

## Undeterred: On the North Carolina General Assembly’s Decision to Double Down on Criminalizing the Opioid Epidemic\*

*Responding to the state’s persistent opioid crisis, the North Carolina General Assembly recently enacted Senate Bill 189, a Bill that heightens the fines levied for opioid trafficking and expands the scope of North Carolina’s death by distribution statute, which provides for second-degree murder charges against anyone who shares drugs with someone who subsequently overdoses on those drugs. This Recent Development explains that new legislation, and it argues that the heightened fines may be ripe for a constitutional challenge under the Excessive Fines Clause and that the expanded homicide crimes may worsen the crisis they purport to address.*

### INTRODUCTION

In 2018, the North Carolina Office of the Chief Medical Examiner found that 1,229 North Carolinians died of fentanyl-positive overdoses—thirty-one percent more than the 936 such deaths in 2017, and almost triple the 442 such deaths in 2016.<sup>1</sup> In response, in 2019, the North Carolina General Assembly created a “death by distribution” criminal offense as a “deterrent” to illegal opioid distribution.<sup>2</sup> The new law promised to “hold illegal drug dealers accountable” and classified the death by distribution offense—which could be brought against anyone who sold or delivered drugs to someone who died from overdosing on those drugs—as a species of second-degree murder.<sup>3</sup> But within three years, fentanyl-positive overdose deaths had almost tripled again, increasing to 3,354 in 2022.<sup>4</sup> Undeterred, the legislature doubled down in 2023 by strengthening the “death by distribution” offense and significantly increasing the criminal fines imposed for trafficking in opioids.<sup>5</sup>

---

\* © 2025 Drew Alexander.

1. NC OFF. CHIEF MED. EXAM’R (OCME) TOXICOLOGY, FENTANYL-POSITIVE DEATHS, NORTH CAROLINA OFFICE OF THE CHIEF MEDICAL EXAMINER (OCME) TOXICOLOGY DATA: DEC 2023, at 1 (2024) [hereinafter NC OCME].

2. Act of June 28, 2019, ch. 83, 2019 N.C. Sess. Laws 390 (codified as amended at N.C. GEN. STAT. § 14-18.4). This Recent Development refers to this Act as “H.B. 474.”

3. *Id.* § 1; N.C. GEN. STAT. § 14-18.4 (2024).

4. NC OCME, *supra* note 1, at 1. That rate held nearly constant across 2023, during which there were 3,341 reported fentanyl-positive overdose deaths. *Id.*

5. Act of Sept. 20, 2023, ch. 123, 2023 N.C. Sess. Laws \_\_ (codified at N.C. GEN. STAT. §§ 90-95(h)(4), 14-17, 14-18.4). This Recent Development refers to this Act as “S.B. 189.”

Advocates of the new legislation argued that the increasingly severe problem called for an increasingly severe response.<sup>6</sup> But this Recent Development argues that the General Assembly's continued reliance on criminal law to counter the opioid epidemic amounts to little more than obduracy and may be ripe for a constitutional challenge. Part I provides the legislative background, introducing the General Assembly's recent legislation and its statutory context. Part II develops a constitutional challenge to the new criminal fines for opioid trafficking under the Eighth Amendment's Excessive Fines Clause. Part III examines the futility of the "death by distribution" offense as a means to combat the opioid epidemic in light of both comparable state and federal legislation and the implementation of that offense in North Carolina thus far.

#### I. BACKGROUND: DEATH BY DISTRIBUTION AND CRIMINAL FINES IN SENATE BILL 189

On March 1, 2023, the General Assembly introduced Senate Bill 189 ("S.B. 189") as an updated response to the opioid epidemic through the arm of the criminal law.<sup>7</sup> S.B. 189 had two principal components: (1) an increase of the criminal fines for a set of drug trafficking offenses, and (2) an expansion of the death by distribution offense.<sup>8</sup> Both changes took the form of amendments: the increased fines were amendments to the North Carolina Controlled Substances Act,<sup>9</sup> and the expansion of the death by distribution offense was an amendment to North Carolina's statutory scheme for homicide offenses.<sup>10</sup> S.B. 189 met little legislative opposition, receiving unanimous support in the Senate and passing with a four-fifths majority in the House.<sup>11</sup> On September 28, 2023, less than

6. See Zach Solon, *Bill Increasing Fentanyl Distribution Penalties Passes in N.C. Senate*, WECT NEWS 6, <https://www.wect.com/2023/03/08/bill-introduced-nc-general-assembly-could-change-fentanyl-distribution-penalties/> [<https://perma.cc/ALG4-XL24>] (last updated Mar. 14, 2023, 5:33 PM).

7. *Senate Bill 189/SL2023-123*, N.C. GEN. ASSEMBLY, <https://www.ncleg.gov/BillLookup/2023/S189> [<https://perma.cc/UKH2-3DHF> (staff-uploaded archive)].

8. Act of Sept. 20, 2023, §§ 1, 2.(a), 2.(b). The Bill has two additional substantive parts; part III adds a section to the Good Samaritan immunity statute, now covering Good Samaritans who possess less than a gram of fentanyl, heroin, or "any controlled substance." *Id.* § 3. Part IV creates an enforcement task force. *Id.* § 4.

9. *Id.* § 1; N.C. GEN. STAT. §§ 90-86 to -113.8 (2024).

10. Act of Sept. 20, 2023, §§ 2.(a), 2.(b); N.C. GEN. STAT. §§ 14-17, 14-18.4 (2024).

11. According to the legislative record, the Bill passed 45-0 in the Senate and 81-20 in the House. See *Senate Bill 189/SL2023-123*, *supra* note 7. The predecessor death by distribution statute, H.B. 474, received slightly less support in the Senate but comparable support in the House in 2019. See *House Bill 474/SL 2019-83*, N.C. GEN. ASSEMBLY, <https://www.ncleg.gov/BillLookup/2019/H474> [<https://perma.cc/2M6D-M7F6> (staff-uploaded archive)].

two weeks after a final House vote in favor of the Bill, Governor Cooper signed S.B. 189 into law without comment.<sup>12</sup>

S.B. 189's two principal amendments appear, on their face, to be simple extensions of prior law rather than wholesale changes.<sup>13</sup> Fines increase, and the scope of a homicide offense broadens. As a result, the General Assembly's decision to make these amendments appears to be predicated on a simple assumption: the current law was not sufficiently severe or broad to accomplish its purpose. But the General Assembly offered no findings about whether the preexisting law had proved successful, even if only incrementally so. Nor did the General Assembly offer evidence that the new amendments would squarely address the preexisting law's shortcomings. This part describes both amendments and their statutory contexts.

#### A. *Increased Criminal Fines for Drug Trafficking*

The North Carolina Controlled Substances Act primarily serves as the statutory basis for criminalizing the manufacture, sale, delivery, and possession of controlled substances, pursuant to the schedules of controlled substances the Act establishes.<sup>14</sup> Within the Act, section 90-95(h)<sup>15</sup> establishes a heightened offense—drug trafficking—for offenses involving larger amounts of certain controlled substances: marijuana;<sup>16</sup> methaqualone;<sup>17</sup> cocaine, methamphetamine, and amphetamine;<sup>18</sup> and opioids.<sup>19</sup>

Each trafficking offense carries a mandatory sentencing range and a minimum criminal fine.<sup>20</sup> For each substance, the statute establishes at least three tiers of sentences and fines—the larger the amount of the substance involved, the longer the sentence and greater the fine.<sup>21</sup> S.B. 189 specifically amended the opioid trafficking offense by carving out heroin, fentanyl, and carfentanil from the class of opioids and increasing the mandatory minimum

12. *Governor Cooper Signs Three Bills, Vetoes One Bill*, N.C. OFF. GOVERNOR (Sept. 28, 2023), <https://governor.nc.gov/news/press-releases/2023/09/28/governor-cooper-signs-three-bills-vetoes-one-bill> [<https://perma.cc/59AH-AWTX> (staff-uploaded archive)]. Significantly, regardless of the governor's response, S.B. 189 had sufficient legislative support to override a veto. *See* N.C. CONST. art. II, § 22(1).

13. Act of Sept. 20, 2023, §§ 1, 2.(a), 2.(b).

14. *See* N.C. GEN. STAT. §§ 90-86 to -113.8.

15. *Id.* § 90-95(h).

16. *Id.* § 90-95(h)(1).

17. *Id.* § 90-95(h)(2).

18. *Id.* § 90-95(h)(3).

19. *Id.* § 90-95(h)(4).

20. *Id.* § 90-95(h).

21. *Id.*

criminal fines for those three substances.<sup>22</sup> The opioid trafficking offense distinguishes between three ranges of opioid quantity: (1) four to fourteen grams, (2) fourteen to twenty-eight grams, and (3) more than twenty-eight grams.<sup>23</sup> Prior to S.B. 189, those distinct ranges provided for three corresponding tiers of fines: (1) \$50,000, (2) \$100,000, and (3) \$500,000.<sup>24</sup> S.B. 189 multiplied the lowest-tier fine tenfold to \$500,000, increased the middle-tier fine more than sevenfold to \$750,000, and doubled the highest-tier fine to \$1,000,000.<sup>25</sup>

Curiously, S.B. 189 only amended the fines. The General Assembly left the mandatory sentencing ranges unchanged.<sup>26</sup> Consider, for example, section 90-95(h)(4)(a)(1), the provision governing offenses involving between four and fourteen grams of opioids. A conviction under that provision carries a mandatory sentence of seventy to ninety-three months,<sup>27</sup> and S.B. 189 increased the fine under that provision from \$50,000 to \$500,000. Within the broader context of section 90-95(h), that change stands in stark relief. All of the other trafficking offenses in section 90-95(h) that carry the same mandatory sentence impose much lower fines: a \$50,000 fine for 2,000 to 10,000 pounds of marijuana;<sup>28</sup> a \$50,000 fine for 5,000 to 10,000 dosage units of methaqualone;<sup>29</sup> and a \$100,000 fine for 200 to 400 grams of cocaine.<sup>30</sup>

Through this amendment, then, S.B. 189 untethered the criminal fines imposed on trafficking fentanyl, heroin, and carfentanil from both the criminal sentences served for the same trafficking offense and the fines imposed alongside comparable trafficking sentences. Part II considers that disjunction as a point of departure for a constitutional challenge to S.B. 189's fines under the state constitution's Excessive Fines Clause.

#### B. *Expanded Scope of Death by Distribution Offense*

North Carolina's General Assembly first created a "death by distribution" offense in 2019 by adding a new subsection to the statutory scheme for homicide

22. Act of Sept. 20, 2023, ch. 123, sec. 1, § 90-95(h)(4), 2023 N.C. Sess. Laws \_\_, \_\_ (codified at N.C. GEN. STAT. § 90-95(h)(4)).

23. *Id.*

24. *Id.*

25. *Id.*

26. *See id.*

27. N.C. GEN. STAT. § 90-95(h)(4)(a)(1) (2024).

28. *Id.* § 90-95(h)(1)(c).

29. *Id.* § 90-95(h)(2)(b).

30. *Id.* § 90-95(h)(3)(b).

crimes.<sup>31</sup> The law’s express purpose, articulated in the preamble to House Bill 474 (“H.B. 474”), was to “act as a greater deterrent to persons who want to illegally distribute opioids and further exacerbate the opioid epidemic.”<sup>32</sup> And the law’s legislative intent, codified within the statute, was to “encourage effective intervention by the criminal justice system to hold illegal drug dealers accountable for criminal conduct that results in death.”<sup>33</sup>

H.B. 474 created two distinct offenses: a default offense of death by distribution of certain controlled substances, and an “aggravated” version of the same offense.<sup>34</sup> The “aggravated” offense escalated the felony level for individuals with prior drug trafficking offenses and thus entailed a more severe sentence.<sup>35</sup> H.B. 474 classified the default offense as a Class C felony and the aggravated offense as a Class B2 felony.<sup>36</sup> Each offense was treated as a species of second-degree murder, with the default offense classified as a lesser included offense under the aggravated offense.<sup>37</sup> The offenses yielded sentences comparable to second-degree murder, rape, and kidnapping, with presumptive sentencing ranges, depending on a defendant’s prior record level, ranging from approximately five to twenty-six years.<sup>38</sup>

The General Assembly characterized the original death by distribution offenses as targeting “high-level drug dealers,”<sup>39</sup> and the law was generally understood to target those who *sold* the drugs that proximately caused an overdose.<sup>40</sup> However, the original statutory language relied solely on “distribution” and was not constrained to “sale.”<sup>41</sup>

31. Act of June 28, 2019, ch. 83, sec. 1, § 14-18.4, 2019 N.C. Sess. Laws 391, 391–92 (codified as amended at N.C. GEN. STAT. § 14-18.4).

32. *Id.*

33. *Id.*; N.C. GEN. STAT. § 14-18.4(a) (2024).

34. Act of June 28, 2019, § 1.

35. *Id.*

36. *Id.*

37. *Id.*; N.C. GEN. STAT. § 14-17(b) (2024).

38. N.C. GEN. STAT. § 15A-1340.17 (2024). The actual presumptive ranges are 58 to 314 months, with mitigation potentially bringing the minimum down to 44 months and aggravation potentially bringing the maximum up to 393 months. *Id.*

39. Steve Daniels, *New Law Allows NC Drug Dealers to Be Charged with Murder*, ABC NEWS (July 8, 2019), <https://abc11.com/opiod-murder-charge-crime/5384754/> [https://perma.cc/J5VA-83E2].

40. See, e.g., Taylor Knopf, *NC Prosecutors Want Harsher Punishments for Drug Dealers. Advocates Say Their Proposal Will Cause More Overdoses*, N.C. HEALTH NEWS (Mar. 27, 2023), <https://www.northcarolinahealthnews.org/2023/03/27/advocates-say-overdoses-to-increase-if-north-carolina-enacts-harsher-punishments-for-drug-distribution/> [https://perma.cc/Q2KS-QMRL] (“In 2019, lawmakers passed a ‘death by distribution’ law that allows prosecutors to charge someone with second degree murder if they *sell* drugs to someone who then dies of an overdose.” (emphasis added)).

41. Solon, *supra* note 6.

S.B. 189’s amendments make the prior focus on “sale” explicit by adding language to the preexisting sections that established the offenses—what once was “distribution” has now been amended to “distribution *through unlawful sale*.”<sup>42</sup> But by adding two new subsections that established two new offenses, the amendments also broadened the scope of the law to reach beyond those who sell drugs that lead to overdose deaths.<sup>43</sup> The new subsections create the offense of “death by distribution *through unlawful delivery*” and a second parallel offense of “death by distribution through unlawful delivery *with malice*.”<sup>44</sup> Advocates of S.B. 189 see these new offenses as closing a “loophole” left by H.B. 474—namely, that H.B. 474 did not expressly provide for prosecution of those who merely *shared*, but did not *sell*, the substance that led to an overdose victim’s death.<sup>45</sup>

The resulting four death by distribution offenses share three nearly identical elements: (1) the person “unlawfully delivers”<sup>46</sup> or “unlawfully sells”<sup>47</sup> a controlled substance; (2) the ingestion of that substance causes the death of the user;<sup>48</sup> and (3) the unlawful delivery<sup>49</sup> or sale<sup>50</sup> was the proximate cause of the victim’s death. The only remaining distinctions between the offenses are the branching of the delivery and sale offenses into two forms each: death by distribution through unlawful delivery with malice straightforwardly adds a malice element to the default delivery offense,<sup>51</sup> and death by distribution through unlawful sale adds an “aggravated” element based on prior trafficking offenses to the default sale offense.<sup>52</sup>

Accordingly, of the four death by distribution offenses, only death by distribution through unlawful delivery *with malice* requires a mens rea. All of the other offenses, including the one with the highest sentence, are strict liability offenses. Part III considers the nature of strict liability in this context as a point of departure for arguing that this broadening of the death by distribution offenses, which in their original form never proved effective, is not likely to produce a new and more successful set of outcomes.

42. Act of Sept. 20, 2023, ch. 123, sec. 2(b), § 14-18.4, 2023 N.C. Sess. Laws \_\_, \_\_ (codified at N.C. GEN. STAT. § 14-18.4) (emphasis added).

43. *Id.*

44. *Id.* (emphasis added).

45. Solon, *supra* note 6.

46. N.C. GEN. STAT. § 14-18.4(a1)–(a2) (2024).

47. *Id.* § 14-18.4(b)–(c).

48. *Id.* § 14-18.4(a1)(2), (a2)(3), (b)(2), (c)(2).

49. *Id.* § 14-18.4(a1)–(a2).

50. *Id.* § 14-18.4(b)–(c).

51. *Id.* § 14-18.4(a2)(2).

52. *Id.* § 14-18.4(c)(5).

## II. AN EXCESSIVE FINES CHALLENGE TO NORTH CAROLINA'S CRIMINAL FINES FOR HEROIN AND FENTANYL TRAFFICKING

The North Carolina Constitution protected against excessive fines even before the United States Constitution and the Eighth Amendment were adopted.<sup>53</sup> But today, North Carolina courts regard the excessive fines analysis under the state constitution as identical to the excessive fines analysis under the Eighth Amendment of the United States Constitution.<sup>54</sup> Because the Supreme Court's excessive fines jurisprudence is limited,<sup>55</sup> North Carolina's courts have likewise had little to say about excessive fines.<sup>56</sup> This part looks first to the Supreme Court's Excessive Fines Clause precedents, second to North Carolina's application of those precedents, and third to the grounds for developing an excessive fines challenge against the significantly increased fines imposed via S.B. 189.

### A. *The United States Supreme Court's Limited Excessive Fines Jurisprudence*

The United States Supreme Court's limited set of excessive fines precedents offer narrow purchase to plaintiffs bringing challenges. The Court did not substantively interpret the Excessive Fines Clause until *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*<sup>57</sup> in 1989.<sup>58</sup> There, Justice Blackmun wrote that the Court had previously “never considered an application of the Excessive Fines Clause.”<sup>59</sup> And in the thirty-six years since *Browning-Ferris*, the Court has only substantively reviewed the clause four more times.<sup>60</sup>

53. N.C. CONST. art. I, § 27.

54. *State v. Sanford Video & News, Inc.*, 146 N.C. App. 554, 557, 553 S.E.2d 217, 219 (2001) (“As the wording of the clause under our North Carolina Constitution is identical to that of the United States Constitution, our analysis is the same under both provisions.”).

55. See *infra* notes 57–60 and accompanying text.

56. See *infra* note 77 and accompanying text.

57. 492 U.S. 257 (1989).

58. *Id.* at 262. Justice Scalia once described the Excessive Fines Clause as having been “rescued from obscurity” by *Browning-Ferris*. *Dep’t of Revenue v. Kurth Ranch*, 511 U.S. 767, 803 n.2 (1994) (Scalia, J., dissenting).

59. *Browning-Ferris*, 492 U.S. at 262. The scholarly literature agrees with Blackmun’s assessment. See, e.g., Elizabeth S. Jahncke, Note, *United States v. Halper, Punitive Civil Fines, and the Double Jeopardy and Excessive Fines Clauses*, 66 N.Y.U. L. REV. 112, 143–44 (1991); Beth A. Colgan, *Revisiting the Excessive Fines Clause*, 102 CALIF. L. REV. 277, 297 (2014); Kevin Bennardo, *Restitution and the Excessive Fines Clause*, 77 LA. L. REV. 21, 27 (2016); Daniel S. Harawa, *How Much Is Too Much? A Test to Protect Against Excessive Fines*, 81 OHIO ST. L.J. 65, 81 (2020).

60. See generally *Alexander v. United States*, 509 U.S. 544 (1993) (remanding a case based on a defendant being required to forfeit his business for racketeering to analyze the “fine” under the Excessive Fines Clause); *Austin v. United States*, 509 U.S. 602 (1993) (holding that forfeiture of

The narrative of those Excessive Fines Clause cases has been told at length elsewhere,<sup>61</sup> so the doctrinal developments can be summarized succinctly. In *Browning-Ferris*, the Court issued a narrow holding—namely, that the Excessive Fines Clause “does not constrain an award of money damages in a civil suit when the government neither has prosecuted the action nor has any right to receive a share of the damages awarded.”<sup>62</sup> In doing so, the Court resisted ruling on the precise scope of the Excessive Fines Clause: “[w]e need not go so far as to hold that the Excessive Fines Clause applies just to criminal cases.”<sup>63</sup>

Four years later, however, in two cases decided on the same day, the Court affirmatively expanded the scope of the Excessive Fines Clause beyond criminal cases. In *Austin v. United States*<sup>64</sup> and *Alexander v. United States*,<sup>65</sup> the Court held that the clause “limits the government’s power to extract payments, whether in cash or in kind, as punishment for some offense.”<sup>66</sup> And, in *Austin*, the Court held for the first time that civil penalties—or, minimally, civil forfeitures—were functionally punishment and thus constrained by the Excessive Fines Clause.<sup>67</sup> Therefore, in the early development of the Excessive Fines Clause jurisprudence, the Court was primarily concerned with the clause’s scope, and specifically with whether the clause applied to civil penalties, on the assumption that the plain language of the clause was addressed to fines imposed pursuant to criminal convictions.

Five more years later, in *United States v. Bajakajian*,<sup>68</sup> the Court ruled for the first time on the standard for excessiveness.<sup>69</sup> There, the Court held that the “touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality: the amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish.”<sup>70</sup> Consequently, “a punitive forfeiture violates the Excessive Fines Clause if it is

---

property involved in drug offenses is subject to the Excessive Fines Clause, even if the forfeiture is for a remedial purpose); *United States v. Bajakajian*, 524 U.S. 321 (1998) (holding that a forfeiture that is grossly disproportional to the level of defendant’s offense violated the Excessive Fines Clause); *Timbs v. Indiana*, 139 S. Ct. 682 (2019) (holding that the Excessive Fines Clause is incorporated by the Fourteenth Amendment and enforceable against the states).

61. See, e.g., Bennardo, *supra* note 59, at 27–32; Harawa, *supra* note 59, at 81–92.

62. *Browning-Ferris*, 492 U.S. at 263–64.

63. *Id.* at 263.

64. 509 U.S. 602 (1993).

65. 509 U.S. 544 (1993).

66. *Austin*, 509 U.S. at 609–10; *Alexander*, 509 U.S. at 558.

67. *Austin*, 509 U.S. at 622.

68. 524 U.S. 321 (1998).

69. *Id.* at 334. Both *Austin* and *Alexander* left the “excessiveness” determination to the lower courts on remand. *Austin*, 509 U.S. at 622–23; *Alexander*, 509 U.S. at 559.

70. *Bajakajian*, 524 U.S. at 334.



grossly disproportional to the gravity of a defendant’s offense.”<sup>71</sup> Applying that standard to the facts in *Bajakajian*, the Court held that a \$357,144 currency forfeiture for a “reporting offense . . . unrelated to any other illegal activities” that carried a maximum fine of \$5,000 was grossly disproportional.<sup>72</sup>

*Bajakajian* represents the last doctrinal development of Excessive Fines Clause protections and the only one applicable to criminal fines. The Supreme Court’s only remaining excessive fines case, *Timbs v. Indiana*,<sup>73</sup> simply held that the clause was in fact incorporated by the Fourteenth Amendment and is thus applicable to the states.<sup>74</sup> Accordingly, the Court has only made two substantive rulings on the Excessive Fines Clause: (1) the clause imposes limits on payments (including civil forfeitures) made to a sovereign as punishment for some offense, and (2) excessiveness is evaluated under a “gross disproportionality” standard. But the scholarly literature reflects discontent with the current status of the Excessive Fines Clause jurisprudence—jurisprudence that one scholar characterizes as “inchoate” and rife with “doctrinal uncertainty.”<sup>75</sup>

#### B. *Excessive Fines in North Carolina*

The Excessive Fines Clause jurisprudence in North Carolina courts is likewise limited and inchoate. Because the Excessive Fines Clause analysis under the North Carolina Constitution mirrors the analysis under the Eighth Amendment, North Carolina courts apply the “grossly disproportional” standard from *Bajakajian* for determinations of excessiveness.<sup>76</sup> Few challenges to applications of the Excessive Fines Clause have made their way into the published opinions of North Carolina courts, and those that do have resulted in dismissals of the challenges.<sup>77</sup>

The North Carolina Court of Appeals recognized an Excessive Fines Clause challenge in *State v. Sanford Video & News, Inc.*<sup>78</sup> as a matter of “first

71. *Id.*

72. *Id.* at 339–40.

73. 586 U.S. 146 (2019).

74. *Id.* at 151.

75. Nicholas M. McLean, *Livelihood, Ability to Pay, and the Original Meaning of the Excessive Fines Clause*, 40 HASTINGS CONST. L.Q. 833, 843 (2013).

76. *State v. Sanford Video & News, Inc.*, 146 N.C. App. 554, 558, 553 S.E.2d 217, 219 (2001).

77. *See State v. Zubierna*, 251 N.C. App. 477, 488, 796 S.E.2d 40, 48 (2016) (holding that a \$1,000 fine was not excessive); *State v. Bedford*, 167 N.C. App. 655, 605 S.E.2d 743, 2004 WL 2940854, at \*2 (2004) (unpublished table decision) (holding that a \$2,500 fine was not excessive); *State v. Oliver*, 343 N.C. 202, 209, 470 S.E.2d 16, 21 (1996) (holding that a \$50 fee was not excessive).

78. 146 N.C. App. 554, 553 S.E.2d 217 (2001).

impression” in 2001.<sup>79</sup> There, an entity subjected to a \$50,000 fine for disseminating obscenity raised an excessive fines challenge on two separate grounds: (1) that the fine was disproportional to the crime committed, and (2) that the fine was disproportional to the defendant’s financial resources.<sup>80</sup> The court rejected both arguments. First, the fine was not disproportional to the crime committed because, according to the court, disseminating obscenity was significantly harmful to the community and the defendant earned substantial income from the crime’s commission.<sup>81</sup> And second, the fine was not disproportional to the defendant’s resources because, according to the court, a review of the defendant’s assets suggested that any lesser fine would not be large enough to function as a deterrent rather than as an “acceptable price of doing business.”<sup>82</sup>

But the *Sanford Video* holding did provide some guidance for future excessive fines challenges. First, the court took express notice of two factors in determining the proportionality of the fine to the crime: (1) the severity of the crime committed, and (2) the income earned from the crime.<sup>83</sup> Second, although the court rejected the defendant’s resources-based challenge, the court did review and consider the defendant’s finances.<sup>84</sup> That is, the court did not say that the financial resources of the defendant were irrelevant to the inquiry. Instead, the court found that the fine was not excessive *because* the defendant had adequate resources.<sup>85</sup>

### C. *An Excessive Fines Challenge to S.B. 189*

Although North Carolina appellate courts have rejected all challenges brought under the Excessive Fines Clause since *Sanford Video*,<sup>86</sup> S.B. 189’s amendments to section 90-95(h)(4) ripen the fines under that provision for an excessive fines challenge.<sup>87</sup> That section’s lowest-level offense, which involves between four and fourteen grams of opioids under section 90-95(h)(4)(1),

79. *Id.* at 557, 553 S.E.2d at 219.

80. *Id.* at 558–59, 553 S.E.2d at 219–20.

81. *Id.* at 559, 553 S.E.2d at 220.

82. *Id.* at 559–60, 553 S.E.2d at 220.

83. *Id.* at 559, 553 S.E.2d at 220.

84. *Id.* at 559–60, 553 S.E.2d at 220.

85. *Id.*

86. *See supra* note 77 and accompanying text.

87. Professor Phil Dixon made this suggestion first around the time S.B. 189 took effect. *See* Phil Dixon, *New Trafficking Fines Coming for Heroin, Fentanyl, and Carfentanil*, N.C. CRIM. L.: UNC SCH. GOV’T BLOG (Nov. 22, 2023), <https://nccriminallaw.sog.unc.edu/new-trafficking-fines-coming-for-heroin-fentanyl-and-carfentanil/> [<https://perma.cc/2Z36-9PZH>].

presents the best case for such a challenge.<sup>88</sup> S.B. 189 increased the fine imposed under that offense tenfold from \$50,000 to \$500,000,<sup>89</sup> and in doing so the Bill untethered the fine for heroin and fentanyl possession from both the fines for possession of other controlled substances and the sentences imposed for comparable possession.<sup>90</sup> Defendants could raise Excessive Fines Clause challenges on at least three grounds.

First, challengers could argue that the new fines are grossly disproportional to the other criminal fines imposed under the same statute. The lowest fine under section 90-95(h)(4)(1) is at least double the fines imposed for trafficking of any other substance under section 90-95(h).<sup>91</sup> The next highest fines in section 90-95(h) are \$250,000 fines imposed for more than 400 grams of cocaine, amphetamines, methamphetamines, or MDMA.<sup>92</sup> As a result, someone convicted of trafficking 100 times the amount of cocaine (400 grams) as someone convicted of trafficking fentanyl (4 grams) is subject to half the fine. Yet, on the street, fentanyl is typically cheaper than cocaine.<sup>93</sup> Such a result runs directly counter to the law's purported rationale—to go after “high-level drug dealers.”<sup>94</sup>

Consider, for example, the contrast between the lowest-level fentanyl fine and the highest-level fine for illegal marijuana distribution. Individuals convicted of trafficking in greater than *10,000 pounds* of marijuana are subject to a fine of \$200,000.<sup>95</sup> The distinction between the potency and danger of the two drugs could reasonably explain a relatively large disparity between the two fines. Notwithstanding that significant distinction, a law that actually targets high-level drug dealers should arguably be more interested in someone running an operation capable of managing more than 10,000 pounds of marijuana at once than in someone holding less than one millionth of that weight—four grams, or one-seventh of an ounce—in fentanyl or heroin. Thus, by untethering the fines for heroin and fentanyl from any reasonable correlation to the fines for all other controlled substances, S.B. 189 imposes grossly disproportional fines—it levies fines on users or low-level dealers that are more than double the fines levied on the most sophisticated traffickers of other controlled substances.

88. N.C. GEN. STAT. § 90-95(h)(4)(a)(1) (2024).

89. See Act of Sept. 28, 2023, ch. 123, sec. 1, § 90-95(h)(4), 2023 N.C. Sess. Laws \_\_, \_\_ (codified at N.C. GEN. STAT. § 90-95(h)(4)).

90. See *supra* Section I.A.

91. See N.C. GEN. STAT. § 90-95(h).

92. *Id.* § 90-95(h)(3)(c), (3b)(c), (3d)(c), (4b)(c).

93. *Fentanyl DrugFacts*, NAT'L INST. ON DRUG ABUSE (2021), <https://nida.nih.gov/publications/drugfacts/fentanyl> [<https://perma.cc/A5RP-FDRW>].

94. See *supra* note 39 and accompanying text.

95. N.C. GEN. STAT. § 90-95(h)(1)(d).

Second, and correlatively, challengers could argue that the unchanged mandatory sentencing ranges offer evidence that the new fines are grossly disproportional to the underlying offense. By leaving the mandatory sentencing ranges unchanged, the General Assembly effectively codified mixed messages about the level of deterrence it thought necessary to deter fentanyl and heroin possession. Section 90-95(h)(4)(1) carries a mandatory sentencing range of seventy to ninety-three months.<sup>96</sup> Every other trafficking offense that carries the same sentence carries a \$50,000 fine, with the exception of cocaine, which carries a \$100,000 fine.<sup>97</sup> Arguably, then, the \$500,000 fine is grossly disproportional to the sentence still deemed reasonable by the General Assembly. This argument gets perhaps the most purchase internal to the class of opioids themselves. Previously, all opioid offenses carried the same sentence and fine, regardless of which opioid was in question.<sup>98</sup> After S.B. 189, commonly abused opioids like oxycontin and oxycodone now carry the same mandatory prison sentence but one-tenth the fine as does the exact same amount of heroin or fentanyl.<sup>99</sup> From October 2023 through September 2024, heroin and fentanyl overdoses accounted for fewer than one-third of the emergency department visits for opioid overdoses in North Carolina.<sup>100</sup> But S.B. 189 carves out fentanyl, heroin, and carfentanil for disproportionately higher fines.

Moreover, this form of the gross disproportionality argument—comparing the fines to the mandatory sentences—undercuts the potential counterargument that a drug like fentanyl merits a higher fine because it is more widely used and abused. The gross disproportionality argument that relies on the disparity between sentences and fines reveals that such counterarguments bear the burden of showing why, if the heightened abuse justifies a higher fine (which defendants are less likely to be able to pay), it nevertheless does not justify a longer sentence. The underlying inconsistency of such a counterargument suggests that the increased fines do not serve their ostensible purpose. Instead, by effectively ensuring that anyone convicted of the lowest-level fentanyl trafficking offense may lose their house, if they have one, as a result of civil forfeiture pursued for the satisfaction of the criminal fine, the enhanced fines ensure that those convicted of even the lowest-level fentanyl trafficking offense

---

96. *Id.* § 90-95(h)(4)(a).

97. *Id.* § 90-95(h)(1)(c), (1a)(c), (2)(b), (3)(b), (3b)(a), (4a)(b), (4b)(b).

98. *See* Act of Sept. 28, 2023, ch. 123, sec. 1, § 90-95(h)(4), 2023 N.C. Sess. Laws \_\_, \_\_ (codified at N.C. GEN. STAT. § 90-95(h)(4)).

99. *Id.*

100. N.C. DEP'T OF HEALTH & HUM. SERVS., NORTH CAROLINA EMERGENCY DEPARTMENT (ED) VISITS FOR OPIOID OVERDOSE: SEPTEMBER 2024, at 1 (2024).

are threatened with the loss of the last vestiges of personal security they may have.

Third, and alongside the two preceding arguments based on the gross disproportionality standard established in *Bajakajian*, challengers could marshal an argument based on the factors established by the North Carolina Court of Appeals in *Sanford Video*. In considering *Sanford Video*'s initial reference to the severity of the underlying crime and the income earned from it, challengers might point to the vast disparity between the street cost of fentanyl and the fine imposed. Even assuming the highest average street prices of fentanyl, four grams likely cost less than \$250 (in lower cost markets, the price is likely less than half that).<sup>101</sup> That means the ratio of the fine to the street cost is at least 200,000:1. To recall, in *Bajakajian* the United States Supreme Court found a fine grossly disproportional when it led to a \$357,144 forfeiture for an offense with a penalty of \$5,000.<sup>102</sup> The two circumstances are not directly analogous, but their relationship is nevertheless instructive: the excessive fine in *Bajakajian* represented a ratio of less than 72:1. And although the effect of the underlying crime can be severe—in the event of an overdose, for example—separate criminal statutes, like the death by distribution offense discussed in Part III, already exist to account for those circumstances. By contrast, the average individual caught with four grams of heroin is more likely to be engaging in a much less severe crime—the maintenance of untreated drug addiction.

Moreover, as-applied challenges in North Carolina could point to the North Carolina Court of Appeals' willingness in *Sanford Video* to consider the relevance of defendant's finances when assessing the proportionality of the fine.<sup>103</sup> Only for the highest-level drug dealers would fines starting at \$500,000 likely be proportional. For someone selling or buying fentanyl by the gram—or even by the ounce—that fine is likely to entail a civil forfeiture of all of that person's assets. As a result, the increased fines imposed by S.B. 189 present future litigants a clear path for challenges under the state constitution's Excessive Fines Clause.

### III. NORTH CAROLINA'S DEATH BY DISTRIBUTION LAW

North Carolina's death by distribution law is predicated on the assumption that criminalizing and severely punishing opioid use serves a productive

---

101. David Sjostedt, *Why Is Fentanyl Drastically Cheaper in San Francisco than in LA, NYC, and Philly?*, S.F. STANDARD (Jan. 22, 2024, 5:00 AM), <https://sfstandard.com/2024/01/22/cheap-street-fentanyl-san-francisco/> [<https://perma.cc/9HSA-N7AD>].

102. *United States v. Bajakajian*, 524 U.S. 321, 339–40 (1998).

103. *State v. Sanford Video & News, Inc.*, 146 N.C. App. 554, 559–60, 553 S.E.2d 217, 220 (2001).

deterrent role and functions as an important element of the government's response to the opioid epidemic. But the experiment thus far in North Carolina suggests otherwise: even as the number of death by distribution prosecutions has ramped up,<sup>104</sup> the yearly rate of opioid overdose deaths has risen even more quickly.<sup>105</sup> This part articulates a critique of S.B. 189's expansion of the death by distribution offense under the guise of pursuing deterrence: namely, that death by distribution prosecutions are not, in fact, primarily brought against the high-level drug dealers legislators purport to target.

Despite political and law enforcement insistence that North Carolina's death by distribution law targets high-level drug dealers,<sup>106</sup> low-level dealers and mere users are not only not exempt from prosecution but are routinely the individuals charged with death by distribution. Daniel Lee Masciotti, for example, was convicted of death by distribution for the fatal overdose of his girlfriend after he purchased crack cocaine for them to inject and injected her with cocaine at her request.<sup>107</sup> Similar circumstances led to a charge of death by distribution against Nicholas Ivey, a nineteen-year-old who facilitated a fentanyl transaction between a drug dealer and Ivey's sixteen-year-old girlfriend, who died after ingesting the drugs purchased in that transaction.<sup>108</sup> These cases suggest that those charged with death by distribution may be partners, friends, or even family members of the overdose victim.

S.B. 189 makes such charges more likely by expressly providing for death by distribution by *delivery*—requiring neither sale nor malice. Under the plain language of the Bill,<sup>109</sup> an overdose victim's friend and fellow user could now be charged with the same offense that would also be brought against their drug

104. Brandon Morrissey, Taled El-Sabawi & Jennifer J. Carroll, *Prosecuting Overdose: An Exploratory Study of Prosecutorial Motivations for Drug-Induced Homicide Prosecutions in North Carolina*, 125 INT'L J. DRUG POL'Y 1, 4 (2024) (showing that the number of death by distribution prosecutions nearly doubled from forty-two to eighty-one within one year of the offense's introduction).

105. NC OCME, *supra* note 1, at 1 (showing that opioid overdose deaths more than doubled during the three-year period following the introduction of North Carolina's first death by distribution offense in 2019).

106. See Act of June 28, 2019, ch. 83, 2019 N.C. Sess. Laws 390 (codified as amended at N.C. GEN. STAT. § 14-18.4) (explaining the purpose of the predecessor legislation in the preamble); Daniels, *supra* note 39 (“Lawmakers and law enforcement say it is needed to put away high-level drug dealers.”).

107. *Man Gets Prison Time for Girlfriend's Death*, WECT NEWS, <https://www.wect.com/story/37077339/man-gets-prison-time-for-girlfriends-overdose-death/> [<https://perma.cc/HL46-UU8F>] (last updated Dec. 15, 2017, 4:16 PM).

108. Kara Fohner, *Man Convicted in Fentanyl Death of Teenager*, GASTON GAZETTE (May 2, 2023, 9:11 AM), <https://www.gastongazette.com/story/news/courts/2023/05/02/man-convicted-in-fentanyl-death-of-teenager/70169222007/> [<https://perma.cc/P6CB-LVF7>].

109. Act of Sept. 28, 2023, ch. 123, sec. 2.(b), § 14-18.4, 2023 N.C. Sess. Laws \_\_, \_\_ (codified as amended at N.C. GEN. STAT. § 14-18.4).

dealer. For example, consider *State v. McCrorey*,<sup>110</sup> the only published North Carolina appellate case that concerns a death by distribution charge.<sup>111</sup> In *McCrorey*, a drug dealer was charged with death by distribution after he sold a gram of heroin and a gram of cocaine to a woman named Michelle, who split the drugs with her friend Kayla.<sup>112</sup> Kayla subsequently died of an overdose from ingesting the drugs.<sup>113</sup> Under S.B. 189, someone like Michelle, who split the cost of drugs and delivered them to the user who overdosed, could be charged alongside the dealer.<sup>114</sup> Michelle's complicity in the events that led to Kayla's death is clear. But so too is the difference between Michelle and the dealer—and S.B. 189 erases that difference under the law.

Empirical data reflect the erasure of that difference. A 2021 study led by Jennifer Carroll at North Carolina State University concluded that “[t]he best data available . . . indicate that the people most often charged under [drug-induced homicide] laws are the friends and family of overdose decedents” who, like most drug users, “sell or deliver [drugs] to friends and relatives on occasion.”<sup>115</sup> And that conclusion, in turn, built on earlier research suggesting that “half of those charged with drug-induced homicide were not, in fact, ‘dealers’ in the traditional sense, but friends and partners to the deceased.”<sup>116</sup>

North Carolina is far from the only state to attempt to address the effects of the opioid crisis through the arm of the criminal law.<sup>117</sup> But the experiments with state and federal drug-induced homicide laws<sup>118</sup> only corroborate the nascent evidence in North Carolina that such laws fail to accomplish their

110. 291 N.C. App. 650, 896 S.E.2d 309 (2023).

111. *Id.* at 651, 896 S.E.2d at 309.

112. *Id.* at 651–53, 896 S.E.2d at 312–13.

113. *Id.* at 652–53, 896 S.E.2d at 312–13.

114. Effectively, this aspect of S.B. 189 undermines the so-called joint-user defense that applies in some other jurisdictions and shields a copurchaser from liability under a death by distribution or drug-induced homicide statute. See Valena E. Beety, Alex D. Kreit, Anne Boustead, Jeremiah Gouka & Leo Beletsky, *Drug-Induced Homicide: Challenges and Strategies in Criminal Defense*, 70 S.C. L. REV. 707, 713–22 (2019).

115. Jennifer J. Carroll, Bayla Ostrach, Loftin Wilson, Jesse Lee Dunlap, Reid Getty & Jesse Bennett, *Drug Induced Homicide Laws May Worsen Opioid Related Harms: An Example from Rural North Carolina*, 97 INT'L J. DRUG POL'Y 1, 1 (2021) [hereinafter Carroll et al., *Laws May Worsen Harms*].

116. Leo Beletsky, *America's Favorite Antidote: Drug-Induced Homicide in the Age of the Overdose Crisis*, 2019 UTAH L. REV. 833, 874 [hereinafter Beletsky, *America's Favorite Antidote*].

117. Jennifer D. Oliva & Taled El-Sabawi, *The “New” Drug War*, 110 VA. L. REV. 1103, 1136–37 (2024) (“Nearly half the states, the federal government, and the District of Columbia currently have a drug-induced homicide (or drug delivery resulting in death) law on the books . . .”).

118. North Carolina's death by distribution offense falls squarely within the broader category of drug-induced homicide laws. See Morrissey et al., *supra* note 104, at 2 (characterizing North Carolina's death by distribution law as a drug-induced homicide law).

purpose.<sup>119</sup> For example, when Rosa Goldensohn reported on this dynamic in 2018, she looked at a six-month period during which eighty defendants were charged with drug-induced homicide in Pennsylvania and found that fifty-nine of the eighty defendants were drug users, and almost half “had a relationship with the victim other than that of a dealer.”<sup>120</sup> The anecdotes reported by Goldensohn were uniformly tragic—including, among others, individuals who had shared drugs with their partners, overdosed with their partners, and then survived while their partners died, only to subsequently face prosecution for the “murder” of their partners.<sup>121</sup>

Prosecutions of family, friends, and fellow users not only target the wrong people but also disincentivize individuals from seeking medical assistance for a friend or fellow user experiencing an overdose. In most states, including North Carolina, so-called “Good Samaritan” laws afford a degree of legal immunity for individuals who seek such assistance.<sup>122</sup> But high-profile prosecutions under drug-induced homicide laws have been found to undercut drug users’ willingness to rely on Good Samaritan laws because they fear the legal consequences that could ensue for them if their friend or fellow user ultimately died from the overdose.<sup>123</sup>

The dark irony of S.B. 189 is that, alongside the increased fines and expanded death by distribution offense, the Bill also slightly broadened the state’s Good Samaritan law so that it provided immunity not only from prosecution for possession of less than one gram of cocaine or heroin, but from prosecution “for possession of less than one gram of *any controlled substance*”—providing, for example, immunity for some fentanyl users.<sup>124</sup> But that slight expansion does nothing to mitigate other hard limits on the scope of Good

119. See DRUG POL’Y ALL., AN OVERDOSE DEATH IS NOT MURDER: WHY DRUG-INDUCED HOMICIDE LAWS ARE COUNTERPRODUCTIVE AND INHUMANE 40–41 (2017); Kaitlin S. Phillips, Note, *From Overdose to Crime Scene: The Incompatibility of Drug-Induced Homicide Statutes with Due Process*, 70 DUKE L.J. 659, 672–73 (2020); Beletsky, *America’s Favorite Antidote*, *supra* note 116, at 869–83.

120. Rosa Goldensohn, *They Shared Drugs. Someone Died. Does That Make Them Killers?*, N.Y. TIMES (May 25, 2018), <https://www.nytimes.com/2018/05/25/us/drug-overdose-prosecution-crime.html> [<https://perma.cc/W3K2-W5YX> (dark archive)].

121. See *id.*

122. See Beletsky, *America’s Favorite Antidote*, *supra* note 116, at 864; N.C. GEN. STAT. § 90-96.2 (2024) (North Carolina’s Good Samaritan law).

123. See, e.g., Carroll et al., *Laws May Worsen Harms*, *supra* note 115, at 5; Beletsky, *America’s Favorite Antidote*, *supra* note 116, at 862–63; Melba Newsome, *Contradictory State Laws Aimed at Stopping Drug Overdoses Aren’t Applied Equally*, N.C. HEALTH NEWS (Jan. 6, 2022), <https://www.northcarolinahealthnews.org/2022/01/06/contradictory-state-laws-aimed-at-stopping-drug-overdoses-arent-applied-equally/> [<https://perma.cc/8KCS-L9QK>].

124. Act of Sept. 20, 2023, ch. 123, sec. 3, § 90-96.2(c3), 2023 N.C. Sess. Laws \_\_, \_\_ (codified at N.C. GEN. STAT. § 90-96.2(c3)) (emphasis added).



Samaritan protection—namely, (1) that possession of *more* than one gram of controlled substances precludes protection, (2) that protection only extends if the relevant evidence for the offense “was obtained as a result of the person seeking medical assistance for the drug-related overdose,”<sup>125</sup> and, critically, (3) that nothing in the law provides potential immunity from prosecution for death by distribution, regardless of whether the Good Samaritan had any controlled substance in their own possession at all.

As a result, S.B. 189’s expansion of North Carolina’s death by distribution offense may worsen, rather than lessen, the harms wrought by opioid epidemic.<sup>126</sup> But that message has not yet sunk in for legislators and prosecutors. A recent survey of North Carolina prosecutors found that most of them believed that prosecutions under the death by distribution law “improve public health and safety” despite research showing that “all relevant evidence contradicts available causal hypotheses that could underly these beliefs.”<sup>127</sup> The expansion of North Carolina’s death by distribution law all but guarantees an increase in prosecutions for overdose deaths. But that increase is not just unlikely to function as a countervailing force to the opioid epidemic—it is more likely to expand the downstream harms.

---

125. N.C. GEN. STAT. § 90-96.2(b)(5) (2024).

126. See Carroll et al., *Laws May Worsen Harms*, *supra* note 115, at 5; Morrissey et al., *supra* note 104, at 9.

127. Morrissey et al., *supra* note 104, at 9.

CONCLUSION

With S.B. 189, the North Carolina General Assembly revealed that it is undeterred: it will continue to rely on criminal law to counter the opioid epidemic. But the state's yearslong experiment with such reliance reveals that such laws cannot deter the epidemic itself. The legislation's rationale cannot support its actual effect—the law not only encroaches on constitutional protections against excessive fines, but also tempts prosecutors to pursue charges against those who are victims of the very crisis that the law purports to address.

DREW ALEXANDER\*\*

---

\*\* Many thanks to the board and staff of the *North Carolina Law Review*, and particularly to my primary editor, Will White, and executive editor, Sam W. Scheipers, for ably shepherding this piece to publication. Thanks also to Eisha Jain and Alexander Jalota for insightful discussion and feedback. And special thanks, as always, to Pops and Ma, and to Hannah, Thomas, and Sorrel.