

SETTING THE RECORD STRAIGHT ON SCHEDULING

IMPACTS OF SCHEDULING FENTANYL & XYLAZINE

FACT #1: Increasing penalties for fentanyl use, sale, and/or trafficking DOES NOT reduce supply, demand, and distribution of fentanyl.

EXPLANATION: 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.

Rather than reduce the supply of illicit substances, scheduling substances accelerates the introduction of new, more potent, substances into the drug supply, which causes unpredictable effects. As a result, overdoses and other health harms increase as our understanding of the changing supply and public health interventions struggle to keep pace. Further, scheduling substances reduces access to treatment and health services by driving people who use drugs to engage in riskier drug-taking activity¹ to avoid detection and prosecution.

From the DEA's February 2018 notice to add fentanyl analogs to the federal schedule: *"Scheduling more substances has not been completely effective in preventing the emergence of new substances structurally related to fentanyl. This is because when DEA temporarily controls a given substance structurally related to fentanyl, illicit manufacturers located abroad begin producing new such substances through other structural modifications."*

From the DEA's October 2023 notice to add several nitazenes to the federal schedule: *"Following the class-wide scheduling of fentanyl-related substances, there has been an increase in the emergence of synthetic opioids that are not structurally related to fentanyl. Beginning in 2019, a new class of synthetic opioids known as benzimidazole-opioids, commonly referred to as "nitazenes," emerged on the recreational drug market.*

FACT #2: Increased penalties & criminalization DO NOT target "big fish" in the supply chain.

EXPLANATION: Scheduling policies have not incapacitated high-level traffickers, "managers of drug enterprises," and "kingpins." Those who are apprehended and sentenced are often in lower levels of the drug trade² and are readily replaced by other sellers³ willing to fill their roles. Out of all persons incarcerated for drug crimes in federal prison, only 14%⁴ are identified as the so-called leaders Congress intended to capture.

¹"The War on Drugs and HIV/AIDS: How the Criminalization of Drug Use Fuels the Global Pandemic," The Global Commission on Drugs, June 2012,

https://globalcommissionondrugs.org/wp-content/themes/gcdp_v1/pdf/GCDP_HIVAIDS_2012_REFERENCE.pdf.

² Kenneth D. Tunnell, "Inside the Drug Trade: Trafficking From the Dealer's Perspective," *Qualitative Sociology* 16, no. 4 (1993): 361-381.

³ Marc Mauer, "RE: Subcommittee Hearing on Defeating Fentanyl: Addressing the Deadliest Drugs Fueling the Opioid Crisis," The Sentencing Project, April 10, 2018, <https://www.sentencingproject.org/wp-content/uploads/2018/04/Subcommittee-Hearing-on-Defeating-Fentanyl.pdf>.

⁴ See Categorical Mistakes at 217, n.138

This approach results in significant racial disparities in fentanyl drug prosecutions. People of color comprise almost 75% of those sentenced in fentanyl cases in 2019⁵. This holds true for fentanyl analogs, for which 68% of those sentenced were people of color⁶.

Many lawmakers want to distinguish between drug users (who “deserve treatment”) and drug sellers (who “deserve punishment”). Such a distinction is difficult because many low-level drug sellers are also drug users. There are many documented cases of people who use drugs pooling resources and “buying in bulk” or “brokering” sales to save money.^{7 8} Some people who use drugs are subsistence drug sellers, who sell drugs so they can buy drugs for themselves.⁹

FACT# 3: Contrary to law enforcement claims, increasing penalties /criminalization DOES NOT reduce the number of fentanyl-involved overdose deaths.

EXPLANATION: Criminalization has been the standard response to the overdose crisis for decades, during which time overdose deaths have been exponentially rising. A 2023 study found that drug busts were associated with a 23.6% increase in opioid overdose deaths in the following weeks after the seizures.¹⁰

FACT #4: Refraining from scheduling more substances DOES NOT “legalize” substances.

EXPLANATION: Both the state and federal agencies currently have tools to prosecute, like the Federal Analogue Act, which carries sentences of up to 20 years, and, if death or serious injury results, 20-year mandatory minimums.

Further, the relative potency of fentanyl and fentanyl analogs varies widely: some analogs, like acetyl fentanyl, are less potent than fentanyl; others, like carfentanil, are many times more potent.¹¹ Scientific research has identified specific substances, like benzylfentanyl, as essentially biologically inactive and have little to no pharmacological potential for abuse but meet the criteria for broad scheduling of fentanyl analogs.¹²

⁵ See U.S. Sent. Comm’n, *Fentanyl and Fentanyl Analogues: Federal Trends and Trafficking Patterns* (Jan. 2021), at 24 (hereinafter “USSC Fentanyl Report”), https://www.uscc.gov/sites/default/files/pdf/research-and-publications/research-publications/2021/20210125_Fentanyl-Report.pdf.

⁶ *Id.*

⁷ Lee Hoffer, “The Space Between Community and Self-Interest: Conflict and the Experience of Exchange in Heroin Markets,” in *The Economics of Ecology, Exchange and Adaptation: Anthropological Explorations*, ed. Donald Wood (Bingley, UK: Emerald Publishing, 2016), 167-196.

⁸ Jason Cherkis, “Dying To Be Free,” *The Huffington Post*, January 28, 2015, <http://projects.huffingtonpost.com/dying-to-be-free-heroin-treatment>.

⁹ Kathryn Casteel, “A Crackdown On Drug Dealers Is Also A Crackdown On Drug Users,” *FiveThirtyEight*, April 5, 2018, <https://fivethirtyeight.com/features/a-crackdown-on-drug-dealers-is-also-a-crackdown-on-drug-users/>.

¹⁰ <https://reason.com/2023/07/06/drug-busts-are-linked-to-more-overdoses-and-deaths/>

¹¹ Kemp Chester, Assoc. Dir., Nat’l Heroin Coordination Grp., Off. of Nat’l Drug Control Pol’y, Response to Questions for the Record Following Hearing Entitled, *The Countdown: Fentanyl Analogues & the Expiring Emergency Scheduling Order to S. Comm. on the Judiciary* (June 4, 2019) at 3, <https://bit.ly/3s7BFcv>.

¹² *Unintended Consequences*, at 3.

FACT #5: NY is aligning the state's Controlled Substance Act to the Federal CSA.

EXPLANATION: The Article VII Health bill's language includes some substances that are still only temporarily scheduled at the federal level, other substances that are scheduled lower than the Article VII proposal, and seeks to schedule xylazine, which is **NOT** scheduled at the federal level.

To save lives and promote public health, New York lawmakers should focus on demand-side interventions rather than supply-side penalties.

