

Drug Policy Alliance

Criminal Justice Issues and Prisoners' Rights

<https://drugpolicy.org/resource/criminal-justice-reform-fentanyl-era-one-step-forward-two-steps-back>

Policy Issue Resources

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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](#).

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. 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 analogdrugs, both on the state and federal level.

Since 2011, 45 states have proposed legislation to increase penalties for fentanyl while 39 states have passed or enacted such legislation.

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*.

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.

Tougher penalties create perverse incentives for manufacturers. 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. This has led to more potent forms of fentanyl that are more likely to cause overdose deaths. 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.

We know that increasing sentences has a downstream impact, largely targeting drug sellers low in the supply chain 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.

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. 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.

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, like fentanyl. 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.

Despite the recent emergence of fentanyl in the illegal market, lengthy sentences 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. With the majority (75%) of those currently federally sentenced for fentanyl trafficking being people of color, these laws threaten to only exacerbate [racial disparities in the criminal justice system](#).

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](#). As Maryland Public Defender Kelly Casper points out, These are 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. Advocates must be careful not to demonize people who sell drugs.

[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. While most overdoses are witnessed, fear of prosecution is often a deterrent for many to call for help. 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.

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. 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. This is why it's important to prioritize community-based naloxone distribution, in addition to equipping conventional first responders.

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. Unfortunately, access to life-saving medications is lacking in many parts of the U.S., with only one third of treatment programs offering OAT. Individuals using OAT significantly reduce their risk of relapsing to fentanyl-adulterated heroin and suffering an overdose.

People who use or sell drugs should be able to test their heroin for adulterants like fentanyl. Studies have found that [drug checking](#) kits are highly desired among service providers and people who use drugs. 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).

[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.

Within such programs, professionals prescribe pharmaceutical-grade heroin or hydromorphone to people with heroin addiction who are not successful with other forms of OAT. 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.

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. 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.

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