

Criminal Justice Reform in the **Fentanyl Era**: One Step Forward, Two Steps Back

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Report authored by: Michael Collins
former Director of National Affairs
Drug Policy Alliance

Sheila P. Vakharia
Deputy Director
Department of Research and Academic Engagement
Drug Policy Alliance

Report prepared by: The Drug Policy Alliance
131 West 33rd St
15th floor
New York, NY 10001

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Executive Summary

The U.S. is in the throes of a deadly overdose crisis that claimed almost 70,000 lives in 2018. Of those, around 30,000 deaths involved synthetic opioids like fentanyl.^{1,a} Policymakers have responded to the overdose crisis with a rhetorical emphasis on “treatment instead of incarceration,” leading journalists to comment that we are in the midst of a “gentler war on drugs.”² However, despite a change in discourse, draconian policies have persisted and in many cases been expanded. This is exemplified by many lawmakers’ reaction to fentanyl and other analog drugs, both on the state and federal level.

Since 2011, 45 states have proposed legislation to increase penalties for fentanyl while 39 states and Washington DC have passed or enacted such legislation.³ At this moment, some members of Congress are working to codify harsher penalties by placing fentanyl analogs permanently into Schedule 1 in both the Senate and the House with proposed legislation like the *Stopping Overdoses of Fentanyl Analogues Act of 2019* (SOFA) and the *FIGHT Act*.⁴ In his annual *State of the State 2020* address this month, New York’s Governor Cuomo proposed banning fentanyl analogs and expanding access to medication assisted treatment in the very same sentence.⁵ Legislators have dusted off the drug war playbook and proposed a variety of new punitive measures including new mandatory minimum sentences, homicide charges, involuntary commitment, expanded powers for prosecutors and more. These efforts repeat the mistakes that epitomize the failed war on drugs, while undermining efforts to reform our criminal justice system and pursue a public health approach to drug use. Indeed, such proposals risk compounding the overdose crisis.

a A note for readers: Throughout this report, the term “fentanyl” is used as a shorthand for fentanyl and fentanyl analogs (drugs that are chemically similar to fentanyl), such as carfentanil, acetylfentanyl and a host of others.

Punitive approaches to fentanyl are particularly disturbing because they run counter to recent policy shifts that have been largely bipartisan in nature. One recent policy shift is a growing promotion of public health approaches to drug use. There is mounting support for a number of policies and interventions – such as increasing access to voluntary, medication-assisted treatment and naloxone^b – as more effective responses to the current overdose crisis than the revolving door of jail or prison. Another notable policy shift is the long-overdue recognition that decades of harsh and racially-biased drug enforcement have had devastating consequences on individuals and communities, while wasting billions of taxpayer dollars. A recent analysis of federal fentanyl sentencing revealed that 75% of all individuals sentenced for fentanyl trafficking were people of color, suggesting that fentanyl enforcement already mirrors other disparate drug enforcement.⁶

The criminal justice reform movement has made tremendous progress on reducing drug sentences at the local, state and federal levels. The trend toward tougher penalties for fentanyl presents a threat to the reform movement, undercutting initiatives to reduce mass criminalization and incarceration. To date, none of the states that enacted harsher penalties for fentanyl, nor the federal government, have demonstrated a reduction in fentanyl-involved deaths because of these new laws.

In this context, the criminal justice reform movement must do more to combat punitive proposals, putting as much energy into challenging the exceptionalism around fentanyl as other efforts to reduce sentences.

b Naloxone is an opioid antagonist, also known as the opioid overdose reversal drug.

This paper aims to shine a light on the danger that harsh fentanyl penalties present to the criminal justice reform movement and efforts to end the war on drugs:

- 1. Harsh penalties for fentanyl are detrimental to public health and exacerbate the overdose crisis.**
- 2. People who use and sell drugs are often unaware of the composition and potency of their drugs and have little control over the quality of product available.**
- 3. Fentanyl in heroin is increasingly the “new norm” in many parts of the country.**
- 4. Lawmakers may believe they are addressing an issue that may pass with time, but fentanyl is no passing trend.**
- 5. There are already harsh penalties in effect for fentanyl and they disproportionately target communities of color.**
- 6. Differentiating between people who use and sell drugs is not possible.**

The most effective ways to address the fentanyl crisis are evidence-based public health and harm reduction approaches. We recommend that policy makers and advocates focus their efforts to promote the following:

- 1. Expand and protect 911 Good Samaritan laws,**
- 2. Expand community-based naloxone access and distribution,**
- 3. Expand Opioid Agonist Treatment (OAT),**
- 4. Improve drug checking, surveillance and data collection and make them more widely accessible,**
- 5. Authorize supervised consumption sites (SCS)^c on the state and local level,**
- 6. Fund pilot injectable opioid treatment as an option for some people with chronic heroin use disorder.**

c Supervised Consumption Sites are facilities where people who use drugs can inject or smoke pre-obtained drugs under the supervision of trained professionals, who can reverse overdoses if necessary.

For lawmakers to respond meaningfully to fentanyl, public health solutions are a much more viable and affordable approach without additional harsh penalties and further criminalization. The criminalization of drug use only drives people who use drugs into more dangerous situations. This makes it less likely that they will seek support; rather it makes it more likely that they will suffer a fatal overdose.

Advocates have made considerable gains in promoting criminal justice reforms to address the many collateral consequences of our failed war on drugs. While the criminal justice reform, treatment and harm reduction movements have many victories to celebrate, there is a real risk that the proliferation of harsh penalties for fentanyl will lead to an increase in the prison population, subverting the fight to end mass incarceration.

A Step Forward: A Decade of Reforms Emphasize Less Punitive Approaches

In the past decade, a nationwide bipartisan movement for criminal justice reform emerged. This movement fought to create a more just and equitable criminal justice system by reducing harsh sentences, reforming the prison system and facilitating re-entry of formerly incarcerated people, among other strategies. Much of the modern criminal justice reform movement emerged as a response to the costly, draconian drug sentencing laws that dominated in the 1980s and 1990s. The re-introduction of mandatory minimum sentences⁷ and the passage of “three strikes” laws were devastating to communities and we still see the effects of this devastation today.⁸ This is clearly illustrated by the fact that in 1980, 40,900 individuals were in state or federal prison for drug offenses and by 2015, the number had increased almost ten-fold to 469,545 although this number has reduced in recent years.⁹

The broad criminal justice reform movement – comprised of civil rights groups, libertarians, faith groups, small-government conservatives and others – generally believes that the tough-on-crime laws enacted in the eras of U.S. presidents Ronald Reagan, George H.W. Bush and Bill Clinton went too far.

In recent years, the criminal justice reform movement has succeeded in reducing state-level sentences for possession and sale of drugs through defelonyization of drug possession, reducing mandatory minimums across the nation, in addition to other reforms. Nearly a dozen states including California, Utah, Connecticut, Alaska and Oklahoma recently reduced non-marijuana drug possession from a felony to a misdemeanor.¹⁰ Some of these policies were passed legislatively through bipartisan efforts; other reforms were ballot measures approved with majority support. Drug-related mandatory minimums have been reduced or relaxed in a number of states including Georgia, Iowa, Maryland, North Dakota, Oklahoma and South Carolina.¹¹

The criminal justice reform movement has also had success at the federal level, most notably with the passage of a bipartisan bill reducing the crack/powder cocaine sentencing disparity so that the amount of crack cocaine and powder cocaine needed to trigger a federal sentence was reduced from 100-to-1 to

18-to-1.¹² The United States Sentencing Commission (USSC) – which sets guidelines for federal judges to follow when sentencing – has also played an important role in reducing sentences for drug offenses, such as trafficking and making such reductions retroactive.¹³ Furthermore, in his last years in office, President Obama granted clemency to almost 2,000 individuals serving lengthy sentences due to drug offenses and also reduced the number of individuals subjected to mandatory minimums, impacting thousands more.¹⁴

Much as the criminal justice reform movement has had some success in changing the narrative about incarcerated people, the current overdose crisis has also inspired a change in rhetoric about people who use drugs.

Alongside and often overlapping with the embrace of treatment instead of incarceration, the harm reduction movement has experienced considerable success in passing laws and implementing interventions to reduce the harm of problematic drug use. Harm reduction refers to philosophies and policies that aim to minimize the risks associated with drug use. Unlike abstinence-only treatment advocates, people who embrace harm reduction recognize that there are measures of success other than abstinence and that people should be able to mitigate the harm even if they continue to use drugs.

Historically, policymakers have shied away from harm reduction. Yet, more recently, some lawmakers and advocates have embraced harm reduction measures such as increasing access to naloxone, Good Samaritan Laws and syringe access programs (including partially lifting a ban on federal funding for such programs). There is also currently a very robust debate in some states about establishing SCS, sites where people can use pre-obtained drugs under the supervision of a medical provider and also receive referrals for social services and treatment.^{15, 16} There are over 100 SCS around the world and there has never been an overdose death documented in these facilities.¹⁷

The Fentanyl Phenomenon: Fentanyl's Role in the Overdose Crisis

We are in the midst of what experts have called the “third wave” of the overdose crisis.¹⁸ The first wave began in the early 2000s with a rise in prescription opioid-involved overdose deaths.¹⁹ Around 2010, heroin-involved overdose deaths began spiking as states limited opioid prescriptions and people transitioned to the illegal market. Since 2015, the adulteration of the unregulated heroin supply with fentanyl and its analogs has further exacerbated the crisis so that over 30,000 recent overdose deaths involved fentanyl in recent estimates (*Fig. 1*). This paper is primarily concerned with this third wave – the impact of fentanyl and the response to it by lawmakers and law enforcement.

Fentanyl is a synthetic opioid that can be 50-100 times more potent than morphine. The U.S. government approved it for medical use in the 1960s and doctors legally prescribe it to this day.²⁰ While fentanyl

originated as a pharmaceutical opioid analgesic, most of the fentanyl in the current illegal drug supply is not the result of diversion of these products, but of unregulated production and distribution.²¹

Illegal fentanyl is typically produced industrially in a lab and is not derived from the opium plant, making it significantly easier, faster and cheaper to produce than heroin. Manufacturers add fentanyl to heroin to increase profit margins, though manufacturers can also press fentanyl into counterfeit opioid prescription pills and occasionally sell it in its pure form.²² There are other versions of fentanyl (known as analogs) that are of widely varying potencies, such as carfentanil and acetylfentanyl. Both have appeared in drug seizures²³ and been implicated in overdose deaths, but they have been regionally-concentrated and are less prevalent than fentanyl on a national scale.

Number of opioid-involved overdose deaths in the United States

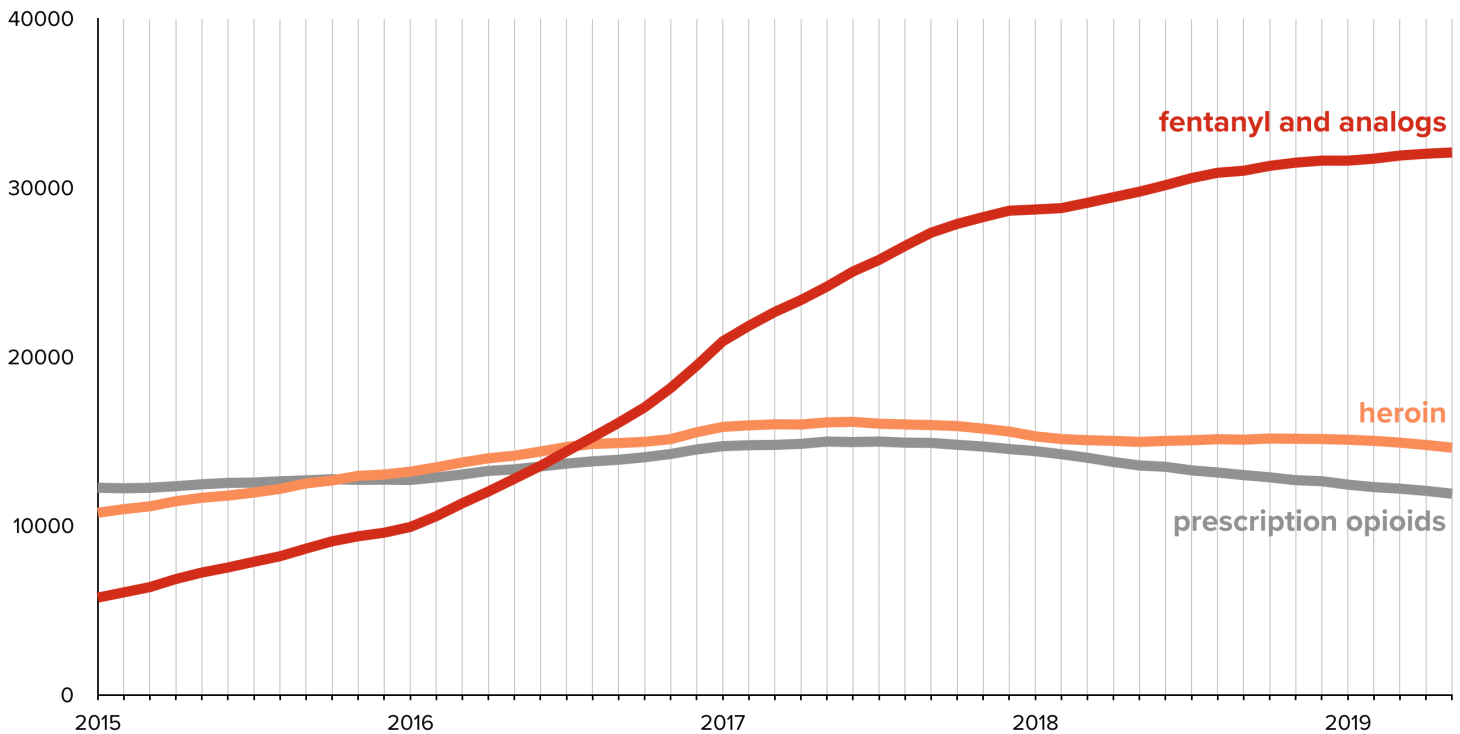


Fig. 1 Number of opioid-involved drug overdose deaths by drug or drug class in the United States³²

Fentanyl carries a higher risk of overdose than other opioids for a number of reasons. One reason is due to its high potency: a small amount mixed into heroin can lead to an overdose because it exceeds someone's tolerance.²⁴ Fentanyl is also fast acting – whereas there may be 2-3 hours to respond to a heroin or prescription opioid pill overdose, the effects of a fentanyl-related overdose are virtually immediate (death can occur in a matter of minutes) and someone must reverse the overdose with naloxone immediately to prevent a fatality. Lastly, the lack of knowledge whether an illegal drug may contain fentanyl (or how much) could mean that people may not be taking necessary precautions to reduce their risk of overdose, such as using a smaller amount, not mixing with other classes of drugs or consuming their drugs more slowly.²⁵ Such precautions are essential since roughly 70% of fentanyl-involved overdoses also involve at least one other drug present and these interactions contribute to lethality.²⁶ There are also ever-changing regional variations in fentanyl's prevalence, which can make it difficult for people to exercise caution. Whereas fentanyl has become an entrenched and unavoidable part of the drug supply in some regions, there are other parts of the U.S. where fentanyl is only slowly emerging or has not yet entered the market at all.

While our illegal drug supply has seen new drugs come and go, experts suggest that fentanyl may be here to stay.²⁷ In fact, fentanyl is now present in most heroin in the Midwest and Northeast, while rapidly spreading west of the Mississippi.²⁸ There are also some reports of non-opioid drug supplies that have tested positive for fentanyl, such as cocaine, methamphetamine and others.²⁹ It has been referred to as a “game changer” for illegal drug producers and distributors and is now one of the most common drugs in the U.S. market.³⁰ Kemp Chester, Associate Director for the National Heroin Coordination Group at the Office of National Drug Control Policy (ONDCP), has echoed this, commenting that, “[w]hile fentanyl is a crisis in its own right, we realize it may also be a window into the future. It is likely that America is seeing the beginning of a move away from plant-based drugs, towards drugs created entirely in labs.”³¹

“While our illegal drug supply has seen new drugs come and go, experts suggest that fentanyl may be here to stay.”

New Fentanyl Penalties: Two Steps Backwards

The rise in fentanyl-involved deaths has tested the rhetorical embrace of a public health approach to drugs since so many harsh penalties have been proposed, and enacted in recent years. The Trump administration has been heavy-handed on the issue of fentanyl, making it a key part of its efforts to escalate the war on drugs.^d

It is too early to say with certainty how fentanyl hysteria and the legislative responses across the country will impact the prison population. Most of the penalty increases have taken place at the state level (*Fig. 2*), where accurate and up-to-date criminal justice data are scarce. It may take a number of years to see the impact of these recently-passed fentanyl sentencing laws on the prison population, much as the impact of tough drug sentencing laws in the 1980s unfolded in the mid-1990s.^{33,34}

Many legislators who support scaling back mass incarceration and the drug war are now supporting extremely harsh measures for fentanyl, undercutting the effectiveness of criminal justice reforms. The contradiction is especially sharp for lawmakers who reduced harsh sentences for the sale of heroin because they recognized the failure of this approach, but subsequently increased sentences for fentanyl. It is also problematic, given that much of the heroin in many parts of the U.S. now contains fentanyl.³⁵

Harsh trafficking charges and troubling racial disparities

After making changes to actually reduce sentences for many drugs, the USSC has recently embraced policies that would keep people who sell fentanyl in prison for longer periods of time. In 2014, the USSC applied “drugs minus two” prospectively and retroactively,³⁶ effectively reducing sentences for a wide variety of drug offenses, including trafficking, impacting thousands of federal prisoners who have since been able to apply for sentencing reductions. Judge Patti

^d For a detailed timeline of his proposals, alongside efforts of former Attorney General Jeff Sessions and Attorney General William Barr, refer to the Appendix at the end of this report.

B. Saris, then chair of the Commission, stated: “This modest reduction in drug penalties is an important step toward reducing the problem of prison overcrowding at the federal level in a proportionate and fair manner... Reducing the federal prison population has become urgent, with that population almost three times where it was in 1991.”³⁷ Yet in 2018, the USSC, citing “the severe dangers posed by fentanyl”, voted unanimously to increase penalties for a variety of law violations related to the substance, with one of the penalties equating to a 50 percent sentence increase.³⁸ The harsher approach to fentanyl reveals a stunning contradiction.

Drug law violations typically have harsher punishments at the federal level. Many state prosecutors often pass cases onto the federal level so they can give defendants longer sentences³⁹ and because the federal government can provide financial resources to states. Drug trafficking charges are under the auspices of the federal government since they involve drugs crossing state lines.⁴⁰

A recent study of individuals convicted of trafficking fentanyl revealed some troubling trends. The USSC released data from a special data collection project that examined nearly all (51 of 52) of the cases of individuals who were convicted for trafficking fentanyl in 2016.⁴¹ Half of the individuals sentenced were classified as “Hispanic” and one quarter were classified as “Black,” perpetuating the racial disparities that characterize sentencing for other drugs.⁴² The average sentence was 66 months. Over half (52.9%) “did not seem to know they had fentanyl.”⁴³ Of those sentenced, 25.5% were classified as “couriers/mules” and 23.5% were classified as “street-level” sellers, demonstrating again that the kingpins that harsh drug laws purport to target are rarely convicted in practice.⁴⁴ Within the two year time frame between 2016 and 2018, the number of individuals convicted for trafficking fentanyl increased eight-fold.⁴⁵

Harsher penalties for selling and distribution have ended up penalizing users and low-level sellers, still failing to reduce overdose deaths. While people who use drugs engender compassion in the context of the current overdose crisis, there remains little sympathy

for people who sell drugs, even though many do so on a small scale simply to fund their own drug use.⁴⁶ Given that manufacturers often add fentanyl to heroin outside the U.S. or higher up in the supply chain, by the time heroin is sold at the retail level, people who use and sell it don't know whether it has been adulterated with fentanyl or with how much.⁴⁷ This begs the question: how can a tough sentence be a deterrent for behavior that people cannot prevent and may not even know they are engaging in?

Problematic federal policy proposals

Harsh federal sentencing proposals have proliferated by legislators on either side of the aisle and from states with diverse constituencies. In August 2015, Former Sen. Kelly Ayotte (R-NH), whose state has suffered heavily because of the overdose crisis, introduced a federal bill to increase sentences for fentanyl.⁴⁸ In an opinion piece, Ayotte – who was up for reelection in one of the toughest races in the country – called those who sell fentanyl “agents of death.”⁴⁹

In 2016, Rep. Tom Reed (R-NY) introduced legislation that would impose the death penalty on anyone convicted of selling fentanyl to someone who subsequently died of an overdose.⁵⁰ One year later, Rep. Katko (R-NY) and Sens. Feinstein (D-CA) and Grassley (R-IA) introduced a bill expanding penalties for the sale or trafficking of fentanyl and a wide range of novel psychoactive substances.⁵¹

The flagship bill of the federal sentencing reform movement, the Sentencing Reform and Corrections Act, contained a sentencing enhancement for selling fentanyl.^{52, 53} A few years later a group of Republican Senators introduced legislation to expand mandatory minimum sentences for fentanyl trafficking and announced that they were open to including the death penalty in their bill.⁵⁴ When Congress passed the First Step Act in 2018, which reduced sentences for certain drug offenses and made some of them retroactive, the bill excluded anyone with a fentanyl-related offense from gaining certain credits for completing prison programming that would reduce their sentence.⁵⁵

“The rise in fentanyl-involved deaths has tested the rhetorical embrace of a public health approach to drugs since so many harsh penalties have been proposed, and often enacted in recent years.”

Prosecutors and law enforcement who support sentencing reform and have boosted the criminal justice reform movement have often supported or pushed for tougher penalties.⁵⁶ Such backing provides politicians with cover to promote these reforms and provides advocates with another group of influential spokespeople. Despite the Obama Justice Department's "Smart on Crime" initiative, for example, which purported to move away from tough sentences for drugs, many Obama-era U.S. Attorneys pursued the harshest penalties possible for fentanyl, even though they acknowledged that "[t]he deterrent doesn't last a long time" and fentanyl is "not a problem they can arrest their way out of."⁵⁷

Reform-minded legislators uphold double-standards

In 2016, Gov. Larry Hogan (R-MD) signed the Justice Reinvestment Act, a sweeping package of criminal justice reforms that reduced the maximum penalties for drug distribution charges, repealed mandatory minimum sentences for drug law violations and more.⁵⁸ Just one year later, Gov. Hogan signed the Distribution of Opioids Resulting in Death Act, which allows prosecutors to seek an additional 10 years for those who sell fentanyl and its analogs, including carfentanil.⁵⁹ It is worth noting that legislators did manage to make changes to the bill to lessen its overall impact after the governor pushed for even harsher penalties.⁶⁰ Hogan had initially wanted to include a 30-year sentence for any drug-induced homicide conviction.⁶¹

Former Gov. Matt Bevin (R-KY) earned support from parts of the criminal justice reform movement by creating a Council on Criminal Justice Reform that produced legislation focused on reentry and recidivism, reducing parole and probation time and eliminating employment barriers for those who have spent time in prison.⁶² Gov. Bevin even took to the pages of the *Washington Times* to announce that "[t]he practice of 'lock 'em up and throw away the key' in our criminal justice system is an approach

whose shot at effectiveness has run its course," urging the federal government to look to Kentucky as an example to follow on criminal justice reform.⁶³ Yet in the same year that Bevin championed criminal justice reform, he pushed for and signed a bill to increase penalties on fentanyl. The legislation "makes the transfer of any amount of heroin or fentanyl a Class C felony with a sentence of 5 to 10 years and no parole eligibility until half of the sentence is served."⁶⁴

At the federal level, Sen. Lindsay Graham (R-SC), has supported sentencing reform, sponsoring and voting to advance a bill that would reduce sentences for trafficking and sales of heroin and other drugs in February 2018.⁶⁵ But the next month, he introduced a bill to increase sentences for trafficking fentanyl, even stating that "[t]he ultimate icing on the cake in terms of deterrents would be, you could literally be put to death by selling fentanyl."⁶⁶ At a hearing on the bill, Graham seemed to recognize that his proposal would make little impact on overdose deaths, saying, "[y]ou can't just pass a law increasing punishment and expect the opioid crisis to go away, but it's a pretty good place to start."⁶⁷

Increased penalties and coercive tactics in states

Since 2011, 45 states have proposed legislation to increase penalties for fentanyl while 39 states and Washington DC have passed or enacted such legislation.⁶⁸ These increased penalties have had no clear impact on fentanyl-involved overdose deaths and more states continue to experience fatalities.⁶⁹ Numerous states have also passed involuntary commitment laws in recent years, allowing authorities to forcibly hospitalize people who use drugs against their will.⁷⁰ While not solely done in response to fentanyl use, fentanyl is often the catalyst.⁷¹ Involuntary commitment is not only ethically questionable, but it does not reduce drug use and instead significantly increases the likelihood of overdose.⁷²

In some states, law enforcement have made internal policy changes and prosecutors have been more

The growth in drug-induced homicide charges exemplifies a long-held misperception about supply-side enforcement: that drug sellers are solely to blame for societal drug use and harsher sentences will deter them; thereby eliminating supply and ending demand.⁸⁵ Such an oversimplification fails to explain the complex interaction of factors (e.g. structural, social, economic, cultural) associated with drug consumption and related harms.^{86, 87}

Increased drug-induced homicide prosecutions and harsher penalties for fentanyl also deter witnesses to an overdose from calling 911 for fear of arrest.⁸⁸ Although most states have “911 Good Samaritan” laws to encourage overdose witnesses to call for emergency assistance, their impact is limited when witnesses may only be granted immunity for a drug or paraphernalia possession charge, but not for a homicide charge.⁸⁹ As a result, these charges simply exacerbate the very crisis they intend to address.

Seizures continue to increase

According to the National Forensic Laboratory Information System, which tests drugs that have been seized by local, state and federal law enforcement, fentanyl was among the top five drugs present in samples that were seized by law enforcement in 2018 (found in 83,765 reports)⁹⁰ and again in 2019 based on preliminary data.⁹¹ Fentanyl seizures at ports of entry have increased. Data from the Customs and Border Patrol shows that 70 pounds of fentanyl were seized in fiscal year 2015 and it increased to 2,545 pounds in 2018.⁹²

Media coverage has fanned the flames

Media coverage has influenced the response of advocates and legislators while garnering public support for such proposals. The news stories of crack era have long been a prime example of how journalists have the power to fan the flames of a drug panic and influence how politicians respond to drug issues.⁹³ Media coverage also decides whose voices are heard the most—and in the case of fentanyl, this often means law enforcement and police rather than doctors and public health experts. As journalist Zachary Siegel points out, “misleading information promulgated by police departments, means that hysteria—not science and evidence—continues to drive and justify carceral drug policy.”⁹⁴

This media hysteria has fed in to a sort of fentanyl exceptionalism. As Daniel Raymond of the Harm Reduction Coalition explains, “fentanyl has become this quasi-sentient, malevolent force. When we lose our sense of proportion and when we treat fentanyl as so exceptional, even people who have generally supported sentencing reform and taken a public health approach will say, ‘Oh, but we can’t afford to do that with fentanyl – it’s too dangerous, too unpredictable.’”⁹⁵

“Media coverage also decides whose voices are heard the most—and in the case of fentanyl, this often means law enforcement and police rather than doctors and public health experts.”

Fentanyl and Crack: Drug War Déjà Vu?

We have been down similar paths before. In the 1980s, the perception of crack as deadly, poisonous and uniquely dangerous led lawmakers to pass bills with harsh sentences for crack law violations. These laws caused immense damage, which still echoes today, particularly in Black communities. While policymakers can reduce sentences, even retroactively, they cannot undo the generational trauma of mass incarceration.

It is imperative that those working on criminal justice reform, particularly sentencing reform, ensure that history does not repeat itself.

Today we have an overdose crisis linked to fentanyl and many legislators are proposing increasingly harsher changes to our already-draconian drug sentencing laws. We must stop making punitive measures our default response to drug problems, real or perceived. These responses are counterproductive when it comes to protecting the health and safety of individuals, families and communities.

Racialized fears have long driven harsh U.S. drug laws

Understanding the history of drug sentencing in the United States is critical to evaluating the current shift in public opinion and policy related to drug use – and what remains the same. The government’s approach to drug use has long been one of ineffective heavy-handedness, compounded by racism in policing, prosecution and sentencing.

Local authorities began banning opium in the late 1800s, after newspapers published stories of “white women being seduced by Chinese men and their opium.”⁹⁶ Within a few years, the 1914 Harrison Narcotics Act was passed to criminalize heroin and cocaine due to fears of “negro cocaine fiends.”⁹⁷ Decades later, authorities made marijuana illegal when authorities claimed Mexican immigrants were using the drug to corrupt white women and destroy society.⁹⁸ In the early 1970s, U.S. President Richard Nixon declared a “war on drugs,” calling drug use “public enemy number one.”⁹⁹

The racism underlying the harsh moralistic framing of drug use and people who use drugs is epitomized by the response to crack cocaine in the 1980s.¹⁰⁰ As with most drugs, rates of cocaine use were highest among white people, but the media portrayed crack, a form of cocaine, as uniquely dangerous and used primarily by Black people.¹⁰¹ They characterized Black people who used crack cocaine as being seduced by this “demon drug”, while vilifying poor, pregnant Black women who used crack cocaine, accusing them of placing their unborn children at risk for mental and physical disabilities.^{102, 103} Though later debunked, the idea of “crack babies” permeated the public consciousness.^{104, 105}

Politicians also enacted laws that made penalties for possessing one gram of crack comparable to possession of 100 grams of powder cocaine, playing into the widespread misperception that crack cocaine was more dangerous than powder cocaine.

By contrast, the recent overdose crisis has generated sympathy among some lawmakers and members of the public, largely due to narratives that explain white rural and suburban opioid use in the context of the poorly-regulated pharmaceutical industry and underlying economic and social despair.^{106, 107} (This narrative was notably absent during the 1980s, despite devastating structural racism and underinvestment that exacerbated drug-related harms in urban Black communities.) Even though overdose death rates remain highest among white people, overdose fatalities among Black people have spiked in recent years.¹⁰⁸

As compassionate coverage of white people who use drugs and their families has become more commonplace,¹⁰⁹ media portrayals of the sources of illegal fentanyl harken back to the racialized fears of the drug war’s early days. Inflammatory headlines like “U.S. drugs bust uncovers enough Chinese fentanyl to kill 14 million people”¹¹⁰ and “Death, made in Mexico”¹¹¹ are stoking fears of racialized “others”. Whereas people who used or sold crack were the targets of scorn and criminalization in the 1980s, people who use fentanyl or other opioids are often portrayed as victims of ruthless dealers who are

Federal drug-related bill sponsorship: Punitive versus treatment-oriented

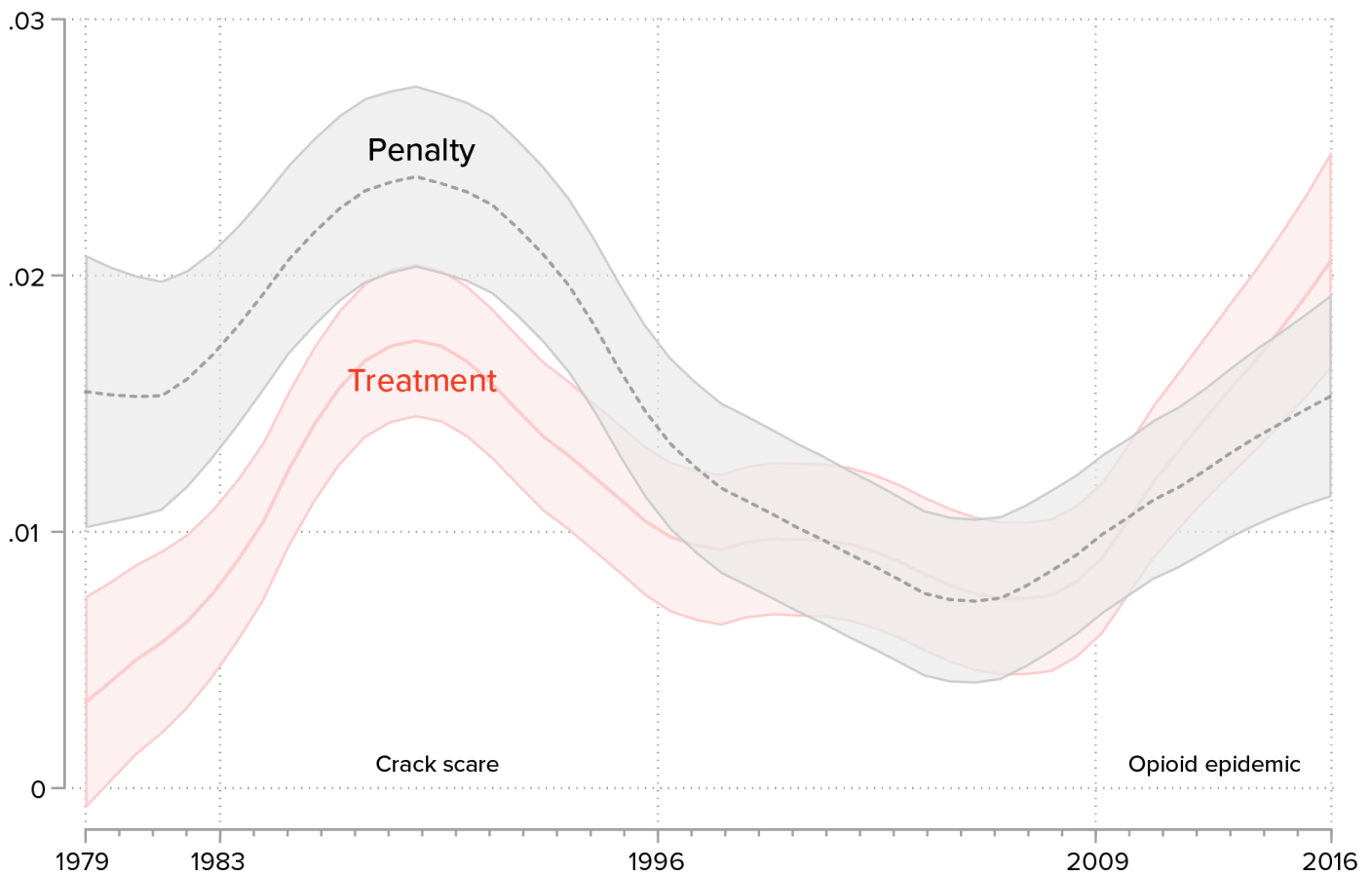


Fig. 3 Federal drug-related bill sponsorship: Punitive versus treatment-oriented¹¹⁹

exploiting and poisoning them. (The USSC drug trafficking sentencing data noted earlier aligns with this narrative.) While headlines about babies born with neonatal abstinence syndrome proliferate today,¹¹² they focus on the health needs of these babies and stories often humanize the struggles of families in stark contrast to media coverage in the 1980s.¹¹³

In the 1980s, politicians increased law enforcement funding as they passed harsher sentences for crack cocaine. Federal funding for treatment and social services for those who used or were addicted to crack “languished” in comparison.¹¹⁴ For communities of color, the harms of stigma, mass incarceration, children growing up without parents and lack of access to treatment were nearly immeasurable.

The response to the current overdose crisis has been one of more compassion, at least in terms of rhetoric. Treatment, not incarceration, has been the mantra of white communities unaccustomed to policing and criminalization. Lawmakers have at times responded

warmly, as formerly tough-on-crime politicians have sponsored far more treatment-oriented bills in response to overdose deaths than during the crack era (*Fig. 3*).¹¹⁵

The recent passage of the 21st Century Cures Act,¹¹⁶ Comprehensive Addiction and Recovery Act¹¹⁷ and the Support Patients and Communities Act¹¹⁸ highlight this shift. These pieces of federal legislation aim to tackle the current opioid overdose crisis by emphasizing treatment and public health solutions. (It is important to note, however, that the focus on “treatment” often does not always include evidence-based treatments, such as methadone and buprenorphine, but rather abstinence-only programs and philosophies that are often of dubious effectiveness.)

The passage of these bills also happened at a time when bipartisan support for criminal justice reform has rapidly grown. Yet the proliferation of new, draconian fentanyl laws is a glaring exception that threatens to undermine the modest progress that has been made toward scaling back mass incarceration.

Why tougher penalties for fentanyl are ineffective and counterproductive

Presumably, the intent of increasing penalties for fentanyl use, sale and/or trafficking is to produce a reduction in all three and accordingly reduce the number of fentanyl-involved overdose deaths.

Decades of research have demonstrated, however, that increasing existing penalties for drugs does not dramatically reduce their use or sale, or save lives.

A RAND study found that increasing penalties for cocaine would have no impact on cocaine use and in order to reduce cocaine use, the money spent on incarceration should be spent on treatment.¹²⁰ An issue brief from Pew Charitable Trusts, *More Imprisonment Does Not Reduce State Drug Problems*, found that as penalties for drugs and the prison population skyrocketed, drug use and availability increased in the same period.¹²¹ The brief also notes, “federal sentencing laws that were designed to focus penalties on the most serious drug traffickers have resulted in long periods of imprisonment for many offenders who performed relatively minor roles in the drug trade.”¹²²

Indeed, experts generally accept that increasing penalties has no impact on reducing drug use. In a 2018 letter opposing increased penalties for fentanyl, Marc Mauer of The Sentencing Project wrote: “Increasing already high penalties for drug offenses is not effective because 1) Most people do not expect to be apprehended for a crime, are not familiar with relevant legal penalties, or criminally offend with their judgment compromised by substance abuse or mental health problems and; 2) Those who are apprehended and sentenced are often in the lower levels of the drug trade and are readily replaced by other sellers willing to fill their roles.”¹²³

Increasing penalties for fentanyl as a means to reduce overdose deaths is a strategy with no proven track record. There is no evidence that punishing the use and sale of a drug more harshly due to its potency will reduce its availability. To date, none of the states that enacted harsher penalties for fentanyl, nor the federal government, have provided evidence that their strategy has contributed to a reduction in fentanyl-involved deaths.

The availability of fentanyl in the drug supply has not decreased despite increased enforcement of fentanyl trafficking laws domestically and on our borders. Rather, these laws simply appear to have been used to justify racially-disparate enforcement that targets communities of color and individuals lower in the supply chain- the majority of whom even the USSC deemed unaware of fentanyl adulteration.

The trend toward increasing penalties for fentanyl has the potential to undermine the sentencing reform movement and undo some of the progress that has been made at the state and federal level to reduce the prison population.

“These laws simply appear to have been used to justify racially-disparate enforcement that targets communities of color and individuals lower in the supply chain.”

Key Lessons: Why We Need to Oppose Harsh Fentanyl Penalties

1. **Harsh penalties for fentanyl are detrimental to public health and exacerbate the overdose crisis.**

Tougher penalties create perverse incentives for manufacturers.¹²⁴ Underground chemists have found new ways of evading enhanced penalties by modifying the structure of a substance to create something that is similar to fentanyl, yet chemically distinct.¹²⁵ This has led to more potent forms of fentanyl that are more likely to cause overdose deaths.¹²⁶ Further criminalization of fentanyl also drives people who use drugs away from health services and encourages them to engage in more risky drug-taking activity to avoid detection and prosecution.¹²⁷ For example, the practice of treating overdose scenes as crime scenes dissuades drug users from calling emergency services in the event of an overdose.¹²⁸ Finally, these penalties will increase the prison and jail population, exacerbating the country's already-devastating problem of mass incarceration.

2. **People who use and sell drugs are often unaware of the composition and potency of their drugs and have little control over the quality of product available.** We know that increasing sentences has a downstream impact, largely targeting drug sellers low in the chain of command and often people who use drugs. But people still have little to no control over how potent their drug supply will be. We know that fentanyl is often brought from outside the country and often added into heroin high up in the supply chain, even when done in the United States. By the time this supply makes it to the retail level, it may have been cut with even more adulterants, unbeknownst to people who use and sell it.^{129, 130} Although people who use heroin may be able to discriminate fentanyl from heroin once it has been consumed, they may not know ahead of time what they have bought.^{131, 132} This highlights the need for a *mens rea* standard, with legislation including provisions that a prosecutor must demonstrate that an individual knowingly sold a product with fentanyl in it.¹³³ Because many sellers do not have this knowledge, convictions would become more challenging.

3. **Fentanyl in heroin is increasingly the “new norm” in many parts of the country.** Perhaps some lawmakers believe they are curbing a drug that is isolated from heroin. However, the reality is that much of the heroin in the East Coast and Midwest of the U.S. already contains fentanyl.¹³⁴ Increasing penalties for fentanyl, therefore, will simply end up increasing penalties for heroin and contribute to more incarceration. This needs to be reiterated to lawmakers, particularly those who have already voted to reduce heroin sentences in recognition that harsh sentencing is not a solution.

4. **Lawmakers may believe they are addressing an issue that may pass with time, but fentanyl is no passing trend.** ONDCP and other government agencies believe that the drug market in the U.S. is permanently moving from drugs produced from plant sources to those wholly produced within labs.^{135, 136} This means that as use and sale of fentanyl grows, enforcement will be more widespread and those caught will be subject to these increased penalties.
5. **There are already harsh penalties in effect for fentanyl and they disproportionately target communities of color.** New fentanyl laws are generally unnecessary. Despite the recent emergence of fentanyl in the illegal market, lengthy sentences already exist for the drug and have been on the books for decades. They have not stopped the spread of fentanyl. At the federal level, pre-existing penalties range from a five-year mandatory minimum sentence for a first offense to life without parole for a third conviction.¹³⁷ With the majority of those currently federally sentenced for fentanyl being people of color, these laws threaten to only exacerbate racial disparities in the criminal justice system.
6. **Differentiating between people who use and sell drugs is not possible.** Many lawmakers want to distinguish between drug users (who “deserve treatment”) and drug sellers (who “deserve punishment”), but such a distinction is difficult because many low-level drug sellers are also drug users. For instance, there are many documented cases of people who use drugs pooling resources and “buying in bulk” or “brokering” sales in order to save money.^{138, 139} Some people who use drugs are subsistence drug sellers, who sell drugs so they can buy drugs for themselves.¹⁴⁰ As Maryland Public Defender Kelly Casper points out, “These aren’t two distinct sets of people...They want to charge all of these people with drug dealing, when in fact the core of the problem is that they’re users.”¹⁴¹ Advocates must be careful not to demonize people who sell drugs.¹⁴²

The Proven Alternative: Harm Reduction and Health-Centered Solutions

For lawmakers to respond meaningfully to fentanyl, public health solutions are a much more viable and affordable approach without additional harsh penalties and further criminalization. Harm reduction principles and evidence-based solutions promise to generate better results and can reduce fentanyl-involved overdose deaths. Below are some policy recommendations:

- 1. Expand and protect 911 Good Samaritan laws.** These laws provide a degree of immunity from prosecution for certain crimes such as drug and drug paraphernalia possession for people who call emergency services in the event of an overdose. Evidence shows that while most overdoses are witnessed, fear of prosecution is often a deterrent for many to call for help.^{143, 144} Such laws can reduce barriers to calling 911 and can save lives. Yet the fentanyl-driven trend to turn overdose scenes into crime scenes and pursue drug-induced homicide charges have severely undermined these successful laws.¹⁴⁵
- 2. Expand community-based naloxone access and distribution.** The speed of a fentanyl overdose is one of the many reasons to expand the availability of naloxone for people who use drugs, as well as their peers and loved ones.¹⁴⁶ There has been a political push to get naloxone in the hands of law enforcement and paramedics, but the first people on the scene of an overdose are often other people who use drugs and their peers or loved ones.¹⁴⁷ This is why it's important to prioritize community-based naloxone distribution, in addition to equipping conventional first responders.
- 3. Expand Opioid Agonist Treatment (OAT).** Medical providers prescribe OAT such as methadone and buprenorphine to treat individuals with opioid use disorder. Decades of evidence have demonstrated its effectiveness in cutting overdose rates.¹⁴⁸ Unfortunately, access to life-saving medications is lacking in many parts of the U.S., with only one third of treatment programs offering OAT.¹⁴⁹ There is also a need to expand OAT to additional access points to reach people at highest risk of overdose, in settings such as courts, prisons, jails and hospitals. Individuals using OAT significantly reduce their risk of relapsing to fentanyl-adulterated heroin and suffering an overdose.¹⁵⁰
- 4. Improve drug checking, surveillance and data collection and make them more widely accessible.** People who use or sell drugs should be able to test their heroin for contaminants like fentanyl. Studies have found that drug checking kits are highly desired among service providers and people who use drugs.¹⁵¹ Fentanyl testing strips are inexpensive, easy to distribute (given adequate infrastructure) and can accurately read whether a substance contains fentanyl or not. Research from Johns Hopkins found that 84% of the people who inject heroin in their study were concerned about fentanyl in the drug supply, 86% would check their drugs with fentanyl test strips if they were available and 70% would mitigate their risk of overdose by modifying their behavior (i.e., doing a “test shot,” injecting more slowly, not using alone, having naloxone on hand).¹⁵²

There is also a need to improve overdose data collection, with an emphasis on speed and accuracy. And given that most overdoses involve more than one substance, such information should be readily accessible to tailor targeted prevention messages. Similarly, the National Institute of Drug Abuse (NIDA) has piloted fentanyl “hotspot” programs to better understand where fentanyl is prevalent, who is using it and why. Such information can help authorities better understand fentanyl use and reduce overdose deaths.

5. **Authorize supervised consumption sites (SCS) on the state and local level.** These sites allow individuals to use previously purchased drugs under medical supervision and in a safe environment. This is particularly pertinent to fentanyl because the onset of overdose is rapid and waiting for an ambulance may mean death or permanent brain damage due to lack of oxygen. Within an SCS, trained professionals are available to intervene in case of an overdose. There are over 100 SCS around the world and there has never been an overdose death documented in these facilities.¹⁵³ Additionally, data shows reductions in the overdose death rate in the immediate vicinity of SCS.¹⁵⁴ In addition to reversing overdoses, SCS also provide wound care and can make referrals to social services and treatment. A recent federal court decision held that a proposed SCS in Philadelphia does not violate the federal “crack house statute” (which makes it illegal to manage or control any

place and intentionally make it available for the purpose of unlawfully using an illegal drug), but the decision is not binding on other jurisdictions.¹⁵⁵ Congress should therefore amend the “crack house statute” to affirmatively allow supervised consumption sites or prevent, via appropriations, the Department of Justice from arresting or prosecuting anyone involved in this vital, life-saving intervention.

6. **Fund pilot injectable opioid treatment as an option for some people with chronic heroin use disorder.** Under such programs, professionals prescribe pharmaceutical-grade heroin or hydromorphone to people with heroin addiction who are not successful with other forms of OAT.¹⁵⁶ More than half a dozen countries have injectable opioid treatment programs, which have managed to reduce overdose rates, as well as associated crime and disease, among the highest risk heroin users for whom other treatments have not worked.¹⁵⁷

Conclusion

The proliferation of harsh measures begs the question: where is the cross-coalition, bipartisan opposition that has formed in response to other harsh punitive measures? While some legislative proposals have been defeated, the large majority of states have recently enacted measures to increase fentanyl penalties and the federal government has done the same, in an era where efforts to reduce sentencing have been widely embraced. The movement for sentencing reform has been in part driven by a rejection of the war on drugs and excessive sentences for drugs like crack and heroin. It is important that members of this movement – both advocates and legislators – push back against excessive penalties for fentanyl, which replicate the failed punitive approaches of the past.

Advocates have made considerable progress in promoting criminal justice reforms to address the many collateral consequences of our failed war on drugs. While the criminal justice reform, treatment and harm reduction movements have many victories to celebrate, we must be vigilant. Fentanyl enforcement already has proven to replicate troubling racial disparities that are characteristic of the current system. The overdose crisis continues with no immediate end in sight, while the current administration only seems to double-down on its harsh tactics. Advocates and lawmakers alike need to be alert to these challenges.

There is a real risk that the proliferation of harsh penalties for fentanyl will lead to an increase in the prison population, subverting the fight to end mass incarceration. At the same time, efforts to reduce overdose deaths and to treat drug use as a public health issue will be severely undermined.

The defeat of the Ayotte amendment (see case study) shows that it is possible to defeat harsh sentencing proposals as long as advocates remain consistent in their aim to combat mass criminalization and incarceration. Such proposals are likely to continue and we must be prepared. We must break the cycle in which the criminal justice system is the default response to drug problems.

Beyond this, we must remember that we cannot have a public health response to some drugs and a criminal justice response to others. We cannot talk about “treatment, not incarceration” and then revert to interdiction and enforcement when a new substance that frightens us appears on the scene.

As the nineteenth-century Spanish philosopher George Santayana once wrote, “Those who fail to learn from history are doomed to repeat it.”¹⁵⁸

Case study: Defeating the Ayotte Amendments

Advocates pursued a successful strategy opposing increased fentanyl penalties in June 2016 when Former Sen. Kelly Ayotte (R-NH), a Republican running for reelection in New Hampshire, announced her plans to attach an amendment expanding federal penalties for fentanyl to a must-pass spending bill.¹⁵⁹ Ayotte was in one of the tightest races in the country, in one of the states hit hardest by the overdose crisis and had made curbing opioid deaths a key part of her campaign.¹⁶⁰

Advocates immediately swung into action, defining the issue in the media as a senator pushing outdated, harsh sentencing measures.¹⁶¹ The media engagement was integral in framing the issue favorably before Ayotte was able to shape the bill on her own terms. Ayotte had tried to tie her bill's passage to the recent death of musician Prince, who died from a fentanyl overdose. Yet advocates pointed out that Ayotte's proposal was so broad that it could have exposed Prince to a stiff prison term.¹⁶² The Ayotte debate raged as lawmakers were trying to pass a sweeping bipartisan sentencing reform bill, so advocates pointed out to Congressional allies in both parties that Ayotte's amendment actually threatened to undermine bipartisan criminal justice reform.

A wide range of advocates – FAMM, Freedom Works, the Sentencing Project, the Drug Policy Alliance and more – placed op-eds, sent letters and released statements expressing opposition to the measure. One letter was signed by more than 100 groups, including faith, health and civil rights organizations.¹⁶³ The letter argued for harm reduction approaches to fentanyl and detailed how Ayotte's approach of toughening sentences for people convicted of selling or trafficking fentanyl was pointless given the widespread manufacturing of fentanyl outside the U.S. Finally, advocates were able to work with sentencing reform champion Senator Cory Booker (D-NJ), who gave a 40-minute speech on the Senate floor opposing the amendment.¹⁶⁴ Days later, Ayotte pulled back and declined to offer the amendment.¹⁶⁵

Appendix: Fentanyl fuels Trump's drug war

In March 2017, the President's Commission on Combating Drug Addiction and the Opioid Crisis, while largely making public health recommendations, also recommended increasing penalties for trafficking fentanyl and its analogs.¹⁶⁶ The following year, Trump signed into law legislation giving the Department of Homeland Security new tools to detect fentanyl at the border, calling fentanyl "our new big scourge."¹⁶⁷ President Trump later said in a speech that he supported the death penalty for people who sell drugs. Explaining the thinking behind Trump's policy announcement, Kellyanne Conway – White House adviser and lead staffer on the opioid crisis – told a reporter "some states execute criminals for killing one person but a dealer who brings a tiny quantity of fentanyl into a community can cause mass death in just one weekend, often with impunity."¹⁶⁸ More recently, in the summer and fall of 2019, Trump has explicitly tied his comments on Chinese tariffs to the country's role in supplying fentanyl to the U.S.¹⁶⁹

Former Attorney General Jeff Sessions repeatedly used fentanyl to justify his escalation of the war on drugs, citing fentanyl as a rationale for more draconian measures against people who sell drugs.¹⁷⁰ After taking office in February 2017, Sessions mentioned fentanyl and/or "synthetic drugs" (analog drugs) in over 25 percent of his public speeches.¹⁷¹

In May 2017, Sessions proposed that the Drug Enforcement Agency (DEA) have its own team of 20 prosecutors that would focus exclusively on opioid cases.¹⁷² The proposal was unprecedented because the DEA has never prosecuted crimes; its role is to build cases and make arrests. It is the job of U.S. Attorneys to prosecute all federal cases, including drugs or any other crime. The move was opposed by senators, with Sen. Booker (D-NJ) calling it "a thinly veiled attempt to ramp up [the] failed War on Drugs."¹⁷³ Congress ultimately blocked the proposal.¹⁷⁴

Months later, Jeff Sessions' Department of Justice pushed the USSC – which sets sentencing guidelines for federal judges – to increase sentences for fentanyl. In written comments, the Department stated that current guidelines do "...not adequately reflect the serious danger posed by these drugs."¹⁷⁵ The Department also supported applying these sentences broadly, commenting, "defendants who distribute seemingly small quantities of fentanyl should face prison time."¹⁷⁶ A year later, the USSC voted to increase penalties.

In November 2017, Sessions announced he was using his emergency scheduling powers to schedule a number of fentanyl analogs and make it easier to prosecute cases involving these substances.¹⁷⁷ Scheduling the substances would instantly make their possession, manufacture or distribution a crime and therefore subject to lengthy sentences. It should be noted that the *SOFA Act* and *FIGHT Act* (currently proposed in Congress) would make permanent this temporary order.

Sessions also followed Trump's death penalty speech with a memo urging federal prosecutors to pursue the death penalty for people charged with drug trafficking in "appropriate cases."¹⁷⁸ Announcing the new policy, Sessions noted that, "[d]rug overdoses, including overdoses caused by the lethal substance fentanyl and its analogs, killed more than 64,000 Americans in 2016 and now rank as the leading cause of death for Americans under 50. In the face of all of this death, we cannot continue with business as usual."¹⁷⁹

Under Sessions, federal law enforcement agencies became more aggressive in their efforts to arrest and charge people for fentanyl-related offenses. Historically, federal prosecutors have denied that they go after low-level drug sellers, saying they reserve harsh sentences for "kingpins" and violent offenders, even if this has proven not to be the case.¹⁸⁰ But federal law enforcement appear to be openly targeting anyone involved with fentanyl, regardless of their role.¹⁸¹

A March 2018 report by the Government Accountability Office reviewed the efforts of federal law enforcement agencies to combat fentanyl under Sessions.¹⁸² The report's authors interviewed federal law enforcement agents and found that many agencies are changing their tactics to tackle fentanyl. The report noted that the Organized Crime Drug Enforcement Task Force, which coordinates drug law enforcement among federal agencies, "has broadened its scope of targets to encompass the entire supply chain involved in opioid trafficking, due in part to an increased recognition that lower-level suppliers are integral to the causal chain of overdose deaths...They have also targeted street-level and mid-level distributors, rather than focusing more heavily on traditional targets, such as cartels."¹⁸³ Federal prosecutors from the U.S. Attorney's Office (USAO) have made a similar commitment, which includes going after people who use drugs. "Some attorneys in the USAOs we spoke with are now using their discretion to prosecute fentanyl cases, even though such cases involve small quantities of the drug relative to other drugs like heroin or cocaine."¹⁸⁴

In July 2018, Sessions announced the launch of Operation Synthetic Opioid Surge (S.O.S.),¹⁸⁵ which involved an "enforcement surge" in ten areas of the U.S., where "participating United States Attorney's Offices will choose a specific county and prosecute every readily provable case involving the distribution of fentanyl, fentanyl analogues and other synthetic opioids, regardless of drug quantity."¹⁸⁶

Sessions resigned in November 2018, but there is no sign his successor, William Barr, has changed course. In written responses to questions from Senators in February 2019, Barr said he would "prioritize prosecutions involving synthetic opioids."¹⁸⁷ Soon after, Trump adviser Kellyanne Conway announced that the Trump administration was working with Congress and the Justice Department to increase penalties for fentanyl.¹⁸⁸ The Trump administration also reported in May of 2019 that there has been a 40-fold increase in federal fentanyl-related prosecutions during the President's time in the White House.¹⁸⁹ In June 2019, the Department of Justice began to push Congress for broader authority to schedule fentanyl analogs and increase penalties and prosecutorial discretion.¹⁹⁰ In Barr's remarks at the International Conference on Cyber Security a month later, he pushed tech companies to make encrypted communications more readily accessible to law enforcement to assist with wiretapping drug cartels who may be bringing fentanyl into the country.¹⁹¹

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