Reflections on the Effects of Federalism on Opioid Policy

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Thank you to the Dickinson Law Review for this opportunity to offer concluding remarks on today's wonderful symposium. I would like to close by extracting and reflecting on a few themes that our terrific speakers have touched upon that I would encourage us all to walk away with.

One thing we have seen today that we talk about in health law all the time is how the policy, the laws and institutions up at the 10,000 foot level, can so dramatically influence the personal, people's lived experiences. Our speakers today have done a really great job of drawing out abstract institutional questions and also showing us how those questions have influenced the lives of real people in often tragic ways.

Another thing we have seen that we talk about in administrative law all the time is the importance of expertise, especially given how hard it is to trace the impact of laws and institutions on real life. Thank you to our amazing experts who have come a long way to share with us great insights about the really important issue of substance use disorder, and showing us that there really are good answers and bad answers, and maybe even right answers and wrong answers. We have heard important insights about causes, effects, and real solutions that they and other researchers have produced by studying incredibly complicated problems in depth. These problems are nuanced and they are complicated and that is part of what makes expertise so valuable.

Before we walk away, I would like to take a moment to dwell on a third theme, which is that knowing the right answer or having

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the expertise is not necessarily enough to get that answer executed in policy and then to have it impact people on a personal level. Experts certainly can and should try to persuade—and we have talked a bit about how best to do so—to figure out the answers and just go tell the people the answers and get them to vote, or tell policymakers the best way to handle the problem they face. But we have seen throughout the day that persuasion is often not enough, in part because of structural barriers that inhibit the ability of those with power or authority to be persuaded, or otherwise constrain or impede their choices even when they are persuaded.

One of the structural barriers that inhibits persuasion that our speakers discussed is narrative, and specifically the issue of problem definition. Professor El-Sabawi's work is an excellent illustration of how the way we define a problem can define where and how we look for solutions[1]—*e.g.*, is the substance use disorder crisis a pharmaceutical industry problem, a personal problem, or (as Professors Beletsky and Burris both persuasively emphasized this morning), is it a regulatory failure problem? How we conceptualize the problem, our narrative, can influence which solutions we can be persuaded to focus on.

Consider me persuaded that voters, legislators, bureaucrats, and legal scholars, at least, should see the problem the way Beletsky and Burris see it: as a regulatory failure. Indeed, our laws and institutions are the only lever we have to try to change the future, so even if there are multiple causes, the regulatory failure is a good one for us to focus upon. The question then becomes why our laws and institutions have been failing, and how to build better laws and institutions. That is one reason why I am focusing as we close on the underlying structural barriers that limit policymakers' capacity to be persuaded or to implement those policies they believe are best.

A recurring theme today has been that federalism can and has acted in many ways as a structural barrier to policymakers implementing the changes recommended by experts. A state policymaker simply cannot adopt a policy that is preempted by federal law, whether she thinks it is a good idea or not. And where the federal government and states share responsibility, two policymakers must be persuaded, not just one.

Of course, federalism also can facilitate reform; it may well be easier to persuade a county official that local circumstances justify a

1. *See* Taleed El-Sabawi, *Defining the Opioid Epidemic: Congress, Pressure Groups, and Problem Definition*, 48 U. MEMPHIS L. REV. 1357 (2018).

special rule for a local treatment provider than it is to persuade a federal official to make such a tailored policy choice. And a successful or pioneering experiment in a related setting is always helpful in advocating for a policy change.[2]

Relatedly, I would like to make explicit an implicit theme that has run through today's presentations, and that is that of a third structural barrier to successful SUD policy—fiscal fragmentation—and the interaction of that barrier with federalism. My scholarship often focuses on appropriations and budgeting issues, and it is very clear today that the fiscal fragmentation of the United States has inhibited our regulatory system when it comes to SUD in meaningful ways.

First, we have been reminded again and again today that money really matters in shaping the choices people and policymakers make. Even when it comes to a relatively straightforward goal like reducing drug overdoses, and even where the things that tend to reduce or increase overdoses are clear, dollars and cents influence the policy that we implement. A few examples include Professor El-Sabawi's discussion of how health insurers are motivated to deny coverage based on adverse selection, which rewards them financially for doing so[3]; Professor Noah's description of New York's use of an excise tax to generate resources to build treatment and prevention programs[4]; and Professor Ahrens' discussion of how one reason prosecutors at the federal level do not investigate and prosecute medical marijuana at the state level is because doing so is so resource intensive.[5]

In short, money matters. And that sets the stage for an interaction that sets us up for failure. Federalism facilitates a fiscal narrative—a narrative about money, about costs and benefits, about tradeoffs—that fragments and hides the costs of the crisis. One fragmentation is that between different "public" entities and pro-

2. Deborah Ahrens, *Safe Consumption Sites and the Perverse Dynamics of Federalism in the Aftermath of the War on Drugs*, 124 DICK. L. REV. 101, 124 (suggesting federal policies "consistent with permitting state experimentation with safe consumption sites").

3. *See* Taleed El-Sabawi, *MHPAEA and Marble Cake: Parity and the Forgotten Frame of Federalism*, 124 DICK. L. REV. 101, 126–27 (2020).

4. *See* Lars Noah, *State Regulatory Responses to the Prescription Opioid Crisis: Too Much to Bear?*, 124 DICK. L. REV. 101, 117–18 (2020) (describing use of excise tax in New York to fund "treatment and other responses to opioid addiction").

5. *See* Deborah Ahrens, *Safe Consumption Sites and the Perverse Dynamics of Federalism in the Aftermath of the War on Drugs*, 124 DICK. L. REV. 101, 123 (2020) ("resource constraints made it difficult or impossible for the federal government to stamp out medical marijuana").

grams. Thanks to federalism you have costs fragmented across the federal government, then state governments, then county government, tribal authorities, and so on. The question is often not "what do we [collectively] pay," but something like "what is Medicaid paying," "what is Medicare paying," and so on? Or "what are the police paying," "what are the healthcare providers paying," "what are the courts paying," etc. All of the costs of the SUD crisis get fragmented, and that is just at the public level. But then we further fragment by dividing "public" and "private" costs and often ignoring the "private." There are costs for family members who have to drive someone to court, there are costs for a person whose life is disrupted due to a disease that doesn't get treatment, there are costs for suffering communities. If we just add up taxes, revenues, and so on, those "private" costs are not even on the balance sheet.

This fragmentation is another barrier to reform that has contributed to the regulatory failure that Professors Beletsky and Burris described. Professor Burris' talk offered several reasons for the regulatory failure fueling the SUD crisis, and in almost every case you had a mismatch in which a single entity or group of entities bore benefits but costs were spread out over a fragmented array of entities. For example, the benefits of overprescribing were concentrated in particular pharmaceutical companies, who were therefore motivated and able to promote prescriptions, but the ultimate costs of over-prescribing were spread out across many different types of entities including the individuals impacted, their families, and the various institutions and programs involved in treating SUD or absorbing the costs when SUD goes untreated. That is the sort of situation in which public choice theorists would predict regulatory failure, and notably, that mismatch between concentrated benefit and dispersed cost is itself a byproduct of federalism and fiscal fragmentation.

If fiscal fragmentation is a structural barrier to better policy, what do we do about it? That question will have to wait for another day but I do want to note in this regard an insight Professor Sharkey offered in her talk that is relevant. Professor Sharkey describes how a court adjudicating claims brought by states and municipalities against manufacturers has the opportunity to develop the full story of the underlying regulatory failure.[6] Among other benefits, litigation can have narrative value, serving as an opportunity to construct and elaborate a more complete story of costs and

6. *Cf.* Catherine M. Sharkey, *The Opioid Litigation: The FDA is MIA*, 124 DICK. L. REV. 101, 124 (2020) ("[t]o date, only bits and pieces of the FDA's prescription opioid regulatory history" have been considered by courts").

actions than what is otherwise available in our fragmented system. One line of inquiry, based on that, might be to explore other opportunities to tell a complete, unified story even if fiscal fragmentation persists among the players that make policy.

Finally, the clearest theme throughout the day has been that at Dickinson Law we are very lucky to have amazing students. The editors of the *Law Review* have put on a terrific symposium. I feel privileged to work with them. As law review advisor watching the editors come up with this idea, to focus on federalism and opioid policy, and then to see them execute it, and then see this day go so well, I feel very proud of them. I think we should close with a last round of applause for the students. Thank you all for coming and for focusing today on these important issues.

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