



**New York State Joint Legislative Budget Hearing on Health
February 28, 2023**

**Testimony submitted to the Joint Legislative Budget Hearing on Health
by the Drug Policy Alliance**

The Drug Policy Alliance (DPA) appreciates the opportunity to submit testimony to the Joint Legislative Budget Hearing on Health. DPA is the leading organization in the U.S. promoting alternatives to the War on Drugs. We envision a just society in which the use and regulation of drugs are grounded in science, compassion, health, and human rights; in which people are no longer punished for what they put into their own bodies; and in which the fears, prejudices, and punitive prohibitions of today are no more.

For nearly a decade, DPA has been working toward comprehensive responses to drug use and the drug supply that are rooted in evidence-based public health strategies to address the danger that fentanyl and other synthetic substances pose. Throughout DPA's work, we have found that increased penalties and criminalization have not reduced the distribution of fentanyl and other synthetic substances, nor does it prevent overdoses. In fact, according to data reported to the Centers for Disease Control and Prevention, over 6,100 of New Yorkers died from a preventable overdose in 2021 alone – the second consecutive year of the highest recorded deaths in New York State history.

Increased penalties and criminalization are not just ineffective, they are actively harmful, particularly to communities of color who are disproportionately targeted with criminal legal punishment. Furthermore, New York has taken important steps in expanding harm reduction services as a strategy to prevent overdose deaths and stem the overdose crisis. Increased penalties and criminalization undermine harm reduction strategies, thereby hindering efforts to prevent overdose deaths and other health risk related to drug use.

The Drug Policy Alliance strongly **opposes Part BB of the Health and Mental Hygiene Article 7 legislation.** Part BB, which adds additional fentanyl analogs to the New York State Controlled Substance list, establishes new crimes for possession with intent to sell, and sale of “imitation controlled substances,” and establishes stricter penalties related to overdose deaths where fentanyl or fentanyl analogs are involved, will only serve to further exacerbate the overdose concerns it purports to solve all while threatening to send New York backwards in the state's drug policy.

Scheduling New Fentanyl Analogs Does Not Make New York Safer

The scheduling of new and additional fentanyl analogs is often done with the belief that by criminalizing different variations of fentanyl there will be less overdose deaths. There is no evidence that further criminalization tactics would reduce fentanyl or fatal overdoses but there is plenty of scholarship on how drug prohibition created the fentanyl crisis.¹ In this current wave of the opioid overdose crisis, deaths have skyrocketed.²

Rather than diminishing the harms of drug misuse, criminalizing people who sell and use drugs amplifies the risk of fatal overdoses and diseases, increases stigma and marginalization, creates racial and

economic disparities in enforcement, and drives people away from needed treatment, health, and harm reduction services.³

Scheduling New Fentanyl Analogs Does Not Reduce Supply or Demand

Substantial evidence demonstrates that criminal penalties do not have any effect on reducing either the supply of drugs or the demand for them. Studies on tough on crime policies clearly show that incarceration does not decrease the demand for drugs.⁴ One study found that states that increase their incarceration rates do not experience a decrease in drug use.⁵ When a drug seller is incarcerated, the supply of drugs is not reduced nor is the drug market impacted. Because the drug market is driven by demand rather than supply, research indicates that an incarcerated seller will simply be replaced by another individual to fill the market demand.⁶

The penalties incurred by being on the Controlled Substances list will not reduce fentanyl and other synthetic drug distribution in New York. The process of adding fentanyl and other substances to drug formulations (including cutting heroin and other drugs with fentanyl) is usually done early in the production process. According to the Drug Enforcement Administration, these substances are generally added to heroin before it enters the U.S.⁷ Low-level sellers thus may not know they are distributing fentanyl. These proposals would not reduce the inclusion of fentanyl in the drug supply, as it takes place high in the distribution chain. Additionally, at least 9 of the proposed analogs are currently only on the Federal Controlled Substance List on a temporary basis. To permanently add analogs that the Federal Government has only added on a temporary basis is not rooted in any logic.

Scheduling New Fentanyl Analogs Repeats the Mistakes of the War on Drugs

Recent reforms to the criminal justice system in New York have aimed to repair and undo the harms caused by mass incarceration and the drug war. We know from a preponderance of evidence that these harms disproportionately impacted and continue to impact poor people and communities of color. One recent study of federal charges revealed that 75% of all individuals sentenced for fentanyl trafficking were people of color.⁸ In this way, despite recent rhetoric about a “gentler” approach to substance use, increasing penalties on fentanyl and other synthetic substances is akin to the devastating crack vs. powder cocaine disparities of the past, which will only further increase racial disparities in arrest.

Creating New Crimes for Sale, Including Drug Induced Homicide is Counterproductive

Part BB amends the definition of imitation controlled substance, as set forth in the Public Health Law, and adds additional crimes for the sale of an imitation controlled substance. This new definition further widens the scope of crimes that people who use drugs may find themselves caught up in.

Further criminalizing the sale of substances does little to curb drug use and nothing to increase public health and safety. The real effect of further criminalization is to inevitably punish and further stigmatize those individuals who use drugs while also placing those people within a criminal legal system that is not designed to provide treatment. In fact, convictions can serve as an additional barrier to those who are attempting to move on with their life or those who want to focus on treatment and recovery. Furthermore, the imposition of harsh penalties – especially for sale – only exacerbates issues for people who use drugs and may suffer from the disease of addiction. Individuals who sell or distribute substances often do so to support their own substance use disorder.

Creating New Crimes for Sale Hinders Overdose Responses

The imposition of harsh penalties for possession and/or distribution is also likely to undermine the work that New York is doing to prevent overdose deaths.

For example, New York's Good Samaritan law encourages people to contact emergency services in case of an overdose.⁹ The threat of police involvement and over a decade in prison may make an individual hesitant to call emergency services or run from the scene rather than help the victim.

Additionally, New York is working to expand the availability of drug checking as a harm reduction measure. As drug checking machines come online, individuals – especially those who may sell or distribute substances to finance their own use – may avoid utilizing these crucial services for fear that knowing what is in their substance will enhance the potential for criminal penalties. Creating new crimes related to imitation controlled substances is wholly at odds and incompatible with the State's harm reduction plan to provide drug testing services.

Finally, just as increased scheduling and criminal penalties are ineffective to prevent overdose deaths, so are stricter penalties related to overdose deaths where fentanyl and other substances are involved. The increasing use of archaic drug-induced homicide statutes do not protect individual or public health. There is ample evidence indicating that relying on law enforcement intervention is detrimental to those who use drugs or witness a drug overdose. Those who favor the use and proliferation of drug-induced homicide measures and severe sentencing for drug sellers contend that the threat of harsh sentencing will deter drug use, drug selling, and prevent fatal overdose. This logic is fundamentally false, and decades of ineffectual drug war policies provide evidence to refute the notion. Arresting and detaining a person for selling, or giving, a small amount of drugs to another person does nothing to interrupt the availability of opioids or any other illegal substance. While these statutes do nothing to decrease use, they do increase drug-war-fueled racial disparities in the criminal justice system. There is abundant research showing that racial bias influences prosecutors' decision-making, and there is no reason to believe that this will not be evident in the enforcement of drug-induced homicide laws.

Instead of criminalization, the Legislature can help save lives by:

Decriminalizing medication for opioid use disorder: Medication for opioid use disorder (buprenorphine and methadone) is considered the gold standard for opioid use disorder treatment. Medication-assisted treatment increases patients' retention in treatment, improves social functioning, reduces the risks of transmission of hepatitis C and HIV, reduces engagement in the criminal-legal system, and reduces overdose deaths. Unfortunately, because of stigma, structural racism and economic disparities, people living with opioid use disorder experience significant barriers to accessing prescribed buprenorphine. Further, because buprenorphine is a Schedule III drug, it is illegal to use without a prescription and those found in possession of diverted buprenorphine or suspected of selling diverted prescriptions are at risk of arrest.

S699/A612¹⁰ will remove buprenorphine from the New York State Schedule of Controlled Substances, a critical step in expanding access to life-saving treatment in New York State in the midst of a catastrophic overdose crisis. Decriminalizing buprenorphine possession is a public health strategy to reduce overdose deaths, enroll more New Yorkers in treatment, reduce stigma, and keep communities safe.

Expanding overdose prevention centers: Overdose prevention centers (OPCs) are controlled health care settings where people can more safely use pre-obtained drugs under clinical supervision and receive health care, counseling, and referrals to health and social services, including drug treatment. OPCs are able

to prevent fatal overdoses especially for high-risk populations, like street homeless individuals, and they foster stigma-free spaces for engaging a population that has traditionally been unlikely to participate in formal health care services.

Beyond the health benefits, overdose prevention centers also encourage public safety without reliance on policing and criminalization. Research shows that overdose prevention centers reduce public drug use, syringe litter, and drug-related crime in surrounding neighborhoods. According to OnPoint NYC – the harm reduction organization that runs New York’s first OPCs – across the street from their Upper Manhattan location the NYC Parks Department used to collect an average of 13,000 syringes per month from Highbridge Park, but since the sites opened in November, 2021, that number has fallen to just 1,000.

Fewer syringes on the street, in parks, and in other public places means a safer environment for our kids to play in, and for sanitation and parks department employees to work in. Less public drug use means a more comfortable, safe, and predictable environment for everyone, drug-users and non-drug users alike.

The Safer Consumption Services Act (SCSA), S.399/A.338, allows the New York State Department of Health to authorize and fund community-based organizations to operate Overdose prevention centers (OPCs). OPCs would be regulated by the New York State Department of Health, identically to Syringe Service Programs. SCSA would dramatically shift the tide in the overdose crisis in New York State. Because fentanyl overdoses occur in a matter of minutes (as opposed to hours for a heroin overdose), relying on emergency services and civilians alone to respond to overdoses is insufficient. Using drugs in a supervised setting would allow for the immediate provision of medical assistance in the event of an overdose.

The Drug Policy Alliance urges the Legislature and Executive to put an end to the criminalization of drug use. Part BB of the Health and Mental Hygiene Article VII Budget, which calls for additional scheduling and penalties for fentanyl, and fentanyl analogs, must not be included in the adopted budget.

New York can save lives and continue being on the forefront of effective overdose prevention by choosing smarter public health and evidence-based approaches.

¹ <https://www.cato.org/commentary/how-drug-prohibition-created-fentanyl-crisis?mslclid=0bb3c679cf4d11ecbde98343c640feff>

² <https://www.cdc.gov/mmwr/volumes/70/wr/mm7006a4.htm>

³ See, e.g., Samuel R. Friedman et al., Relationships of Deterrence and Law Enforcement to Drug-Related Harms Among Drug Injectors in US Metropolitan Areas, 20(1) AIDS 93, 93-99 (2006); Caitlin Elizabeth Hughes and Alex Stevens, What Can We Learn from the Portuguese Decriminalization of Illicit Drugs?, 6 British Journal of Criminology 50 (2010).

⁴ Przybylski, Roger K. "Correctional and Sentencing Reform for Drug Offenders." Colorado Criminal Justice Reform Coalition, Sept. 2009. Available at: http://www.ccjrc.org/wp-content/uploads/2016/02/Correctional_and_Sentencing_Reform_for_Drug_Offenders.pdf

⁵ Ibid.

⁶ Roger K. Przybylski, *Correctional and Sentencing Reform for Drug Offenders: Research Findings on Selected Key Issues*, Colorado Criminal Justice Reform Coalition (September 2009). Available at: http://www.ccjrc.org/pdf/Correctional_and_Sentencing_Reform_for_Drug_Offenders.pdf.

⁷ United States. Drug Enforcement Administration. Strategic Intelligence Section. *Counterfeit Prescription Pills Containing Fentanyls: A Global Threat*. 2016. <https://www.dea.gov/docs/Counterfeit%20Prescription%20Pills.pdf>

⁸ "Public Data Presentation for Synthetic Cathinones, Synthetic Cannabinoids and Fentanyl and Fentanyl Analogues Amendments," United States Sentencing Commission, January 2018, https://www.uscc.gov/sites/default/files/pdf/research-and-publications/data-briefings/2018_synthetic-drugs.pdf.

⁹ See Assembly Bill 472 (Ammiano 2012) found at http://www.leginfo.ca.gov/pub/11-12/bill/asm/ab_0451-0500/ab_472_bill_20120917_chaptered.pdf

¹⁰ 2023-24 NY Assembly bill number pending