



Reducing Barriers to Recovery

Shifting Low-Level Drug Possession From Felonies to Misdemeanors in Illinois



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Executive Summary

For the past five decades, the ongoing War on Drugs has both spearheaded and amplified the mass incarceration of Black and Brown people across the United States. The War on Drugs had the stated goal of stopping illegal drug use, distribution, and trade by imposing extreme sentences upon drug users and drug dealers. Instead of alleviating the impacts of drug use across America, the War on Drugs has heavily policed and incarcerated Black and Brown folks while simultaneously denying people who use substances the resources and help that they need to recover and avoid relapse.

In Illinois, the stated purpose of the Controlled Substance Act is to target high-level drug distributors. But in practice, the law has mostly policed and incarcerated people who use drugs. Since the 1980s, Illinois has increased penalties of drug offenses at least eight times, and in 2019, 13% of people in Illinois prisons were incarcerated for drug law violations, often for simply possessing a small amount of drugs. When police conduct pedestrian and traffic stops - key tactics in the War on Drugs - they usually recover only small amounts of controlled substances.

The way that Illinois drug laws are currently written makes it extremely easy for law enforcement and prosecutors to charge people with “manufacturing,” “delivery,” or “possession with intent to manufacture/distribute,” even if there is no evidence of ever giving another person drugs. The standard to prove “intent to deliver” is both vague and elusive, paving the way for a broad legal interpretation that can give harsh sentences to anyone who has been allegedly caught with a small amount. This is especially problematic for people who have been caught with a personal-use quantity, because they end up being convicted and sentenced as if they are high-level drug dealers.

Most importantly, the carceral focus of the War on Drugs disproportionately harms Black and Brown Illinoisans. These individuals are already systemically more likely to be profiled, brutalized, and discriminated against at any given point during the legal process. Arrest and incarceration for felony drug possession has long-lasting consequences. There are thousands of laws in Illinois that make it harder for

people with felony convictions to find jobs and housing. The aftermath of incarceration is detrimental to the wellbeing of people with previous drug convictions because even after their sentence is complete, they must constantly work to navigate crippling barriers while seeking housing, unemployment, education, and other opportunities. In a society where formerly incarcerated folks are already looked down upon and dehumanized, the collateral consequences of drug incarceration due to small-scale possession makes people more vulnerable to relapse, overdose, and re-incarceration.

Our state’s current drug laws hinder the path to recovery; this paper aims to show why and provide solutions to alleviate the suffering they perpetuate. These laws have not prevented or decreased drug use, but they continue to threaten the livelihood of marginalized people who struggle with substances and cost Illinois taxpayers millions of dollars that could be reinvested into communities. In regards to the growing public health crisis caused by opioid use, Illinois must implement a solution that prioritizes the humanity and wellbeing of all people, while working towards a future where the recovery process is both accessible and centralized. The prison system is ill-equipped and negligent when it comes to treating addiction. Among those incarcerated in jail and prisons nationally, only a miniscule amount of the people in need of clinical treatment actually receive those services during their incarceration. In Illinois, only 17% of those in need of drug treatment accessed it while incarcerated. This treatment often comes in the form of mandatory detoxing which is both traumatic and unlikely to dissuade someone from using drugs long-term. On the contrary, voluntary community-based treatment is clinically proven to be more effective in addressing substance abuse long-term. In order for people to successfully access treatment, they must be free, not entangled in a harmful criminal legal system.

We must take a holistic, comprehensive approach to decreasing penalties for drug possession, so that people who use drugs can find a path to live happy, productive lives and avoid the catastrophic consequences of felony prosecution and conviction.

Introduction

For all of human history, people have used drugs for religious, medicinal, and recreational purposes. “Drugs” include legal substances like caffeine, alcohol, and cannabis, as well as numerous over-the-counter and prescription medications proven effective to treat certain conditions and illnesses. However, whether a particular substance is allowed to be sold in stores or prescribed by a doctor, as opposed to criminalized is often arbitrary—and frequently relies upon users and sellers’ power and influence, historical biases,¹ and other factors.² For example, alcohol, nicotine, and caffeine are all psychoactive, have addictive potential, and can be lethal. et, these drugs are legal and socially accepted while other drugs that carry relatively low risks are illegal and severely punished across the United States.

For the majority of the past century, the United States has adopted increasingly punitive policies toward the possession, use, and distribution of some drugs (i.e. cannabis, methamphetamine, cocaine, heroin, and others). The harsh “drug war” policies championed by the Nixon Administration were enthusiastically adopted as a blueprint by states across the country, including Illinois.³ This “war on drugs” substantially fueled mass incarceration: Since the 1980s, Illinois has increased penalties of drug offenses at least 8 times,⁴ and in 2019, 13% of people in prison were incarcerated for a drug law violations⁵ — often for simply possessing a small amount of drugs.

Proponents of harsh drug laws may have believed that punishing people was the only way to stop them from damaging their lives by using substances. However, as the drug war has continued, studies have shown that the criminal legal system is not only an ineffective response to addiction⁶ but also increases the likelihood that someone will fatally overdose⁷ or die by suicide⁸ upon release from prison or jail. Heavy criminalization of drug use also saddled millions with felony convictions that create daunting obstacles to people successfully re-entering society after incarceration. This includes significant barriers to housing, meaningful education, and gainful employment—barriers which may exacerbate the circumstances that led someone to use drugs in the first place.⁹ Due to massive disparities in drug arrest rates, sentencing, and access to

community-based treatment, these consequences are ultimately felt most acutely by Illinois’ Black communities.¹⁰

Over the last decade, Illinois has experienced a shift in thinking around drug use and punishment.¹¹ In 2019, the Illinois General Assembly passed the Illinois Cannabis Regulation and Tax Act to legalize recreational cannabis use, expunge the records of hundreds of thousands of people, promote diversity in the cannabis industry, and ensure revenues from the new legal industry go to communities most harmed by cannabis prohibition.¹² The passage of the Act made Illinois not only the 11th state to legalize the recreational use of cannabis, but also the leading state in passing cannabis legalization with the most expansive social equity measures at the time. Because of cannabis prohibition’s disproportionate impact on Black and poor communities across Illinois, legislators lauded the passage of the Act as a victory against the war on drugs. Specifically, State Representative Kelly Cassidy described the bill’s passage as a way of hitting “the reset button” on the drug war,¹³ and Governor JB Pritzker said the bill’s passage would address how “the war on cannabis has destroyed families, filled prisons with nonviolent offenders, and disproportionately disrupted [Illinois’s] black and brown communities.”¹⁴

While cannabis legalization was an important first step for Illinois to begin addressing and repairing the immense harm the war on drugs has caused Black and brown people, cannabis legalization cannot—and has not—ended the drug war in Illinois. Thousands of Black and brown Illinois residents continue to be disproportionately arrested, charged, and incarcerated for the possession of small amounts of drugs such as cocaine and heroin. The next step in ending the drug war is to reform how Illinois charges and sentences people for the possession of other drugs (i.e. any controlled substance, including unauthorized possession of prescription drugs and methamphetamine) that remain criminalized under Illinois law.

In 2015, a bipartisan group of judges, legislative leaders, directors of state agencies, prosecutors, public defenders, law enforcement officers, and researchers served on the Illinois State Commission on Criminal Justice and Sentencing Reform.¹⁵ The group members—including then-state senator and now-Attorney General Kwame Raoul, former State’s

Attorney of St. Clair County and now-Acting Director of the Illinois State Police, Brendan F. Kelly, former Director of the Illinois Department of Corrections Howard Peters, and former chief of staff to Governor Rauner and recently appointed member of the Illinois Prisoner Review Board Rodger Heaton—reviewed the state’s current sentencing structure and practices, and recognized that:

“Incarceration is costly, harsh, and in some cases, has a criminogenic effect on individuals, making them more likely to commit future crimes... long sentences have not had the desired deterrence effect, but have consequences that can be disproportionate and counter-productive.”

The Commission recommended that sentences for drug possession and most other drug offenses should be reduced by one class, and that mandatory minimums should be eliminated for many drug offenses.¹⁶ In 2020, Illinois Governor JB Pritzker proposed a set of principles to build a more

equitable criminal justice system. These principles included modernizing sentencing laws on drug offenses and using a public health approach to address mental health and substance use disorder. According to the Office of the Governor, these principles would “decrease unnecessary admissions into prison, match modernized sentencing standards across the country, and limit criminal justice involvement for non-violent offenders who need and would benefit from a public health intervention.”¹⁷ Public opinion is in alignment with this recommendation. According to a recent poll by the ACLU of Illinois, 79% of Illinois voters stated they support reducing the penalty for low-level drug possession from a felony to a misdemeanor for all drug offenses.¹⁸

While reducing penalties for low-level drug possession cannot fully repair the harms perpetuated by the war on drugs, making possession of small amounts of drugs a misdemeanor will remove barriers to success for Illinoisans arrested for drug possession, improve access to treatment for those who need it, and save lives.

Recommendations

Illinois must implement a public health approach to reduce the harms caused by criminalizing drug use, including shifting resources away from the failed strategy of arresting and incarcerating people who use drugs. We recommend that Illinois reclassify simple possession of a personal use quantity of a controlled substance from a felony to a Class A misdemeanor.¹⁹

An Overview of Illinois Drug Laws

2022 marks the fiftieth anniversary of the Illinois Controlled Substances Act, which establishes penalties for possession, manufacturing, and distribution of different types of controlled substances. In the 50 years since the passage of that law, the state legislature has continued to expand upon that framework, creating a set of drug laws that harshly punish the possession of small amounts of any controlled substance and provide sentences for the distribution or possession of larger quantities of drugs that exceed the penalties for many violent crimes.

The Structure of Illinois Drug Laws

Illinois drug laws have become increasingly harsh since the 1970s. Between 1972 and 2002, the General Assembly enacted nearly 20 laws that increased penalties for both possession and distribution of controlled substances. **As a result of the war on drugs, Illinois laws are now structured so that any activity involving drugs, no matter how minor, is punished as a felony. This is true even when someone possesses a small amount of a drug or has residue that tests positive for a controlled substance.** Specifically, the war on drugs generated two major criminal statutes, which now govern Illinois's drug prohibition regime:

1. The Illinois Controlled Substances Act (720 ILCS 570), enacted in 1972, regulates the vast majority of controlled substances. Under the Act, possession involves knowingly having physical control over a drug. The Act groups *manufacturing, delivery, and possession with intent to deliver* charges under one statute and lays out the same penalties for all three.
2. The Methamphetamine Control and Community Protection Act (720 ILCS 646), which was enacted in 2005, separates methamphetamine from the general Controlled Substances Act and provides specific penalties for the *possession, distribution, and manufacturing* of methamphetamine. The Methamphetamine Control and Community Protection Act groups “possession with intent to deliver” and “delivery” in one section and lays out the same penalties for

both; the law then has various separate sections criminalizing methamphetamine manufacturing.

Within each category of alleged behavior, sentences are determined by the type and the amount of drugs possessed. Importantly, the amount is determined by weight, and is measured by the total weight of the substance recovered by police. This means that when a substance that is believed to be drugs is recovered and contains a small amount of a controlled substance (e.g. cocaine) along with a larger amount of a legal substance (e.g. baking soda), the person in possession is sentenced for the combined weight of both the controlled substance and the legal substance. Similarly, if two controlled substances are mixed together (e.g. fentanyl and heroin), a person can be charged under the combined weight of both substances. For example, 1 gram of fentanyl and 2 grams of heroin could be charged as 3 grams of fentanyl, regardless of whether or not the person knew what they had consisted of multiple drugs and the fact that different substances have different penalties.

Overall, the amount of drugs necessary to qualify someone for severe sentences has decreased dramatically since the start of the war on drugs. Weight thresholds were reduced in 1987 for cocaine and again in 2002 for heroin. Before 1987, possession of more than 30 grams of cocaine or heroin qualified someone for a Class 1 felony charge - and 4-15 years in prison - instead of a Class 4 that qualifies for probation or 1-3 years in prison. Now, half that amount - 15 grams - is required to upgrade a person's possession charge.²⁰ These penalties for possessing drugs are as harsh or harsher than penalties for crimes that many people would consider to be more serious. **Under current Illinois law, simple possession of drug residue carries the same penalties as criminal sexual abuse or identity theft, and higher penalties than domestic battery or violation of an order of protection.**²¹ “Possession with intent to deliver” carries even harsher penalties: Even when the quantities of drugs are miniscule, those sentences are more severe than those for possession of child pornography or aggravated battery.

Possession with Intent to Deliver: The Overcharging of People Who Use Drugs

The structure of Illinois drug laws make it easy for law enforcement and prosecutors to charge people with more serious “manufacture,” “delivery,” or

“possession with intent to manufacture” charges even when they are never alleged to have given drugs to another person or only possess a personal-use quantity of a controlled substance. The problem with the law hinges on the phrase “possession with intent to deliver.” In theory, the “possession with intent to deliver” allegation allows police to arrest people for dealing drugs even if they do not specifically witness a drug transaction, or if police supposedly witnessed a transaction but cannot prove that what they saw exchanged were narcotics. Over the years, **the standard to prove the “intent to deliver” has been interpreted so broadly by the Illinois courts that nearly any person who is alleged to buy drugs on the street can be charged and convicted of possession with intent to deliver and sentenced more harshly as a result.**

The factors to determine if there is sufficient evidence of the “intent to deliver” are laid out in a 1995 Illinois Supreme Court case, *People v. Robinson*.²² *People v. Robinson* uses a totality-of-the-circumstances approach to proving someone’s “intent to deliver.”²³ The factors that courts have found sufficient (by themselves or in combination) to prove whether someone “intended” to deliver drugs include, but are not limited to:

- Drugs that are “packaged for sale.”²⁴
- A cell phone or walkie-talkie is in one’s vehicle or on their person.²⁵
- Police are aware of a history of past drug delivery.²⁶
- Drug paraphernalia, including a pipe for consuming drugs, is found near drugs.²⁷
- Police find cash in one’s home or on their person in amounts that, in various decisions, have ranged from \$63 to \$3,400.²⁸

With such a wide array of circumstances allowing for upgraded charges from “possession” to “possession with intent to deliver,” police and prosecutors are able to charge people with more serious felonies even when the person arrested is alleged to possess only a miniscule amount of a drug. These penalties can be further enhanced when drugs are possessed in certain locations such as near schools and other public buildings.²⁹

The combination of the lax definition of “intent to deliver” and the broad location-based penalty

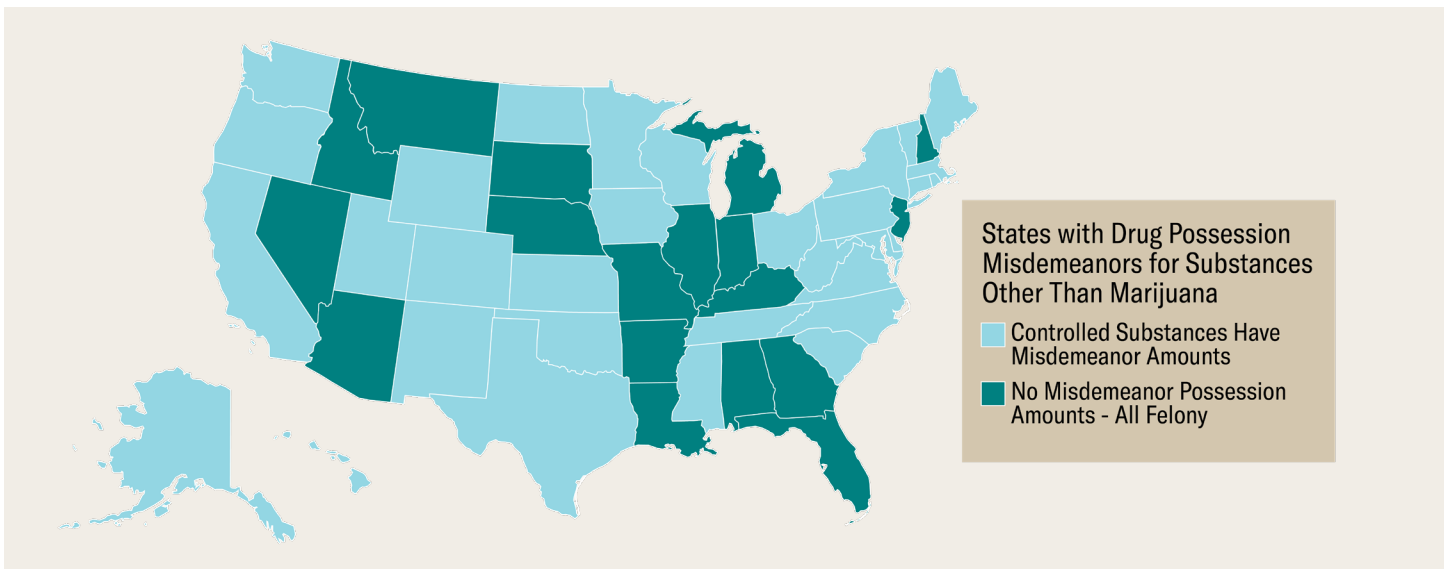
enhancements make it easy for a person to be charged with either the lowest class of felony (Class 4 - punishable by probation or 1-3 years in prison) or the second highest class of felony (Class 1 - usually not eligible for probation, and punishable by 4-15 years in prison) for possessing a small quantity of a controlled substance, depending on the circumstances in which the person was arrested and the charging decisions made by police and prosecutors.

When people who possess drugs are instead charged with “possession with intent to deliver,” they face longer sentences and are often passed over for deferred prosecution programs. In Cook County, 12% of people charged with Class 4 “possession” are sent to diversion programs designed to help people avoid felony convictions whereas only 4% of those charged with “delivery” or “possession with intent to deliver” a personal use quantity of a controlled substance are sent to diversion programs.³⁰ “Possession with intent to deliver” charges are also excluded from many deferred prosecution programs throughout the state, including in Kane,³¹ Lake,³² Massac,³³ and Morgan³⁴ counties, among others.

All in all, Illinois’ current, fluid drug laws allow simple possession to be charged as a more serious felony based on highly subjective factors with low evidentiary standards. These enhancements and subjectivity mean that people who use drugs recreationally or people with substance use disorders (rather than “drug kingpins”) are unnecessarily being pulled even deeper into the criminal legal system.

Lessons from Other States

Illinois’ harsh approach to drug possession is not the only way. Illinois is one of only 18 states that makes all drug possession a felony. In 24 states, all drug possession is a misdemeanor; in Oregon, drug possession is decriminalized.³⁵ While some of these laws have been in place for decades and other laws are recent developments, the drug laws of other states allow Illinois to learn from other states that have changed drug possession from a felony to a misdemeanor. Since the 2014 passage of Proposition 47 in California, four other states – Utah, Connecticut, Oklahoma and Rhode Island – have reclassified all drug possession from a felony to a



misdemeanor. These states have seen a range of positive impacts from these changes. First, states that have reclassified have seen substantial reductions in prison and local jail population, saving money and saving lives. In California, both state prison and local jail populations have declined, with nearly 15,000 fewer people incarcerated.³⁶ Oklahoma saw a 23% drop in the prison population between 2016 (when the law was changed) and 2021.³⁷ Utah saw a 71% drop in drug possession convictions between 2014 and 2018 – a 59% reduction in the number of people in prison for drug possession.³⁸

Second, reclassifying drug possession has allowed some states to reinvest savings created by the new law into evidence-based programs to reduce recidivism and improve public health. For instance, California’s Prop 47 requires the state annually to reinvest the savings from reduced prison spending into crime prevention programs, drug and mental health treatment, and trauma recovery services for victims of crime.³⁹ State officials estimate that Proposition 47 reduced prison spending by \$68 million in the first year of its passage alone, and California awarded more than \$100 million in grants to local governments for mental health treatment, victims’ services, and crime prevention programs.⁴⁰ Oklahoma uses the savings to fund drug treatment and mental health programs,⁴¹ and Utah’s legislation directs the state to invest more than \$10 million in behavioral health programs and training for treatment staff.⁴²

While some detractors feared negative consequences from these changes, **the states that have reduced incarceration due to drug reclassification have seen large declines in crime**

and little-to-no effect on the recidivism rates of people convicted of drug possession.⁴³ Reductions in penalties for drug possession did not increase drug use.⁴⁴ These outcomes are in line with the growing body of evidence that demonstrates that incarceration is an ineffective and harmful response to drug use. Specifically, research shows that incarceration and felony convictions *increase* recidivism for people who are already at low risk to re-enter the criminal justice system and have needs related to substance use disorders and substance use.⁴⁵

The Harmful Effects of Illinois’ Drug Possession Laws

In stark contrast to these success stories, Illinois has increased penalties for drug offenses 8 times since the 1980s.⁴⁶ Illinois’ drug possession laws, like most “war on drugs” legislation, was ostensibly meant to target high-level drug traffickers. One of the listed purposes of the Illinois Controlled Substances Act is to “penalize most heavily the illicit traffickers or profiteers of controlled substances, who propagate and perpetuate the abuse of such substances with reckless disregard for its consumptive consequences upon every element of society.”⁴⁷

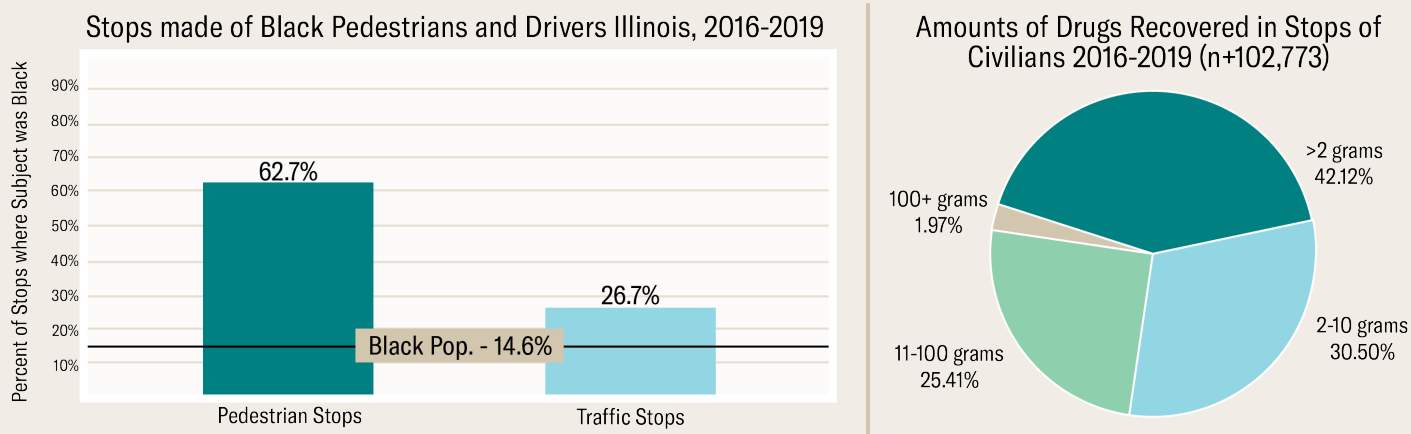
Regardless of this legislative intent, Illinois’ drug laws and their enforcement are primarily targeted at the very “unlawful users” and “petty distributors” that the law claims to want to treat less severely, and they disproportionately affect Black and Brown communities.

Illinois Drug Possession Laws Primarily Target People Who Use Substances

Despite the stated goal of the Illinois Controlled Substances Act to target large-scale distributors, most people stopped, arrested, prosecuted, convicted, and sentenced for drug charges in Illinois are accused of possessing only small amounts of drugs – often less than 2 grams of a controlled substance. Possession of these low amounts suggests that the people being swept into Illinois drug law enforcement – and the people being saddled with lifelong felony convictions – are primarily people who use drugs.

Statewide, records of drugs recovered during pedestrian and traffic stops suggest that many people are being stopped and arrested for possessing less than 2 grams of drugs – a quantity of drugs smaller than half a sugar packet. Between 2016 and 2019, **Illinois police reported 4.67 million traffic stops and over 468,000 pedestrian stops, with 4% of pedestrian stops and 1 percent of traffic stops resulting in drugs being found.**⁴⁸ Of the stops that resulted in drug arrests, 78% of these pedestrians and 71% of traffic stops recovered less than 10 grams of drugs, with 45% of pedestrian stops and 41% of traffic stops resulting in seizures of less than 2 grams—an amount equivalent to half a sugar packet that carries a misdemeanor charge in many states including Oklahoma, South Carolina, and Pennsylvania.⁴⁹ Overall, across all stops, 72% of people stopped were found with less than 10 grams of drugs – less than a tablespoon. Notably, very few traffic stops recover more than 100 grams of drugs – amounts that might indicate that the person possessing the drug is involved in high level distribution. Only 0.02% of all traffic stops resulted in recovery of that large an amount of drugs.⁵⁰

The demographic differences in drug enforcement begin at the decision to stop and search pedestrians and cars. Although only 14.6% of Illinoisans are Black, they make up 26.7% of reported traffic stops and 62.7% of reported pedestrian stops statewide.⁵¹ In Chicago, the disparities are even more acute: 29.2% of Chicagoans are Black, but 61.2% of traffic stops, 68.9% of pedestrian stops, and 77.4% of drug crime arrests are of Black people.⁵² These demographic disparities persist through conviction and sentencing.



In Chicago, most people arrested for drug crimes are arrested for low-level possession. The majority of people arrested for drug charges are charged with a Class 4 felony offense of possession of a controlled substance. Class 4 charges are the lowest type of felony charge. Between 2014 and 2021, there were 65,849 controlled substance-related arrests in Chicago, of which 69% were for Class 4 possession of a controlled substance charges. Most of the resources invested in arresting people in Chicago for violating drug laws, then, is directed at possession, not distribution.⁵³

When people are sentenced and sent to prison, many are sent to prison for drug possession, not distribution. In 2019, 2,507 people were admitted to the Illinois Department of Corrections (IDOC) for being convicted of possessing a Class-4 level quantity of a controlled substance. Although the total number of people admitted to IDOC for some

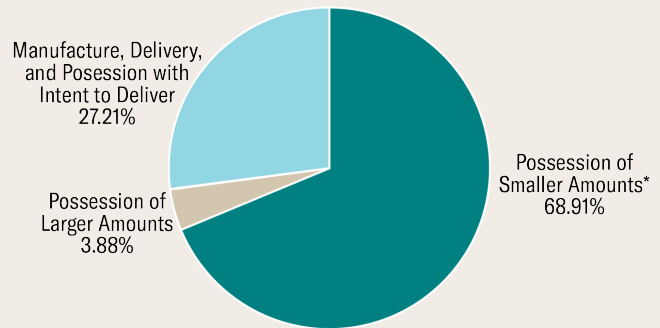
drug charges has decreased in recent years from all-time highs in the early 2000s.⁵⁴ concerningly, there are areas of the state where the number of people being incarcerated for drug possession is rising, not falling. the number of people incarcerated for methamphetamine possession has increased: Between 2018 and 2019, the number of people incarcerated for possession of drugs that are not methamphetamine fell by 19%, even as methamphetamine-related incarceration increased by 13%. Today, prison admissions for drug charges are rising again in certain areas of Illinois: In Southern Illinois, prison admissions rose 56% between 2015 and 2019, and prison admissions in Central Illinois rose 21% between 2015 and 2019.⁵⁵

Illinois Drug Possession Laws Disproportionately Target Black Illinoisans

Draconian drug sentencing laws have produced profoundly unequal outcomes for Black communities. There is no conclusive evidence that Black people use or sell drugs at higher rates than other groups,⁵⁶ but poor Black people and people of color are more likely to be criminalized for both drug use and distribution.⁵⁷ Black people, particularly those who live in impoverished communities, are more likely to be policed and arrested than White people who sell drugs and reside in more affluent neighborhoods, often because the drug trade in impoverished communities is more likely to happen outside, in public, where police can more easily see it.⁵⁸ This is one reason that Black people and people of color are searched, arrested, convicted, and imprisoned for drug selling and distribution at far higher rates than White people not only across the country,⁵⁹ but in Illinois as well.⁶⁰

The Illinois prison population has the eighth highest ratio of Black-to-White racial disparities.⁶¹ This ratio exceeds states such as Alabama, Indiana, Florida, and Texas⁶² and exists among Class 4 offenses in the number of arrests, convictions, and imprisonments.⁶³ While Black people only make up 14% of the state population and have similar drug usage rates as White people, **Black people make up 55% of the prison population, and are convicted at nearly twice the rate of White people for Class 4 possession offenses. 70% of the people incarcerated for “possession of a controlled**

Types of Drug-Related Arrests by the Chicago Police Department, 2014-2021 (n=65,849)



**Small Amounts” denotes the lowest category of drug quantity that the law recognizes - e.g. 15 g for heroin and cocaine, 5 g for methamphetamine. “Larger Amounts” denotes any amount over those thresholds. Manufacture, Delivery, and Possession with intent to Deliver charges can involve any amount of drugs.

substance” charges in the Illinois Department of Corrections are Black.⁶⁴

The impact drug classification has on the racial disparities in the Illinois criminal legal system is best demonstrated in Cook County. **Cook County alone admits 71% of the total Illinois population charged with “possession of a controlled substance.”⁶⁵** The community areas with the highest rates of felony drug arrests are overwhelmingly Chicago’s racially segregated areas of concentrated poverty.⁶⁶ Data from the Chicago Police Department (CPD) shows more than 40,000 cases in which people were charged with drug possession, many concentrated in a few areas on the West Side.⁶⁷ Specifically, there have been more than 23,000 drug possession arrests since 2014 in the four districts that make up the largely black west side (the 10th, 11th, 15th, and 25th districts).⁶⁸ In the remaining eighteen police districts of Chicago, on the other hand, there were only 17,000 drug possession arrests combined over the same period.⁶⁹

If Illinois continues to arrest and administer felony convictions for simple drug possession, Black people and people of color will continue to be disproportionately involved in the criminal legal system, have little-to-no access to treatment, and subsequently be at higher risk of committing suicide or experiencing a fatal overdose after imprisonment.

The High Costs of Illinois' Drug Policy

As illustrated above, it is not uncommon for people to face harsh consequences for convictions related to the possession of controlled substances, even in small amounts. Although it is less common now than it was a decade ago for people to be incarcerated for small-scale drug possession, Illinois laws still provide sentencing ranges of one-to-three years in prison that disproportionately impact Illinois' Black residents, and many charges also involve pretrial incarceration.⁷⁰ Incarceration is extremely expensive and extremely harmful to the incarcerated person. As a result, felony convictions for drug possession cost taxpayers millions per year. More importantly, incarceration and felony convictions rob many Illinoisans of their chance at a successful future, and felony prosecution and incarceration can cost people their lives.

Felony Drug Convictions Cost State and County Taxpayers Millions of Dollars

Between 2018 and 2021, 4,479 people were sentenced to IDOC for Class 4 drug possession or possession of less than five grams of methamphetamine charges, with the median sentence being two years.⁷¹ In sum, IDOC projected people incarcerated for these charges would serve a collective 1,275,990 actual days in prison, which translates to serving over 3,400 years behind bars. Given the fact that it costs around \$54,000 per year to incarcerate someone in an Illinois prison,⁷² **imprisoning people for low-level drug possession between 2018 and 2021 cost the state of Illinois over 190 million dollars.**⁷³ Between 2005 and 2009, nearly \$300 million was spent on prison sentences for residents of the Austin neighborhood of Chicago for drug crimes alone; in East and West Garfield Park, nearly \$200 million was spent incarcerating community-members for drug crimes.⁷⁴

Prison costs are not the only costs to taxpayers caused by felony arrests and prosecutions for drug possession, because many people are jailed pre-trial for these crimes as well. In one study, 75% of felony drug arrests involved half a gram or less of a controlled substance, and 100 of those arrests alone cost Cook County \$350,000 associated with court costs and the

cost of jailing those people.⁷⁵ **Between 2013 and 2018, Cook County spent more than \$100 million on briefly housing people in Cook County Jail for low-level drug possession charges (not including the cost of medical care for people in need of medication-assisted therapy while incarcerated).**⁷⁶ In 2021, 751 people were admitted to Cook County Jail for drug possession charges and served a total of 24,424 days in jail. **At a cost of \$111 per day, Cook County spent about \$2.7 million incarcerating people for drug possession in 2021 alone.**⁷⁷

The Human Cost of Illinois' Drug Possession Laws

The Long-Term Consequences of Felony Convictions

Taxpayer costs pale in comparison to the immense toll the war on drugs has on Illinois residents.

Because all common controlled substances charges in Illinois are felonies, they all carry with them the devastating consequences of felony convictions. The collateral consequences of felony convictions are not only burdensome, but are life-long and further impede Illinoisans' recoveries from substance use. **In Illinois, there are 1,449 statutes which constrain the rights, entitlements, and opportunities of individuals with past felony convictions.**⁷⁸ Black and poor people are disproportionately incarcerated in Illinois prisons; these institutional barriers caused by felony drug convictions thus adversely affect Illinois' Black and lower-income communities the most.

Education | Punitive policies that prevent people with convictions for drug charges from accessing higher education have been the norm. Because of intergenerational poverty caused by centuries of discrimination, young Black people and people of color are the most in need of financial assistance in order to attend college. Yet, Black people and people of color with past drug convictions are deprived of access to higher education through the denial of public funding and requirements of college admissions offices that applicants disclose past convictions. The barriers to higher education spurred by a felony conviction are not only a senseless waste of human potential, but are detrimental to communal upward mobility and individual and community wellbeing, given evidence showing that postsecondary education significantly lowers a person's likelihood of returning to prison or jail.⁸⁰

Housing and Public Aid | For people with past drug-related felony convictions, securing safe and affordable housing resents significant struggles because they are systematically excluded from both the public and private housing markets. Most housing authorities across Illinois make decisions around someone’s housing application based on whether or not they have any convictions in the last 3-to-7 years.⁸¹ This trend also persists with private management companies who set their own policies around leasing to individuals with criminal records—especially those with felony convictions.⁸² People with drug charges on their criminal backgrounds often face particularly harsh consequences: They cannot receive federal housing assistance, and in Illinois, face restrictions on access to Temporary Assistance for Needy Families (TANF).⁸³ For years, the federal “one strike rule” encouraged housing authorities to evict all members of a family if one member had a criminal record. Although the rule was repealed in 2011, it set a strong ethos that continues to discourage private and public housing authorities from allowing people with felony convictions from moving in with relatives who live in public or subsidized housing.⁸⁴ Even after the repeal of the rule, the Fair Housing Act does not include explicit protections for individuals with criminal records, and restrictions based on criminal history are not illegal.⁸⁵

Harsh penalties and collateral consequences contribute to the negative outcomes our state’s criminal legal system claims to be interested in preventing. For many years, researchers and advocates fighting to end homelessness have followed the evidence-based “Housing First” model, which holds that people’s basic needs (i.e. shelter) must be met before they can effectively address other issues, such as substance use disorders.⁸⁶ Being unable to secure housing due to criminal convictions produces even more barriers to people’s ability to secure education and employment opportunities that can get them out of poverty. For example, not having a stable address prevents people from being contacted regarding employment opportunities. Hindering economic mobility while also preventing people from securing safe housing has also been found to harm families and increase the likelihood that someone will experience relapse and overdose death.⁸⁷

Employment | Felony convictions also impede a person’s ability to secure gainful employment, despite

the fact that employment can reduce poverty and provide the means for people to seek treatment in their communities.⁸⁸ According to the Illinois Criminal Justice Information Authority (ICJIA), 77% of these constraints impose restrictions on people with past felony convictions’ employment, occupational licensing, and business activities. There are over 900 different barriers to licensure and employment, and 50% of these are lifelong bans.⁸⁹ Moreover, the majority of those restrictions are mandatory, automatic, and permanent.⁹⁰

“I can get specific jobs until I’m trying to get certain jobs that have benefits, maybe a union, maybe a 401K, or maybe they pay a certain salary, then I gotta get fingerprinted and once i get fingerprinted then I usually get a script about why they’re going with a different candidate in spite of the fact of me having 18/19 years of experience, and a masters degree, a substance abuse license, a mental health license... none of that matters once they fingerprint me. I don’t know how many jobs I’ve been turned down from just because I have past convictions. Even though my record has gotten sealed and expunged, but it still impacts me right now to this day”
- Reginald



Employment is often identified as an important goal by people in treatment and recovery from substance use and is also found to prevent negative health effects and lower rates of drug use and substance use disorder.⁹¹ Despite the importance of employment in supporting people's recoveries, the constraints listed here exclude thousands of Illinoisans who use drugs and have past felony convictions.⁹² Given the fact that Black people and other people of color disproportionately represent the majority of drug-related felony convictions, the harmful effects these policies have on people's recoveries and rearrest rates are further compounded by the additional, institutionally racist barriers to employment given the discrimination prevalent in the labor market.⁹³

Felony Prosecutions Can be Fatal – Especially to Black Illinoisans

Across the United States, overdoses are the leading cause of death for people recently released from prison.⁹⁴ Yet, while exorbitant funds are spent every year to disproportionately arrest Black people for felony drug possession charges, much less money is spent to remedy the impact the war on drugs has had on disparities in drug treatment and fatal overdoses in Illinois.

In August 2021, the Illinois Department of Public Health reported that while the opioid overdose fatality rate (per 100,000 of each population) for non-Hispanic White residents is 20.8 and Latine/Hispanic residents is 16, the overdose fatality rate for non-Hispanic Black residents is 55.3.⁹⁵ This represents a 32.7% increase from 2019, is 2.3 times higher than motor vehicle fatalities, and is 2.2 times higher than the rate of homicides in our state.⁹⁶ **Clearly, the people dying from overdoses share the same demographics as the people disproportionately experiencing felony drug arrests and who live in Chicago's underfunded neighborhoods, which lack access to mental health and substance use treatment.**

Incarcerating people charged with low-level drug offenses ultimately worsens the health of incarcerated people: People with substance use disorders are more

vulnerable to the psychological impact of imprisonment, as they are more likely to have histories of trauma in and outside of their communities.⁹⁷ Prisons are not only unable to address the treatment and mental health needs of people living in them, but being incarcerated is, in itself, a traumatic experience which may exacerbate those needs.⁹⁸ **Moreover, people returning home from prison are 8-to-18 times more likely than non-imprisoned people to commit suicide. Substance use disorder is a risk factor of suicide, and about a quarter of suicides occur within one month after someone is related from prison.**⁹⁹ As illustrated above, overdose risk remains high when someone is released. In the immediate two weeks after release, **individuals re-entering the community from correctional settings are almost 130 times more likely to die of an overdose than the general population.**¹⁰⁰

Overdose risk can be attributed to many reasons—including when newly-released individuals resume drug use after a period of abstinence basing their intake on their pre-incarceration practices, when they use drugs from unfamiliar sources and of unknown strength,¹⁰¹ the trauma brought on by imprisonment,¹⁰² the inability to obtain certain needs-based social benefits after incarceration, and the stress generated by employment and housing restrictions and stigma.¹⁰³

Continuing the harmful and ineffective policies of the war on drugs era that prioritize incarcerating people charged with low-level drug offenses contributes to both the rate of fatal overdoses and racial disparities in Illinois. Felony drug arrests, convictions, and incarceration take necessary funding *away* from the communities hit hardest by the war on drugs and the current overdose crisis. Instead of investing in community services, diversion programs, and harm reduction, Illinois spends billions of dollars every year in policing, arresting, and incarcerating people who use drugs. These communities are where investment is urgently needed to improve treatment capacity and equitable access to community-based treatment, recovery supports, and harm reduction—which has time and time again proven to be our country's most effective response to addressing substance use disorders and fatal overdoses.

The Failure of the War on Drugs: Why Illinois' Drug Laws Struggle to Achieve Their Goals

The criminalization of drug possession causes immense harm to Illinoisans. Simultaneously, it has failed to achieve many of its goals of reducing drug use or making it more expensive or difficult to buy drugs. Fundamentally, the reason these policies have failed to achieve their goals is because of now disproved beliefs about how drug markets work and why and how people use drugs.

The War on Drugs Does Not Make it Harder for People to Buy or Use Drugs

Many of the politicians who supported war on drugs policies believed that heavy criminalization of drug selling and use would decrease the supply of drugs, therefore making drugs more expensive and less accessible to people who use them.¹⁰⁴ Despite these intentions, it is now well-understood that the war on drugs has been an abject failure in changing the dynamics of how many people use and sell drugs, and in mitigating the harm associated with drug use.¹⁰⁵

In fact, the war on drugs and continued emphasis on drug arrests, prosecutions, and incarceration have had no substantial effect on drug use in the United States. In a 2017 paper, the Pew Charitable Trusts found that there is no correlation between states' rates of sentencing people to prison for drug crimes and their rates of adult drug use.¹⁰⁶ In an interview in 2018, drug policy expert Mark Kleiman stated succinctly:

“We did the experiment. In 1980, we had about 15,000 people behind bars for drug dealing. And now we have about 450,000 people behind bars for drug dealing. And the prices of all major drugs are down dramatically. So if the question is do longer sentences lead to a higher drug price and therefore less drug consumption, the answer is no.”¹⁰⁷

Several studies have supported Kleiman's findings¹⁰⁸ and have not found any evidence to support the

proposition that felony or other criminal penalties for drug possession impacts prevalence of drug sales or use. The National Research Council of the National Academy of Science concludes that:

“In summary, existing research seems to indicate there is little apparent relationship between severity of sanctions prescribed for drug use and prevalence or frequency of use, and that perceived legal risk explains very little of the variance in individual drug use.”¹⁰⁹

Put simply, prosecuting all drug use as a felony has made no impact on how often people use or sell drugs. Moreover, at the same time that prison sentences for drug law violations rapidly rose between 1980 and 2000, the price of heroin, cocaine, and methamphetamine all dropped dramatically—by 80%, 88%, and 68% respectively.

The Drug User vs. “Drug Dealer” Myth

The structure of Illinois' drug laws assumes that there are two distinct kinds of people involved in the illegal drug trade – people who use drugs and people who sell them. But the truth is not so simple; in many cases, there is an overlap between these two groups. In 2012, 43% of people who reported selling drugs in the past year also met the criteria for a substance use disorder;¹¹⁰ **84% of people arrested for drug distribution in Chicago tested positive for drug use, and nationally, 87.5% of people who reported selling drugs also reported using drugs that same year.**¹¹¹

People who are arrested for selling drugs often work at the lowest rungs of drug supplying hierarchies and are selling to fund their own drug use. People who sell or distribute drugs to support their own use are more vulnerable to arrest and incarceration than higher-level drug suppliers and manufacturers because they frequently play low-level, public roles as runners or interface directly with customers.¹¹² People in these lower-level roles are more likely to be arrested than other suppliers given the fact that undercover law enforcement or confidential informants are more likely to take on the roles of customers before making an arrest.¹¹³ Moreover, low-level street dealers can be quickly replaced in drug-selling operations.¹¹⁴ **Given the frequency and ease of replacing low-level,**

public-facing roles within larger hierarchies, incarcerating people for the distribution of drugs has not and will never significantly impede the drug trade in Illinois.

Many people in Illinois prisons for convictions related to drug selling and distribution are serving long sentences because **Illinois currently punishes all conduct—big and small—through sentences designed for the heads of drug distribution networks.** Unfortunately, this practice has done nothing to diminish the harms of drug use or reduce activity in the drug trade. The federal system demonstrates the way that harsh penalties for drug distribution play a significant role in extending prison sentences rather than hindering access to drugs, with federal drug law violations raising average prison sentences by 35% between 1980 and 2011.¹¹⁵ In Illinois, harsh penalties have helped fill Illinois' prisons with people who use drugs occasionally or suffer from a substance use disorder instead of targeting higher-level distributors. **The truth of the matter is that our criminal legal system is incapable of separating high-level drug distributors from drug users, and most often criminalizes people with minor or no involvement in the illegal drug trade.**

“My record prohibits me from being able to get certain types of work, I feel like I still have the label as a hardened criminal, the way I was made out to look at the time of my arrest.. I’m still [seen as] the ‘drug dealer’ and that definitely has an impact on my life today still.

- Tim

The Shortcomings of Mandatory Treatment

One of the most persistent arguments for continuing felony prosecution of drug possession is the belief that the criminal legal system gives people access to treatment that they would not otherwise have, or that it forces them to engage in treatment they would otherwise not engage in. Some believe that involuntary treatment is necessary because people with substance use disorders “lack motivation” to pursue treatment, and involuntary treatment can give people the opportunity to “hit rock bottom,” access treatment, and address their substance use in a way that motivates engagement to avoid a more punitive outcome.¹¹⁶ However, research shows that the criminal legal system is an ineffective, and often harmful, way to encourage people who use substances to get treatment.

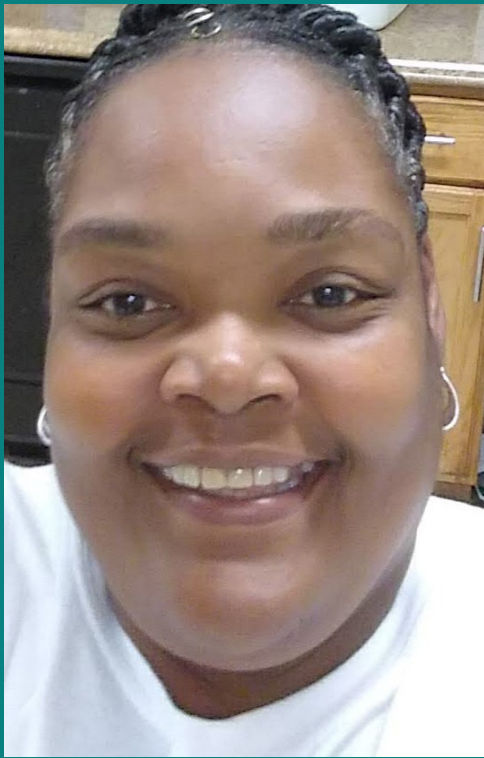
“[Jail] felt like punishment, it didn’t feel like rehabilitation. A lot of the places where I was locked up at, they didn’t offer anything that would begin to help you understand anything about addiction or recovery”

- Reginald

The criminal legal system is ill-equipped to meet the needs of people who use drugs. Throughout the criminal legal system, even well-intentioned staff and personnel may lack the training, support, and resources to respond to the specific treatment needs of people with substance use disorders in prisons.¹¹⁷ Among those incarcerated in jail and prisons nationally, it is estimated that only 7-to-20% of those in need of clinical treatment actually receive those services during their incarceration.¹¹⁸ In Illinois, only about 17% of those in need of drug treatment accessed it while incarcerated.¹¹⁹

“I didn’t have anyone to go to or seek help, so I did seek help with the court system. It didn’t appear to them that I needed help. They felt that I was just a criminal, and to put me away, send me to jail, and that would be the end of it”

- Keshia



The belief that incarceration and other forms of criminal legal system involvement can be the impetus for someone to recover from their substance use disorder is ill-conceived, as there is growing evidence that punishing people with **involuntary treatment is ineffective at best and fatal at worst**. The reasons people do not seek treatment is often not that they have not hit “rock bottom” – instead, people do not seek treatment for various reasons, including cost, lack of access, and facing other pressing needs including housing, medical treatment, and employment. Moreover, evidence suggests that involuntary treatment may be ineffective in reducing the rate of rearrest, and many scholars believe that legal requirements perceived as coercion can have negative effects on people’s treatment outcomes.¹²⁰ Specifically, research suggests that involuntary treatment can damage the relationship between treatment provider and recipient

and further traumatize individuals who have already experienced significant hardships in their lives, diminishing the likelihood of successful treatment outcomes as well as engagement in future health services.¹²¹ Other evidence suggests that involuntary, abstinence-only treatment can be fatal, with one study particularly finding that clients who received involuntary treatment were 2.2 times more likely to die of opioid-related overdoses than those who enrolled in voluntary treatment.¹²² In contrast, **voluntary community-based treatment has been found to be dramatically more effective in meaningfully addressing substance use disorders.**¹²³ Given the fact that community-based treatment is dramatically more effective than involuntary treatment and incarceration, funds that would be expended on the criminal justice system for the purposes of involuntary treatment should be used to expand the state’s far too limited current treatment capacity.

Fentanyl: Why a New Drug Does Not Change the Need to Decrease Penalties for Drug Possession

One common argument against reclassifying penalties for drug possession is a fear that reducing those penalties will fuel the harms caused by fentanyl.¹²⁴ While fentanyl is a major public health concern, it is not a reason to resist common sense changes to Illinois’ drug possession laws. It is important that any changes to drug possession charges apply to *all* drugs, and do not exempt fentanyl or any other drug for higher penalties; exemptions would be harmful and counterproductive.

Understanding Fentanyl and the “Third Wave” of the Opioid Crisis

Fentanyl is responsible for the proclaimed “third wave” of the opioid¹²⁵ - involved overdose epidemic in North America.¹²⁶ Starting in 2013, and continuing with record-breaking numbers of overdoses in 2021,¹²⁷ illegally manufactured fentanyl has dramatically and perhaps irrevocably shifted the illicit drug supply and largely supplanted heroin in several markets,¹²⁸ and as

a result, remains the primary driver and reason for the increase in opioid-involved deaths.

In Cook County, fentanyl-involved overdose deaths increased from 58% of all opioid-involved overdose deaths in 2017 to 77% of all opioid-involved overdose deaths in 2019.¹²⁹ The Cook County Medical Examiner's Office has confirmed a total of 1,840 opioid-involved overdose deaths in 2020,¹³⁰ although an exact breakdown of fentanyl-involvement remains pending.

Myths About Fentanyl

Unfortunately, Fentanyl now permeates most drug markets, and experts agree it is here to stay.¹³¹ Although there are legitimate public health concerns posed by fentanyl, some of the most pervasive concerns about fentanyl have been overstated, and some fears are based on misinformation about fentanyl and how it differs from other opiates.

One concern is around fentanyl analogues. Fentanyl analogues, which are substances that mimic effects of fentanyl, but have slightly different chemical structures.¹³² Many people fear that these fentanyl analogues may be even more potent or dangerous than fentanyl itself, and could cause increases in overdose deaths. These fears are based on some misconceptions. While there are many¹³³ fentanyl analogues found in the country's illicit drug supply, with the well-documented exception of carfentanil, very little evidence exists to determine if the majority of fentanyl analogues are actually more potent or dangerous than fentanyl.¹³⁴

One pervasive myth about fentanyl that is often used as a reason to push for its increased criminalization is the belief that fentanyl causes unique risks to non-users like first responders who encounter the drug. However, there is no evidence that this kind of exposure is prevalent or poses any meaningful health risk. Environmental fentanyl exposure concerns are widespread and largely misunderstood, as the mainstream media continues to perpetuate the myth that fentanyl can be ingested via touch, skin contact, or airborne exposure.¹³⁵ The American College of Medical Toxicology (ACMT) released a definitive position statement in 2017 outlining the extremely low likelihood of fentanyl exposure via evaporation of standing product (e.g. breathing in an inert powder)

and/or incidental dermal absorption (e.g. touching inert powder with bare skin). The only confirmed case of overdose due to unintentional contact in the United States is an instance of a veterinarian accidentally squirting himself in the eyes with liquid carfentanil;¹³⁶ The veterinarian was treated with naltrexone and suffered no consequences or ill effects other than temporary drowsiness.¹³⁷ In sum, **there is no risk of overdosing from simply touching or breathing the same air as inert powder containing fentanyl.** The only risk of overdosing from inert powder containing fentanyl is if the powder is snorted (thereby applying it directly to the nose's mucous membranes in a high quantity) or if it is injected (thereby introducing fentanyl directly to the bloodstream). Correcting pervasive myths and fears around fentanyl exposure is an important public health and public safety intervention,¹³⁸ as fears of incidental exposure drive punitive legislation, similar to HIV/AIDS criminalization laws in the 1990s and early 2000s.¹³⁹

The DEA currently classifies all fentanyl analogues, both those previously identified and those unknown, as Schedule 1 drugs,¹⁴⁰ which means they will carry the harshest penalty for both possession and distribution at the federal level. Fentanyl itself remains Schedule II, due to its use in anesthesiology and palliative care.¹⁴¹ But there is intense pressure to increase penalties for both fentanyl and its analogues. 45 states have proposed legislation to increase penalties for fentanyl and its analogues while 39 states have passed or enacted such legislation since 2011.¹⁴² Penalties for possessing or distributing drugs which contain fentanyl have included mandatory minimum sentences, homicide charges, involuntary commitment, and more.¹⁴³

Illinois politicians should resist the pressure to increase penalties for fentanyl possession or exempt it from the reductions in penalties for drug possession that are desperately needed. Possession of small amounts of fentanyl should be a misdemeanor, just like possession of all other types of controlled substances.

Increased Penalties for Fentanyl Would be Unjust

Increased fentanyl penalties frequently have unfair outcomes that punish people who didn't specifically intend to possess fentanyl or who possess extremely

small quantities of the drug. This is because (1) Fentanyl is usually mixed with other controlled substances, and it is difficult to identify its presence or quantity with current testing; (2) both substance users and drug sellers are often unaware of the presence of fentanyl in their drugs and (3) in states with increased fentanyl penalties, the enforcement of those penalties is already creating racially disparate results.

Fentanyl is Difficult to Detect and Quantify

Most proposed changes to laws regarding fentanyl would set certain amount thresholds where either the possession of more than a certain amount of fentanyl would become a more serious crime, or would carry a higher penalty than possessing other drugs. However, determining if, when, and how much fentanyl is present in a bag of drugs remains a serious technological challenge, particularly when police and prosecutors rely on tests that are available in the field, rather than in a lab.¹⁴⁴ **At present, no front-line technology can reliably or definitively identify and quantify any substance in a bag of drugs, nor distinguish between most fentanyl analogues.** Despite the weaknesses of front-line tests, further testing on drugs is rarely done, and verifying fentanyl-in-substances through laboratory testing is costly, time-consuming. Even in the best laboratory conditions, it can be unclear if the substance and fentanyl were sold together originally, or whether they were mixed by a person consuming the substance after purchase.¹⁴⁵

The inability to both (a) properly identify fentanyl and fentanyl analogues using front-line tests and (b) quantify the amount of fentanyl relative to other substances in a given bag of drugs makes legal processes and sentencing prone to punishing even trace amounts of fentanyl as pure fentanyl—leading to longer sentences.

Both Sellers and Users are Often Unaware of the Presence of Fentanyl

The injustices associated with the inability to accurately test for fentanyl and its analogues at the frontlines—all the while administering tougher penalties—is compounded by the inability of most drug users and drug sellers to accurately identify what is in their possession. Most people who use drugs do not know with certainty what they have purchased on the illicit

drug market, including if those drugs contain fentanyl. **From 2018 to 2019, patients at Cook County Health’s Stroger Hospital with a positive opiate screen tested positive for at least one fentanyl analog 65% of the time.¹⁴⁶ After receiving a positive fentanyl test result, 75% of these patients reported they were not expecting fentanyl and/or were unaware of having consumed fentanyl prior to the test.¹⁴⁷** Studies in other states have reported similar findings that the majority of patients test positive for fentanyl while reporting only heroin and/or non-fentanyl drug consumption.¹⁴⁸ A study of Emergency Department patients in Baltimore demonstrated that even among a population that reported a preference for heroin (90.8%) and high knowledge of increased risk for overdose with fentanyl (85.5%), the majority had positive urine tests for fentanyl (80.6%).¹⁴⁹ **As such, people who use drugs are at risk of being harshly punished for the possession and/or distribution of something they did not know was there.**

The exact mechanics of the illicit drug market remain largely undocumented, as illicit activities are difficult to study and publish without putting research subjects at risk of arrest or retaliation. In the absence of clear documentation of how drugs are sold on the illicit drug market, it is difficult to determine how much knowledge a point-of-sale vendor (i.e. the person someone directly buys their drugs from) has about what exactly is in their supply. However, there is some evidence that **most point-of-sale vendors, or street-level drug sellers, in the United States are unaware of the exact composition of their drugs as the people buying them are.¹⁵⁰**

Fentanyl Enhancements Create Racially Disparate Sentences

The ways in which fentanyl penalties are currently enforced are already mimicking the impact the war on drugs has historically had on Black communities and communities of color. A recent study of individuals convicted of trafficking fentanyl revealed that among 52 cases involving fentanyl trafficking, half of the individuals sentenced were classified as “Hispanic” and one quarter were classified as “Black” with the average sentence being 66 months.¹⁵¹ These trends not only perpetuate the racial disparities that characterize sentencing of other drugs, but also predominantly affect Black people and people of color who participate

in the lower-tiers of the drug market, with the “kingpins” which motivate harsher penalties rarely convicted.

As stated, fentanyl penalties are only further contributing to the racial disparities already perpetuated by drug-sentencing laws¹⁵² and are not saving lives or dramatically reducing the use or sale of fentanyl.¹⁵³

Harm Reduction: A Different Vision for Addressing Fentanyl and Other Substance Use

In successfully addressing the new wave of fentanyl overdoses and the harms caused by substance use, it is clear that the old strategies of the drug war are and will be a failure. Harm reduction is a strategy of addressing substance use that meets drug users where they are, and provides them with the services they need to be as safe as possible, whether or not they continue to use substances. Fentanyl poses new public health concerns that are best addressed through harm reduction. For example, For example, people who inject drugs which contain fentanyl – knowingly or not – may need to inject more frequently due to fentanyl’s shorter duration in contrast to heroin.¹⁵⁴ This puts people who use drugs intravenously at a higher risk for injection-related health outcomes such as HIV, Hepatitis C virus (HCV), or soft tissue infection.

The extent to which fentanyl is present in the illicit drug market raises concerns around “drug-induced homicide.” In Illinois, drug-induced homicide is the act of providing drugs to a person who then experiences an overdose from those drugs and dies.¹⁵⁵ Researchers have noted that there is a lack of “systematic empirical evidence that DIH prosecutions slow the sale of illegal drugs.”¹⁵⁶ Preliminary research suggests that drug-induced homicide laws may in fact have several harmful unintended consequences, including deterrence from calling emergency medical services for fear of arrest and/or criminal prosecution.^{157 158} Other case studies further underline how drug-induced homicide often targets family, friends, and/or people living with opioid use disorder (OUD) rather than the high-level dealers.¹⁵⁹

An illegal and unregulated drug market is incapable of guaranteeing safety. Widespread, community-based, low-barrier harm reduction

services and protection for people who use drugs is thus needed to mitigate the harms caused by the presence of fentanyl in drugs. Examples of low-barrier harm reduction services and protections include:

1. Overdose Prevention Sites (OPS) or Overdose Prevention Centers (OPC), which are physical locations where PWUD can use pre-obtained drugs safely under the care and supervision of trained personnel.¹⁶⁰
2. Expanded distribution of fentanyl test strips, which provide binary results on the presence or absence of fentanyl and many analogues.¹⁶¹
3. Community-based drug checking with Fourier-transform Infrared (FTIR) spectroscopy and other advanced technologies.¹⁶²
4. Widespread distribution of naloxone, an easy-to-administer overdose reversal agent which will safely and quickly reverse an opioid-involved overdose, preventing brain damage and/or death.¹⁶³

Illinois also needs to invest more in treatment – something that will be possible if the state saves millions of dollars by reclassifying drug possession. Treatment access in Illinois is much harder for Black and Latinx residents than for White residents. One hypothesis that explains the disproportionate rate in which Black residents are dying from overdoses is that “many large cities do not have good treatment systems, or do not have treatment systems that can handle the capacity of need among potential patients.”¹⁶⁴ For instance, there are few public treatment options available in communities like the South and West Sides of Chicago, with Chicago having the lowest treatment capacity for medication-assisted treatment (buprenorphine) in the Midwest and being the third lowest in accessibility among large cities nationally.¹⁶⁵ Not only does Chicago have limited treatment capacity, but Cook County also lacks the necessary mental health clinics that can address root causes behind substance use disorder—especially in the south, west, and southwest suburbs. In 2018, there were only 63 mental health clinicians on the entire Southwest Side of Chicago, equivalent to 0.17 therapists per 1,000 residents (or, in other words, one therapist per every 5,883 residents).¹⁶⁶ In contrast, Gold Coast, an affluent Near North Side neighborhood, had 381

mental health care providers, equivalent to 4.45 therapists per 1,000 residents.¹⁶⁷

Investing in community based treatment, not prosecution, jail, and prison, is the path forward towards keeping more people in Illinois alive and living safe, happy, fulfilling lives.

Conclusion

The war on drugs has wreaked havoc on millions of lives and has failed to fulfill its goals of decreasing drug use and sales, and in many ways has exacerbated the associated harms. It is time to abandon decades of failed policies and focus on public health solutions to drug use, rather than continue harsh criminalization. While refocusing the strategy to address substance use disorder and the overdose crisis requires significant and comprehensive changes, the first step must be to pivot from the central, disproven premise that all unauthorized drug possession and use is something that should carry severe and life-altering punishment. Simply put, this strategy is not only ineffective, but is only fueling Illinois' drug use crisis. Instead, **Illinois' approach should be evidence-based, focused on health and the preservation of lives, and in support of people's ability to recover without any impediments to their safety and well-being.**

As other states' experiences have shown, reclassifying the penalty for possession of small amounts of drugs from a felony to a misdemeanor would allow more people who struggle with substance use disorders to be deflected or diverted from the criminal legal system towards effective community-based treatment, which in turn would create better opportunities for recovery, upward mobility, and overall mental and physical health. For these reasons, the undersigned organizations recommend that **Illinois should reclassify simple possession of a personal-use quantity of a controlled substance from a felony to a misdemeanor.** This means creating a classification that makes possession of a controlled substance a Class A misdemeanor. We hope this overview of Illinois' current drug possession laws, explanation of the harm caused by these laws, and guiding principles assist various stakeholders in pursuing meaningful reforms.

"I hope to see the county jail population go down, especially for people who have minor offenses and misdemeanor offenses. I know connected with this bill it would be them getting services. I'm hoping that we can stop that 'in and out' thing going on at the county jail with minor cases... and I would like to see them receive the services they need. A lot of the time people don't get offered those services and aren't aware of them being out there. I'm just hoping the information is out there once the bill is passed and that these people are able to stay home and learn some things about their lives"

- Keshia

ACLU of Illinois
Cabrini Green Legal Aid
Chicago Appleseed Center for Fair Courts
Chicago Council of Lawyers
Chicago Urban League
Clergy for a New Drug Policy
Communities United
Cook County Department of Public Health
Cook County Board's Justice Advisory Council
Illinois Justice Project
Law Office of the Cook County Public Defender
Live4Lali
Perfectly Flawed Foundation
Shriver Center on Poverty Law

Appendices

APPENDIX 1: History of Penalty Enhancements in Illinois Drug Laws

Notable penalty enhancements over the years include:

1970s:

- 1972: Felony penalties for drug possession began as a result of the Controlled Substances Act, which established the scheduling of various controlled substances and felony charges for possession and distribution.
- By the end of the 1970s, some drug charges were classified as Class X—the most serious class of felony in Illinois other than murder.

1980s:

- 1987: Weight thresholds were reduced for cocaine. Prior to 1987, possession of more than 30 grams of cocaine qualified someone for a Class 1 felony charge instead of a Class 4. With this change, only half of that amount—15 grams—require's a person's possession charge to be upgraded.

1990s:

- In the 1990s, a system of mandatory minimum penalties was created.
- Increases were made to the maximum possible penalties for Class X drug offenses.

2000s:

- 2002: Weight thresholds were reduced for heroin. Similar to the weight threshold change in 1987 for cocaine, possession of more than 30 grams of heroin qualified someone for a Class 1 felony charge instead of a Class 4. After 2002, only half of that amount was required to upgrade a person's possession charge.
- 2005: In 2005, the General Assembly separated methamphetamine offenses out of the Controlled Substances Act, and prescribed separate and often harsher penalties for methamphetamine crimes.

APPENDIX 2: Timeline of Recent Legislation Enacted to Reduce Drug Criminalization in Illinois

2012:

- SB 1701 (Silverstein/Cassidy), enacted as P.A. 97-678: Created “Good Samaritan” law, providing limited immunity from prosecution for certain drug possession offenses if evidence for the charge was acquired as a result of the person seeking or obtaining emergency medical assistance.

2013:

- HB 1, enacted as P.A. 98-122: Created medical cannabis pilot program.

2016:

- SB 2228, enacted into law as P.A. 99-697: Reclassified cannabis possession under 10 grams from a misdemeanor crime to a “civil infraction” punishable by a fine.

2017:

- SB 2872 (Raoul/Gordon-Booth), enacted as P.A. 99-938: Repealed mandatory minimum prison sentences (and made probation a sentencing option) for:
 - Cannabis trafficking;
 - Calculated criminal cannabis conspiracy;
 - Possession w/ intent to deliver 5 grams or more of cocaine; and
 - A second or subsequent conviction for a violation of the Methamphetamine Control and Community Protection Act.
- SB 1722 (Raoul), enacted as P.A. 100-003: Changed the mandatory felony classification increase for drug crimes committed near a protected area. Reduces the protected area from 1,000 feet to 500 feet; Removes public housing as a protected area; and requires a nexus between the location and the drug offenses before the offense is increased by one felony class.

2018:

- SB 336 (Harmon/Cassidy), enacted as P.A. 100-1114: Expanded medical cannabis program to make cannabis available as an opioid painkiller replacement.

2019:

- SB 2023 (Fine/Morgan), enacted as P.A. 101-363: Made medical cannabis program permanent and expanded qualifying conditions.
- HB 1438 (Cassidy/Steans), enacted as P.A. 101-27: Legalized adult use of recreational cannabis.

2020:

- HB 3653 (Slaughter/Sims), enacted as P.A. 101-652: Policing and criminal justice omnibus package (“SAFE-T Act”):
 - State funding for “deflection” co-responder programs allowing non-police responses (including by EMS and community-based behavioral health providers) to crisis and non-crisis situations involving mental health and substance use.
 - Abolishes cash bail and limits pretrial incarceration to certain qualifying offenses—effectively eliminating pretrial incarceration of people charged with drug offenses (effective January 1, 2023).
 - Narrows “three strikes” law to exclude convictions for drug offenses and other non-forcible offenses.

2021:

- HB 158 (Lilly/Hunter), enacted as P.A. 102-0004/ HB 3445 (Yang Rohr/Ellman), enacted as P.A. 102-476: Expanded “Good Samaritan” law to provide limited immunity from arrest (formerly only applied to prosecution), and prohibited finding a person in violation of parole, mandatory supervised release, probation, or conditional discharge, or seizure of property under State civil asset forfeiture laws, if evidence for the violation was acquired as a result of the person seeking or obtaining emergency medical assistance in the event of an overdose. Expanded the scope of the immunity to include more offenses, including:
 - Any possession, possession with intent to deliver, or delivery charge involving quantities of substances below specified thresholds (previously, the law applied only to simple possession charges, and only those classified as Class 3 or 4 felonies AND involving quantities below the thresholds);
 - Possession of drug paraphernalia;
 - Drug-induced homicide; and

- Aggravated battery.
- Increased, from 1 gram to 3 grams, the quantity threshold below which the law provides immunity from methamphetamine charges.

APPENDIX 3: Background: Natural, Semi-Synthetic, and Synthetic Opioids

Opioids are pain-relieving (analgesic) drugs that bind to opiate receptors (μ [mu], κ [kappa] and δ [delta]) located primarily in the brain and central nervous system (CNS). Opioids are a distinct analgesic in that at proper doses, they relieve pain but do not induce unconsciousness. There are three types of opioids:

1. Natural opioids – also designated as opiates – are made from opium or have opium in them. Opium is produced by and then extracted from the opium poppy *Papaver somniferum*, and contains both morphine and codeine. Natural opioids are generally further developed into semi-synthetic opioids, which have higher potencies.
2. Semi-synthetic opioids are derived from morphine and/or codeine, and can be produced in laboratories for pharmaceutical purposes. Examples of semi-synthetic opioids produced in laboratories for pharmaceutical purposes include: hydromorphone, hydrocodone, and oxycodone. Other semi-synthetic opioids are produced in illicit laboratories for illicit market distribution, most notably heroin.
3. Synthetic opioids contain no opiates or opiate-derivatives, and similar to semi-synthetic opioids, can be produced in laboratories for both pharmaceutical purposes and illicit market distribution. Pharmaceutical synthetic opioids include tramadol and fentanyl. Fentanyl is also commonly produced in illicit laboratories and substituted for other opioids in substances sold via illicit markets.

APPENDIX 4: Opioid Production Landscape: Pharmaceutical and Illicit

Opioids are available via both pharmaceutical and illicit routes in the United States. Opioids available pharmaceutically include the following: oxycodone (OxyContin®), oxycodone in combination with

acetaminophen (Percocet®), hydrocodone (Vicodin®), hydromorphone (Dilaudid®), morphine (MS Contin®), codeine (various brands). Prescription fentanyl is also available as a transdermal patch (Ionsys® or Duragesic®) and a lollipop (Actiq®).

Opioids available via illicit or unregulated markets in the United States include heroin (powder and tar), fentanyl (illicitly manufactured powder and diverted pharmaceuticals), and both diverted and illicitly manufactured pharmaceutical opioids. Diverted pharmaceutical opioids will contain the type and dosage of opioid controlled by the prescription. Illicitly manufactured pharmaceutical opioids may or may not contain the type and dosage of opioid expected by the prescription. An example of this is the common substitution of fentanyl for oxycodone in fake OxyContin® or Percocet® pills. Illicitly manufactured pharmaceutical opioids can also have variable dosage that does not match the intended prescription amount, which makes them particularly dangerous for the consumer.

Opioids purchased on the illicit market in the United States are likely to contain illicitly manufactured fentanyl (IMF) instead of their “sold-as” opioid. This is largely due to the economic potential of IMF: as a colorless, odorless, highly potent powder opioid, it is easier to make and transport than other opioids (particularly heroin). IMF is also easy to substitute for a less potent opioid like heroin or oxycodone. When this substitution occurs, it is usually not done with a 1:1 substitution ratio for potency, leading to drugs that may be more potent than the person consuming them realizes. This unpredictable potency is the main driver behind continuously rising overdose deaths in the United States and Canada. The point at which substitution occurs remains unclear, as the illicit market is not regulated and not easily studied. Additionally, chemical testing to determine a drug’s exact composition is impossible outside of an advanced laboratory setting. Chemical testing that provides some information on drug composition is possible in a community setting (fentanyl test strips, infrared spectrometers) but will not provide accurate information on potency.

Endnotes

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- 14 *Id.*
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- 20 Possessing 15 grams or more of cocaine or heroin makes possession a Class 1 rather than a Class 4 felony. See 725 ILCS 5/570-401(a)(1)(a) and 725 ILCS 5/570-401(a)(2)(a). For more information on the history of sentencing enhancements for Illinois Drug laws, see Appendix 1.
- 21 Simple Possession under 720 ILCS 5/570-402 is Criminal Sexual Abuse is the act of committing and act of sexual conduct by use or threat of force or when the perpetrator has knowledge that the victim cannot consent; it can be charged as a Class 4 felony (720 ILCS 5/11-1.50(d)). Identity Theft not exceeding \$300 is a Class 4 felony (720 ILCS 5/16-30(e)(1)(A)(i)). First time Domestic Battery is a Class A Misdemeanor (720 ILCS 5/12-3.2) as are some forms of violation of an order of protection (720 ILCS 5/12-3.4). For an explanation of different sentences for different classes of offenses in Illinois see 730 ILCS 5/5-4.5-20 – 5-4.5-85.
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 - 133 *Id.*
 - 134 Maurice Wilde et al., *Metabolic Pathways and Potencies of New Fentanyl Analogs* 10 FRONTIERS IN PHARMACOLOGY, Apr. 2019, No. 238, <https://www.frontiersin.org/articles/10.3389/fphar.2019.00238/full>. The absence of scientific study in this area can be attributed to at least two barriers: United States Drug Enforcement Agency (DEA) regulations that severely limit who can handle and administer controlled substances, and ethical considerations around administering potentially highly-potent controlled substances to human subjects.
 - 135 Leo Beletsky et al., *Fentanyl panic goes viral: The spread of misinformation about overdose risk from casual contact with fentanyl in mainstream and social media*, INT’L J. OF DRUG POL’Y, Dec. 2020, No. 102951, <https://dx.doi.org/10.1016%2Fj.drugpo.2020.102951>.
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 - 138 Brandon del Pozo et al., *Can touch this: training to correct police officer beliefs about overdose from incidental contact with fentanyl*, HEALTH & JUST., Nov. 2021, No. 34, <https://healthandjusticejournal.biomedcentral.com/articles/10.1186/s40352-021-00163-5>.
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 - 140 Schedules of Controlled Substances: Placement of Four Specific Fentanyl-Related Substances in Schedule I, 86 FED. REG. 23,602–606 (May 4, 2021) (to be codified at 21 CFR Part 1308).
 - 141 *Facts About Fentanyl*, UNITED STATES DRUG ENF’T ADMIN., <https://www.dea.gov/resources/facts-about-fentanyl>
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 - 143 *Id.*
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Another frontline system, Fourier-transform infrared spectroscopy (FTIR), is able to detect fentanyl in the presence of multiple cutting agents but cannot accurately detect or quantify substances below a roughly 5-10% concentration threshold. See e.g., J. Leslie, *Alkaline hydrolysis of 1,3-dimethylphenobarbital*, 68 J. PHARM. SCI. 639 (1979), <https://pubmed.ncbi.nlm.nih.gov/34726a975/>; Traci C. Green et al., *An assessment of the limits of detection, sensitivity and specificity of three devices for public health-based drug checking of fentanyl in street-acquired samples*, INT'L J. DRUG POL'Y, Mar. 2020, No. 102661, <https://pubmed.ncbi.nlm.nih.gov/31951925/>; Karen McCrae et al., *Assessing the limit of detection of Fourier-transform infrared spectroscopy and immunoassay strips for fentanyl in a real-world setting*, 39 DRUG & ALCOHOL REV. 98 (2020), <https://pubmed.ncbi.nlm.nih.gov/31746056/>.

Fentanyl analogues are primarily detected in forensic toxicology testing, (gas-chromatography mass-spectrometry (GC/MS) or liquid-chromatography mass-spectrometry (LC/MS) testing). Still, forensic toxicology data cannot tell us in what form any substance was consumed (i.e., if multiple fentanyl analogues were found, were they all from the same bag of drugs? Multiple bags? Was that bag sold as fentanyl, or was it sold as heroin or drugs?).

145 Leslie, *supra* note 137.

146 Neeraj Chhabra et al., *A cross-sectional analysis of fentanyl analog exposures among living patients*, 47 AM. J. OF DRUG & ALCOHOL ABUSE 344 (2021), <https://www.tandfonline.com/action/showCitFormats?doi=10.1080/00952990.2021.1891420>.

147 Juleigh Nowinski Konchak et al., *Effect of positive urine fentanyl screen on attitudes toward heroin use*, DRUG & ALCOHOL DEPENDENCE, Apr. 2020, No. 107934, <https://doi.org/10.1016/j.drugalcdep.2020.107934>.

148 Raminta Daniulaityte et al., *Street fentanyl use: Experiences, preferences, and concordance between self-reports and urine toxicology*, 71 INT'L J. OF DRUG POL'Y, SEPT. 2019, AT 3, <https://pubmed.ncbi.nlm.nih.gov/31146200/>.

149 H Bach et al., *Prevalence of fentanyl exposure and knowledge regarding the risk of its use among emergency department patients with active opioid use history at an urban medical center in Baltimore, Maryland*, 58 CLINICAL TOXICOLOGY 460 (2019), <https://pubmed.ncbi.nlm.nih.gov/31475588/>.

150 Interviews with people who use drugs highlight that a point-of-sale vendor or drug seller may also be unsure about how much fentanyl is present in a bag of drugs. People who use drugs in New York City have reported that point-of-sale vendors may warn buyers that a batch may be potent or have fentanyl in it, but that the drug seller may not always know a batch has fentanyl unless they are using the same supply themselves. Other research done in Rhode Island[#] and North Carolina documented similar strategies, with trusted vendors or drug sellers using the product themselves before sale, or providing other quality assurance. However, even among people who reported that their drug seller was providing fentanyl testing or would throw away batches with fentanyl before selling them, no specific

chemical test or analysis could be provided as proof that point-of-sale vendors can actually test their product for fentanyl. Ethnographic research in Canada has demonstrated that drug sellers will access and use drug checking services to modify fentanyl-related overdose risk and enable clients to make more informed choices about their product. However, community-based drug checking services are not widely spread in the United States, in large part due to state-by-state variation regarding legality of the service. See e.g., Samuel Tobias et al., *Time-Series Analysis of Fentanyl Concentration in the Unregulated Opioid Drug Supply in a Canadian Setting* 191 AM. J. OF EPIDEMIOLOGY 241 (2022), <https://academic.oup.com/aje/article-abstract/191/2/241/6274219?redirectedFrom=fulltext>; C. McKnight and D.C. Des Jarlais, *Being "hooked up" during a sharp increase in the availability of illicitly manufactured fentanyl: Adaptations of drug using practices among people who use drugs (PWUD) in New York City*, INT'L J. OF DRUG POL'Y, Oct. 2018, at 82, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6457118/>.

151 Public Data Presentation for Synthetic Cathinones, Synthetic Cannabinoids and Fentanyl and Fentanyl Analogues Amendments," UNITED STATES SENT'G COMM'N, (Jan. 2018), https://www.uscc.gov/sites/default/files/pdf/research-and-publications/data-briefings/2018_synthetic-drugs.pdf.

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153 JONATHAN P. CAULKINS, ET AL., MANDATORY MINIMUM DRUG SENTENCES: THROWING AWAY THE KEY OR THE TAXPAYERS' MONEY? (1997); More Imprisonment Does Not Reduce State Drug Problems, PEW CHARITABLE TRUSTS, (Mar. 8, 2018), <https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2018/03/more-imprisonment-does-not-reduce-state-drug-problems>.

154 Drug Policy Alliance "Fact Sheet: Fentanyl and Synthetic Opioids." <https://drugpolicy.org/sites/default/files/2021-synthetic-opioids-fact-sheet.pdf>

155 See 720 ILCS 5/9-3.3

156 *Drug Induced Homicide*, HEALTH IN JUST. ACTION LAB <https://www.healthinjustice.org/drug-induced-homicide>.

157 Meghan Peterson et al., "One guy goes to jail, two people are ready to take his spot": Perspectives on drug-induced homicide laws among incarcerated individuals, INT'L J. OF DRUG POL'Y, Aug. 2019, at 47, <https://www.sciencedirect.com/science/article/abs/pii/S0955395919301173>.

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159 Morgan Godvin, *When Accidental Overdose is Treated as Murder: Seeking Relief for Defendants and Why Post Conviction Relief is Necessary*, HEALTH IN JUST. ACTION LAB

(2021), https://www.healthinjustice.org/files/ugd/3bb1a_9a50168a658e4ab29461d2d887e707d0.pdf.

- 160 *Overdose Prevention Sites*, COOK CTY. DEPT. OF PUB. HEALTH (2022), <https://cookcountypublichealth.org/wp-content/uploads/2022/03/CCDPH-Harm-Reduction-Brief-Overdose-Prevention-Sites-OPS.pdf>. OPS/OPC not only remove the risk of overdose by simply having another person present who can respond to and reverse an overdose, they can also act as service hubs and provide a number of wraparound care and services, including treatment and recovery services. New York City opened the nation's first OPC in December 2021, and in the first few months of operation, more than 85 overdoses have been safely reversed on site with no deaths reported. OPS/OPC are a key and powerful tool in reducing opioid-involved overdose deaths.
- 161 Green et al., *supra* note 137.
- 162 Matthew K. Laing et al., *Drug checking as a potential strategic overdose response in the fentanyl era*, INT'L J. OF DRUG POL'Y, Dec. 2018, at 59, <https://pubmed.ncbi.nlm.nih.gov/30359874/>.
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- 164 Bechteler & Kane-Willis, *supra* note 77.
- 165 *Id.*
- 166 Mattie Quinn, *This Is What Happens When a City Shuts Down Mental Health Clinics*, GOVERNING (Sept. 27, 2018), <https://www.governing.com/archive/gov-chicago-mental-health.html>.
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