45kGT [https://perma.cc/F38M-XYKZ] (indicating Sessions was an advocate for tougher criminal sentencing).

151. *See* Nicholas Fandos & Michael D. Shear, *Trump Impeached for Abuse of Power and Obstruction of Congress*, N.Y. TIMES (Dec. 18, 2019), https://nyti.ms/2v2rzIV [https://perma.cc/E2NN-W8VX].

prosecutorial discretion, future administrations are likely to be more open.

In spite of similar federal scheduling, however, the general consensus would likely be that opioid misuse poses a greater public health threat than marijuana consumption. Certainly, there have been historic concerns about the effects of marijuana use; marijuana continues to be characterized by some as a gateway drug that leads to more serious drug use. Even under legalization regimes, states continue to worry about cannabis use by minors and motor vehicle operation by people under the influence. Still, it is not a particularly controversial assertion that the dangers of opioid misuse exceed those of marijuana use. Therefore, the federal government might be more justified in interfering with state and local experimentation. Simply put, the stakes may be higher.

Nevertheless, even to the extent the federal government disagrees with the concept of supervised consumption sites (from both a moral and empirical perspective), there is no serious suggestion that states or localities are actually interested in encouraging or expanding injection drug use. Federal authorities may believe that supervised consumption sites tacitly lend government approval of drug use or encourage satellite crimes. But there is no actual allegation that the individuals who operate supervised consumption sites do so because they wish to encourage substance use disorders. Rather, federal disapproval of supervised consumption sites stems from policy disagreement. The current presidential administration has clearly articulated its position: supervised consumption sites will not sufficiently link substance use disorders to treatment and are at odds with a message and practice of abstinence.[152] But the goals of the federal, state, and local governments are all aligned. They all seek to eradicate opioid substance use disorder. The question is how best to do so, not whether.

Under such circumstances, it makes sense to respect the model of federalism that permits state and local governments to engage in experimentation to protect the welfare of residents.[153] As I have noted, the federal government is not constitutionally or doctrinally constrained from intervention.[154] Unlike in the marijuana legalization context, the federal government probably has the resources to shut down safe consumption.[155] However, it should step back and disengage from criminal law enforcement under circumstances

152. *See supra* notes 52–75 and accompanying text.
153. *See supra* notes 113–17 and accompanying text.
154. *See supra* notes 118–22 and accompanying text.
155. *See supra* notes 144–46 and accompanying text.

where it ordinarily would not intervene and where state and local governments are engaged in policymaking intended to promote the health and well-being of their citizens. The federal government should do so even where, as here, it sincerely disagrees with the policy. Further, the case for disengagement here is strengthened by the federal government's lack of willingness thus far to pass comprehensive policy to address substance use disorder.

CONCLUSION

States and localities currently face a major impediment to introducing harm-reduction strategies to ameliorate the effects of substance use disorder. It is easy for states and localities to decide to prosecute or incarcerate themselves out of a perceived opioid crisis. But moving forward with a public-health-oriented strategy, like a supervised consumption site, requires all levels of government to agree not to prosecute, even under circumstances where the federal government generally would not intervene. Even if a state decides to permit or promote safe consumption sites, localities may balk and try to prosecute.[156] All of this pressure perversely favors expensive punitive approaches, even though so far there is scant evidence that such approaches have curtailed the harms of substance use.[157] It is time for a different approach.

Changing this landscape to permit state and local experimentation will take persuasion and work, but it is within the realm of possibility. Twenty years ago, punitive, criminal-law approaches were the default to perceived social problems. This is especially true with substance use, which spawned an entire critical literature regarding the one-way ratchet of criminal law.[158] Enthusiasm for criminal law approaches has waned for a variety of reasons, and substantial criminal justice reforms over the past several years sig-

156. In states that have legalized marijuana, for example, some localities nevertheless have banned marijuana dispensaries. *See* Robert Mikos, *Marijuana Localism*, 65 CASE W. RES. L. REV. 719, 720 (2015). Given the experience in Washington state where several localities have banned safe consumption sites (see note 79 *supra*), even if a state wished affirmatively to promote safe consumption sites, presumably people using and supervising such sites still could be subject to criminal sanctions.

157. *See generally* Section IV *supra* (explaining how perverse dynamics of federalism empower states when they behave punitively but not when the behave in a harm-reduction mode).

158. For a representative article in this genre, see Eric Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, 719 (2005) (arguing that criminal law expands because politicians have an incentive to criminalize but not to decriminalize).

nal an openness to alternatives.[159] States and localities, whether out of optimism or desperation, are at least partially open to the harm-reduction approaches advocates have promoted for decades. It is time to adjust the perverse dynamics of federalism to encourage communities to implement empirically supported strategies to minimize the harms of substance use. It is no longer efficient to throw the same old criminal law at the wall, hoping to get a different result.

159. *See generally supra* note 5 (forthcoming 2020).