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## Solving the Fentanyl Problem Beyond The Border: A Call For An International Solution

Agneta Hendershot

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**SOLVING THE FENTANYL PROBLEM  
BEYOND THE BORDER: A CALL FOR AN  
INTERNATIONAL SOLUTION**

*By Agneta Hendershot\**

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## I. INTRODUCTION

Many people move to the United States in hopes of achieving the “American Dream.” However, what is not advertised is the reality that this dream has turned into a nightmare: a nightmare that has shattered families, led life expectancy to drop for the third year in a row, and has left thousands of people dead.<sup>1</sup> The culprit of this nightmare? Opioids, and specifically fentanyl and its analogs. For the first time in the United States’ history, people are more likely to die from accidental opioid overdoses than car crashes.<sup>2</sup>

The opioid epidemic has ravaged the United States. Opioids were involved in over 47,600 overdose deaths in 2017 (67.8 percent of all drug overdose deaths).<sup>3</sup> In 2016, synthetic opioids passed prescription opioids as the most common drugs in overdose deaths in the United States.<sup>4</sup> Fentanyl is a synthetic opioid 50 times more

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<sup>1</sup> Julia Haskins, *Suicide, Opioids Tied to Ongoing Fall in US Life Expectancy: Third Year of Drop*, 49 THE NATION’S HEALTH 1 (2019) (discussing how the opioid crisis is having a negative effect on the U.S. life expectancy).

<sup>2</sup> *Odds of Dying*, NAT’L SAFETY COUNCIL, <https://injuryfacts.nsc.org/all-injuries/preventable-death-overview/odds-of-dying/> (last visited Jan. 10, 2020).

<sup>3</sup> Lawrence Scholl et al., *Drug and Opioid-Involved Overdose Deaths — United States, 2013–2017*, 67 MORBIDITY AND MORTALITY WKLY. REP. 5152 (2019).

<sup>4</sup> *Fentanyl and Other Synthetic Opioids Drug Overdose Deaths*, NAT’L INST. ON DRUG ABUSE (May 29, 2018), <https://www.drugabuse.gov/drug-topics/trends-statistics/infographics/fentanyl-other-synthetic-opioids-drug-overdose-deaths>.

powerful than heroin and 100 times more potent than morphine and is one of the leading causes of drug overdoses.<sup>5</sup> In 2017, an estimated 28,400 people died from overdoses involving synthetic opioids such as fentanyl.<sup>6</sup>

From where is the fentanyl originating? Most of the illegal fentanyl in the United States and globally is produced in China.<sup>7</sup> China is the lead manufacturer and exporter of active pharmaceutical ingredients and chemicals used in legal and illegal substances.<sup>8</sup> Chinese illegitimate suppliers ship these substances via the international postal system and private express consignment carriers, such as FedEx and DHL, then traffic them across the Mexican and Canadian borders into the United States.<sup>9</sup> The United States has responded with tighter border scrutiny, and from 2012 to 2014, confiscations—or seizures—of fentanyl increased almost sevenfold.<sup>10</sup> However, fentanyl is still making its way onto the United States' streets, disrupting and ending countless lives. In August 2019, the U.S. Treasury imposed sanctions on three Chinese men for trafficking fentanyl produced in their nation, reaffirming that China is playing a considerable role in the United States' opioid crisis.<sup>11</sup>

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<sup>5</sup> *Synthetic Opioid Overdose Data*, U.S. CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/drugoverdose/data/fentanyl.html> (last updated Mar. 19, 2020).

<sup>6</sup> Scholl, *supra* note 3.

<sup>7</sup> SEAN O'CONNOR, U.S.-CHINA ECON. AND SECURITY REV. COMM'N, FENTANYL: CHINA'S DEADLY EXPORT TO THE UNITED STATES 3 (2017).

<sup>8</sup> *Illicit Supply of Fentanyl and Other Synthetic Opioids: Transitioning Markets and Evolving Challenges: Hearing before the H. Comm. on Homeland Sec., Subcomm. on Intelligence and Counterterrorism and Subcomm. on Border Security, Facilitation, and Operations*, 116th Cong. 6-9 (2019) (statement of Bryce Pardo), available at [rand.org/content/dam/rand/pubs/testimonies/CT500/CT515/RAND\\_CT515.pdf](http://rand.org/content/dam/rand/pubs/testimonies/CT500/CT515/RAND_CT515.pdf).

<sup>9</sup> *Id.* at 5.

<sup>10</sup> *Increases in Fentanyl Drug Confiscations and Fentanyl-Related Overdose Fatalities*, U.S. CTRS. FOR DISEASE CONTROL & PREVENTION (Oct. 26, 2015), <http://emergency.cdc.gov/han/han00384.asp>.

<sup>11</sup> See Jonathan Landay, *U.S. Imposes Sanctions on Three Chinese Accused of Fentanyl Trafficking*, REUTERS (Aug. 21, 2019, 10:40 AM), <https://www.reuters.com/article/us-usa-china-fentanyl/u-s-imposes-sanctions-on-three-chinese-accused-of-fentanyl-trafficking-idUSKCN1VB1PN>.

The United States has continually urged China to step up its enforcement and regulation to curtail the pipeline of illegal trafficking of fentanyl.<sup>12</sup> In April 2019, China responded to requests by agreeing to classify fentanyl and its related analogs as controlled substances.<sup>13</sup> While the regulations took effect in May 2019, there has been no substantive curtailment of fentanyl flows from China to the United States, according to President Donald Trump.<sup>14</sup> In a series of tweets, President Trump stated, “also, I am ordering all carriers, including Fed Ex, Amazon, UPS and the Post Office, to SEARCH FOR & REFUSE, all deliveries of Fentanyl from China (or anywhere else).”<sup>15</sup> The following tweet stated, “fentanyl kills 100,000 Americans a year. President Xi said this would stop - it didn’t. Our Economy, because of our gains in the last 2 1/2 years, is MUCH larger than that of China. We will keep it that way.”<sup>16</sup> Tensions escalated even further when President Trump announced he would impose a ten percent tariff on certain Chinese imports, worth approximately \$300 billion, beginning September 1, 2019.<sup>17</sup> China’s narcotics regulator responded to President Trump’s claims by stating that the United States is politicizing the issue of Chinese fentanyl exports and “up-ending the facts for their own political necessities.”<sup>18</sup> President Trump believes,

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<sup>12</sup> See Steven Lee Myers, *China Cracks Down on Fentanyl. But Is It Enough to End the U.S. Epidemic?*, N.Y. TIMES (Dec. 1, 2019), <https://www.nytimes.com/2019/12/01/world/asia/china-fentanyl-crackdown.html>.

<sup>13</sup> See Sasha Ingber, *China to Close Loophole on Fentanyl After U.S. Calls for Opioid Action*, NPR (Apr. 1, 2019, 7:38 PM), <https://www.npr.org/2019/04/01/708801717/china-to-close-loophole-on-fentanyl-after-u-s-calls-for-opioid-action>.

<sup>14</sup> Steven Jiang, *Chinese Official Says Trump’s Fentanyl Tweets Are Not True at All*, CNN (Sept. 3, 2019, 5:46 AM), <https://www.cnn.com/2019/09/03/asia/china-us-fentanyl-trump-intl-hnk/index.html>.

<sup>15</sup> Donald J. Trump (@realDonaldTrump), TWITTER (Aug. 23, 2019, 9:59 AM), <https://twitter.com/realDonaldTrump/status/1164914963766546435>.

<sup>16</sup> Donald J. Trump (@realDonaldTrump), TWITTER (Aug. 23, 2019, 9:59 AM), <https://twitter.com/realDonaldTrump/status/1164914963766546435>.

<sup>17</sup> Press Release, Off. of the U.S. Trade Rep., Exec. Off. of President, USTR Announces Next Steps on Proposed 10 Percent Tariff on Imports from China (Aug. 13, 2019), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2019/august/ustr-announces-next-steps-proposed>.

<sup>18</sup> *Chinese State Media Refutes Trump on Tariffs, Fentanyl*, BLOOMBERG (Aug. 3, 2019, 7:09 AM), <https://www.bloomberg.com/news/articles/2019-08-03/china-state-media-says-more-tariffs-won-t-help-solve-trade-issue>.

in large part, that the illegal flow of fentanyl continues to persist due to weak regulations governing pharmaceutical and chemical production in China.<sup>19</sup> Simultaneously, China has vehemently stated that they have taken steps to decrease trafficking, and the onus is back on the United States.<sup>20</sup>

Additionally, new evidence suggests that the opioid epidemic is not just a problem within the United States.<sup>21</sup> Opioid use has more than doubled in Australia from 22 million doses annually in 2001 to 106 million doses in 2013, with an estimated 800 people currently dying annually from opioid overdoses.<sup>22</sup> Between January 2016 and June 2019, more than 13,000 Canadians died from an apparent opioid-related overdose.<sup>23</sup> In the U.K., the Advisory Council on the Misuse of Drugs released a report demonstrating that deaths associated with fentanyl and its analogs are increasing.<sup>24</sup> Thus, even though the United States is at the center of the crisis, one nation does not confine this deadly epidemic.

The United States must be forward-thinking. To defeat the fentanyl crisis, the United States must apply both national tactics, such as securing borders and stringent postal regulations, and international tactics. As evidenced above, the fentanyl problem is not just systemic within the United States' borders. Thus, a critical

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<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> Lawrence A. Palinkas, *Opioid Use Epidemic in Mexico: Global Solutions to a Global Problem*, 109 AM. J. PUB. HEALTH 26, 26-27 (2019) (discussing the need for global solutions to ensure that Mexico does not succumb to the opioid epidemic).

<sup>22</sup> Melissa Davey, *Painkiller Use Quadruples in Australia As Codeine and Other Opioids Abused*, THE GUARDIAN (Feb. 3, 2016, 5:00 AM), <https://www.theguardian.com/science/2016/feb/03/painkiller-use-quadruples-in-australia-as-codeine-and-other-opioids-abused>; Sarah Whyte, *800 Australians Die Per Year from Prescription Drug Overdoses, Experts Say*, ABC NEWS (Apr. 13, 2017, 3:18 AM), <https://www.abc.net.au/news/2017-04-13/800-australians-overdose-on-prescription-drugs-per-year-experts/8443578>.

<sup>23</sup> *Opioid-Related Harms in Canada*, GOV'T OF CAN, <https://health-infobase.canada.ca/substance-related-harms/opioids/#AORD> (last visited Jan. 10, 2020).

<sup>24</sup> Sarah Marsh, *Fentanyl Deaths on The Rise as Drug Is Added to Heroin, Warns Report*, THE GUARDIAN (Jan. 3, 2020, 1:27 PM), <https://www.theguardian.com/society/2020/jan/03/fentanyl-deaths-on-the-rise-drug-added-to-heroin-report>.

international tactic would be for the United States to strengthen its relationship with China and other impacted nations to support stricter international law enforcement operations to disrupt fentanyl trafficking.

Section two of this article will overview opioids, synthetic opioids—mainly fentanyl—and the current United States tactics to combat opioid misuse. Section three will provide an overview of the status of the United States – China, counternarcotic negotiations for fentanyl reduction and will address the difficulties of curtailing fentanyl trafficking, specifically focusing on: (1) China’s complex regulation and agency oversight; (2) fentanyl trafficking at the Mexican and Canadian borders; (3) the dark web; and (4) lagging international regulations. Section four will discuss recommendations for eradicating the illegal deadly fentanyl flow. Lastly, section five will discuss potential global ramifications if nations like the United States and China cannot reach a consensus to combat the illegal use of fentanyl.

## II. BACKGROUND

### A. Opioids

The Mayo Clinic describes opioids as a “broad group of pain-relieving drugs that work by interacting with opioid receptors in your cells.”<sup>25</sup> Opioid medications travel through an individual’s blood and attach to opioid receptors within their brain.<sup>26</sup> The purpose of opioids, once they attach to the receptors, is to numb an individual’s perception of pain and boost their feelings of pleasure by releasing the hormone, dopamine.<sup>27</sup>

Opioid use in the United States can trace its origins to the civil war era when morphine was imported to combat pain created by

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<sup>25</sup> Carrie Krieger, *What Are Opioids and Why Are They Dangerous?*, MAYO CLINIC (Mar. 21, 2018), <https://www.mayoclinic.org/diseases-conditions/prescription-drug-abuse/expert-answers/what-are-opioids/faq-20381270>.

<sup>26</sup> *Id.*

<sup>27</sup> *Opioid Crisis Fast Facts*, CNN (Jan. 16, 2019), <http://www.cnn.com/2017/09/18/health/opioid-crisis-fast-facts/index.html>.

war injuries and ailments.<sup>28</sup> The Centers for Disease Control and Prevention (CDC) concludes that three distinct waves define the rise in opioid overdose deaths:

The first wave began with increased prescribing of opioids in the 1990s, with overdose deaths involving prescription opioids (natural and semi-synthetic opioids and methadone) increasing since at least 1999. The second wave began in 2010, with rapid increases in overdose deaths involving heroin. The third wave began in 2013, with significant increases in overdose deaths involving synthetic opioids, particularly those involving illicitly-manufactured fentanyl (IMF). The IMF market continues to change, and IMF can be found in combination with heroin, counterfeit pills, and cocaine.<sup>29</sup>

In 2017, American patients received More than 191 million opioid prescriptions.<sup>30</sup> Sadly, once taking opioids consistently, it is easy to become addicted. In the United States, “one in four patients receiving long-term opioid therapy in a primary care setting struggles with opioid addiction.”<sup>31</sup> The United States has experienced a decrease in some opioid usage, such as the use of heroin.<sup>32</sup> However, some critics are skeptical and insist that this decrease is simply because synthetic

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<sup>28</sup> *A History of Opioids in America*, NPR (Apr. 4, 2019, 5:01 AM), <https://www.npr.org/2019/04/04/709767408/a-history-of-opioids-in-america>.

<sup>29</sup> *Opioid Overdose Data Analysis and Resources*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/drugoverdose/data/analysis.html> (last visited Jan. 10, 2020).

<sup>30</sup> U.S. CTRS. FOR DISEASE CONTROL & PREVENTION, 2018 ANNUAL SURVEILLANCE REPORT OF DRUG-RELATED RISKS AND OUTCOMES 10 (2018) (finding “A total of 191,146,822 opioid prescriptions were dispensed by retail pharmacies; the total opioid prescribing rate was 58.5 prescriptions per 100 persons”).

<sup>31</sup> *Prescription Opioids*, CTRS. FOR DISEASE CONTROL & PREVENTION (Aug. 29, 2017), <https://www.cdc.gov/drugoverdose/opioids/prescribed.html> (last visited Jan. 10, 2020).

<sup>32</sup> See Abby Goodnough, *In Cities Where It Once Reigns, Heroin Is Disappearing*, N.Y. TIMES (May 18, 2019), <https://www.nytimes.com/2019/05/18/health/heroin-fentanyl-deaths-baltimore.html> (analyzing the shift from heroin to fentanyl).

opioids, namely fentanyl, are cheaper to produce and distribute than heroin.<sup>33</sup> Opioid users often quickly develop a tolerance to prescription opioids and then struggle to find enough to obtain its original desired effects.<sup>34</sup> As a result, users turn to more potent illicit drugs such as fentanyl.<sup>35</sup>

## B. Synthetic Opioids: the Rise of Fentanyl

The CDC defines synthetic opioids as a class of drugs designed to provide pain relief, mimicking naturally occurring opioids such as codeine and morphine.<sup>36</sup> Legitimate pharmaceutical companies manufacture many synthetic opioids, but many others are manufactured illegally in clandestine labs and distributed through the illicit drug market, mainly through the dark web.<sup>37</sup> Since the 1970s, there is documentation of illicitly manufactured synthetic opioids entering the United States' borders.<sup>38</sup> However, the initial outbreaks were "generally localized and short-lived."<sup>39</sup>

While there are many different synthetic opioids, analyses of death certificate records show that most of the synthetic opioid overdoses in the United States, as of 2016, involve fentanyl.<sup>40</sup> Fentanyl was first synthesized in 1960 by Paul Janseen in Belgium and marketed as a medicine for treating pain.<sup>41</sup> Fentanyl was approved by the U.S. Food and Drug Administration (FDA) as an

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<sup>33</sup> *Id.*

<sup>34</sup> *How Opioid Addiction Occurs*, MAYO CLINIC (Feb. 16, 2018), <https://www.mayoclinic.org/diseases-conditions/prescription-drug-abuse/in-depth/how-opioid-addiction-occurs/art-20360372>.

<sup>35</sup> Elizabeth Hartney, *Fentanyl Analogs and Derivatives in the Epidemic*, VERYWELLMIND (Aug. 19, 2019), <https://www.verywellmind.com/fentanyl-analogs-and-derivatives-4165882>.

<sup>36</sup> *Synthetic Opioid Overdose Data*, *supra* note 5.

<sup>37</sup> *Id.*

<sup>38</sup> BRYCE PARDO ET AL., *THE FUTURE OF FENTANYL AND OTHER SYNTHETIC OPIOIDS* 71 (2019).

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 10.

<sup>41</sup> Patil Armenian et al., *Fentanyl, Fentanyl Analogs and Novel Synthetic Opioids: A Comprehensive Review*, 134 *NEUROPHARMACOLOGY* 121, 123 (2018) (discussing the origins of fentanyl and its current state).

intravenous anesthetic in 1972.<sup>42</sup> “Within a year of going off patent (1981), sales of fentanyl increased 10-fold,” and reports of misuse began early in the 1980s.<sup>43</sup> Therefore there are two types of fentanyl: medicinal and illicit.<sup>44</sup> Shortly after its legal emergence, many fentanyl analogs – drugs developed to imitate fentanyl, but are not chemically identical – appeared.<sup>45</sup> Fentanyl analogs have quickly become just as deadly; by the mid to late 1980s, over ten analogs were identified on the black market and were “reported to be responsible for overdoses” related to laced heroin.<sup>46</sup>

Pharmaceutical fentanyl comes in patches, sprays, and lozenges.<sup>47</sup> Patches were used initially to treat chronic pain relief but spread in popularity due to the potency and effectiveness.<sup>48</sup> In contrast, illicit fentanyl is encountered either as a powder or in counterfeit tablets and is sold alone or in combination with other drugs, such as heroin or cocaine.<sup>49</sup> It can take less than 2 milligrams of fentanyl to overdose, and frequently users are unaware of added fentanyl.<sup>50</sup> Fentanyl and its analogs are predominately manufactured in illegal labs in China and Mexico.<sup>51</sup> Illicit fentanyl analogs pose significant problem because their chemical make-up, once easily altered, is no longer banned by law.<sup>52</sup> This “begins a game of cat and mouse: federal agents race to identify and ban the analogs while chemists continue to make new ones.”<sup>53</sup>

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<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> Julie Vitkovskaya, *What is Fentanyl?*, WASH. POST (May 22, 2019), <https://www.washingtonpost.com/graphics/2019/national/fentanyl-questions-and-answers/>.

<sup>45</sup> Armenian, *supra* note 41, at 123.

<sup>46</sup> Armenian, *supra* note 41, at 124.

<sup>47</sup> Vitkovskaya, *supra* note 44.

<sup>48</sup> Hartney, *supra* note 35.

<sup>49</sup> U.S. DRUG ENFORCEMENT ADMIN., DRUGS OF ABUSE, A DEA RESOURCE GUIDE 2017 EDITION 40 (2017), *available at* [https://www.dea.gov/sites/default/files/sites/getsmartaboutdrugs.com/files/publications/DoA\\_2017Ed\\_Updated\\_6.16.17.pdf#page=40](https://www.dea.gov/sites/default/files/sites/getsmartaboutdrugs.com/files/publications/DoA_2017Ed_Updated_6.16.17.pdf#page=40).

<sup>50</sup> Vitkovskaya, *supra* note 44.

<sup>51</sup> *Illicit Supply of Fentanyl and Other Synthetic Opioids*, *supra* note 8.

<sup>52</sup> Myers, *supra* note 12.

<sup>53</sup> *Id.*

### C. U.S. Current Tactics to Combat Opioid Misuse

President Trump declared the opioid epidemic a public health emergency in October 2017.<sup>54</sup> Before and after this declaration, several steps were taken to curb the fentanyl flow into American streets.<sup>55</sup> In a senate hearing, Kemp L. Chester, Assistant Director of the National Opioids and Synthetics Coordination Group Office of National Drug Control Policy, stated that “in 2017, over 83,400 domestic drug seizures involved fentanyl or fentanyl analogs.”<sup>56</sup> Fentanyl is flowing into Americans’ homes daily, and currently, the strategy is multifaceted; but is it enough?

#### 1. Legislation

The Controlled Substances Act (CSA), signed into law in 1970 by President Nixon, placed all regulated substances under existing federal law into one of five schedules.<sup>57</sup> The “placement is based upon the substance’s medical use, potential for abuse, and safety or dependence liability.”<sup>58</sup> Schedule I drugs do not currently have an accepted medical use and possess a high potential for abuse; heroin falls under this category.<sup>59</sup> Schedule II drugs, which fentanyl falls under, are drugs, substances, or chemicals defined as drugs with a high potential for abuse, potentially leading to severe psychological or physical dependence.<sup>60</sup> Once a drug is “controlled,” the CSA

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<sup>54</sup> *Ending America’s Opioid Crisis*, THE WHITE HOUSE, <https://www.whitehouse.gov/opioids/> (last visited Dec. 1, 2020).

<sup>55</sup> *Tracking Fed. Funding to Combat Opioid Crisis*, BIPARTISAN POLICY CENTER (Mar. 2019), <https://bipartisanpolicy.org/wp-content/uploads/2019/03/Tracking-Federal-Funding-to-Combat-the-Opioid-Crisis.pdf>.

<sup>56</sup> *The Countdown: Fentanyl Analogues and the Expiring Emergency Scheduling Order: Hearing S. Comm. on the Judiciary*, 116th Cong. 3 (2019) (statement of Kemp L. Chester, Assistant Director of the Nat’l Opioids and Synthetics Coordination Group, Off. of Nat’l Drug Control Pol’y), available at <https://www.judiciary.senate.gov/imo/media/doc/Chester%20Testimony.pdf>.

<sup>57</sup> 21 U.S.C.A. § 811 (West 2015); *The Controlled Substances Act*, U.S. DRUG ENFORCEMENT ADMIN., <https://www.dea.gov/controlled-substances-act> (last visited Jan. 10, 2020).

<sup>58</sup> THE CONTROLLED SUBSTANCES ACT, *supra* note 57.

<sup>59</sup> *Drug Scheduling*, U.S. DRUG ENFORCEMENT ADMIN., <https://www.dea.gov/drug-scheduling> (last visited Jan. 10, 2020).

<sup>60</sup> *Id.*

provides more structure on how to regulate the drug. Many believe that the CSA's primary purpose was to ensure that the United States complied with two international treaties' requirements.<sup>61</sup> These treaties, the 1961 Single Convention on Narcotic Drugs and the 1971 Convention on Psychotropic Substances, set a system for classifying controlled substances in several schedules in accordance with binding scientific and medical findings of a public health authority.<sup>62</sup>

On February 2, 2018, the Stopping Overdoses of Fentanyl Analogs (SOFA) Act was introduced in the House.<sup>63</sup> SOFA would amend the CSA to classify certain fentanyl analogs as Schedule I controlled substances, along with any derivatives of those analogs.<sup>64</sup>

If SOFA or a similar act passes and fentanyl analogs are classified as a Schedule I drugs rather than a Schedule II drugs, even temporarily, there would then be a vehicle for the United States to regulate and enforce more stringent penalties.<sup>65</sup> While President Trump called for the death penalty for fentanyl traffickers, the current penalty for trafficking fentanyl analogs trafficking as a first offender is at least ten years in prison and not more than life.<sup>66</sup> However, if a death or serious injury were to occur, the penalty would be at least twenty years in prison or a fine of up to \$10 million dollars.<sup>67</sup> Comparatively, a first offense for a Scheduled II substance is typically between five to forty years in prison, unless death or a serious injury occurred.<sup>68</sup> If a serious injury occurs the penalty would

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<sup>61</sup> Virgil Van Dusen & Alan R. Spies, *An Overview and Update of the Controlled Substances Act of 1970*, PHARMACY TIMES (Feb. 1, 2007, 6:00 AM), <https://pharmacytimes.com/publications/issue/2007/2007-02/2007-02-6309>.

<sup>62</sup> *Id.*

<sup>63</sup> Stopping Overdoses of Fentanyl Analogs Act, H.R. 4922, 115th Cong. (2018).

<sup>64</sup> *Id.*

<sup>65</sup> U.S. DRUG ENFORCEMENT ADMIN, *supra* note 49, at 30.

<sup>66</sup> Jennifer Jacobs & Steven T. Dennis, *Trump Tells Sessions He Favors Death Penalty for Fentanyl Dealers*, BLOOMBERG (Aug. 23, 2018, 4:16 PM), <https://www.bloomberg.com/news/articles/2018-08-23/trump-is-said-to-propose-death-penalty-for-fentanyl-dealers>; 21 U.S.C.A. § 841 (West 2018).

<sup>67</sup> 21 U.S.C.A. § 841 (West 2018).

<sup>68</sup> *Id.*

be between twenty to life in prison or a fine of not more than \$5 million.<sup>69</sup>

On January 10, 2018, President Trump signed into law the International Narcotics Trafficking Emergency Response by Detecting Incoming Contraband with Technology (INTERDICT) Act. This Act granted \$9 million in funding for screening equipment used by border patrol agents to give them access to better tools to detect and stop the smuggling fentanyl.<sup>70</sup> In Addition to the INTERDICT Act, the House and the Senate passed Substance Use-Disorder Prevention that Promotes Opioid Recovery and Treatment for Patients and Communities (SUPPORT) Act.<sup>71</sup> The SUPPORT Act effectively makes changes to Medicare, Medicaid, and the public health sector to prevent addiction or, in some circumstances, provide treatment.<sup>72</sup>

## 2. Going to the Domestic Source: Big Pharma

Some have argued that Big Pharma “created the market” for deadly synthetic opioids such as fentanyl and its analogs by “hooking millions of Americans on prescription pain pills.”<sup>73</sup> In the 1990s, there was a substantial uptick in the number of opioid prescriptions, many of which have been attributed to the aggressive “marketing opioids to treat chronic, not just acute, pain, claiming they carried little risk of addiction.”<sup>74</sup> The pharmaceutical industry spent over \$800 million on lobbying state legislatures and campaign

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<sup>69</sup> *Id.*

<sup>70</sup> Dave Boyer, *Trump Signs Law to Gives Border Patrol Better Tools to Stop Smuggling of Fentanyl*, WASH. TIMES (Jan. 10, 2018), <https://www.washingtontimes.com/news/2018/jan/10/trump-signs-interdict-act-help-border-patrol-detec/>.

<sup>71</sup> SUPPORT for Patients and Communities Act, Pub. L. No. 115-271, 132 Stat. 3894 (2018).

<sup>72</sup> *Id.*

<sup>73</sup> Josh Meyer, *What Are Mexican Drug Cartels Fighting Over? The Chance to Sell Fentanyl Here*, WASH. POST (Nov. 7, 2019), <https://www.washingtonpost.com/outlook/2019/11/07/what-are-mexican-drug-cartels-fighting-over-chance-sell-fentanyl-here/>.

<sup>74</sup> Keith Humphreys et al., *Opioids of the Masses: Stopping an American Epidemic from Going Global*, 97 FOREIGN AFF. 118 (2018).

contributions from 2006 to 2015.<sup>75</sup> Furthermore, in 2013, “the marketing expenditure of each of the ten largest pharmaceutical companies exceeded the entire budget of the U.S. Food and Drug Administration.”<sup>76</sup> Another point of contention is evidence which suggests that the FDA had information about doctors off-label prescribing (prescribing outside of its intended use), and did not intervene early in 2011.<sup>77</sup> In 2015 alone, fentanyl was prescribed in the U.S. 6.5 million times.<sup>78</sup>

Due the abundance of damning evidence and new legislation, the United States is now fighting the opioid epidemic by going after Big Pharma in the courtroom. In 2019, the state of Oklahoma settled a suit against one of the largest pharmaceutical corporations, Purdue Pharma, for \$270 million, “while separately, an Oklahoma judge ordered Johnson & Johnson to pay \$572 million in damages associated with the opioid crisis and specified where the funds should go.”<sup>79</sup> The Oklahoma attorney general, Mike Hunter, accused Johnson & Johnson of a “cunning, cynical and deceitful scheme” to boost narcotic painkiller sales.<sup>80</sup>

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<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> Emily Baumgaertner, *F.D.A. Did Not Intervene to Curb Risky Fentanyl Prescriptions*, N.Y. TIMES (Aug. 2, 2018), <https://www.nytimes.com/2018/08/02/health/fda-fentanyl-opioid-epidemic-overdose-cancer.html> (“The F.D.A. established a distribution oversight program in 2011 to curb inappropriate use of the dangerous medications, but entrusted enforcement to a group of pharmaceutical companies that make and sell the drugs. 5,000 pages of documents, obtained by researchers at the Johns Hopkins Bloomberg School of Public Health through the Freedom of Information Act and provided to The New York Times, show that the F.D.A. had data showing that so-called off-label prescribing was widespread. But officials did little to intervene.”).

<sup>78</sup> *Diversion Control Division, Fentanyl*, U.S. DRUG ENFORCEMENT ADMIN. (Sept. 2019), [https://www.deadiversion.usdoj.gov/drug\\_chem\\_info/fentanyl.pdf](https://www.deadiversion.usdoj.gov/drug_chem_info/fentanyl.pdf).

<sup>79</sup> Cheryl Heaton et al., *The Opioid Crisis, Corporate Responsibility, and Lessons from the Tobacco Master Settlement Agreement*, 322 JAMA 2071 (2019).

<sup>80</sup> Chris McGreal, *Capitalism Gone Wrong: How Big Pharma Created America's Opioid Carnage*, THE GUARDIAN (Jul. 24, 2019, 2:00 AM), <https://www.theguardian.com/us-news/2019/jul/24/opioids-crisis-big-pharma-drugs-carnage>.

While several states are holding individual pharmaceutical corporations accountable, the 1998 tobacco Master Settlement Agreement (MSA) between 46 attorneys general and multiple territories will be likely utilized as a reference point for large scale industry accountability moving forward.<sup>81</sup> The tobacco MSA came out of one of the most massive class action lawsuits in U.S. history.<sup>82</sup> Its primary objective was to force corporate responsibility by making the tobacco industry bear the cost of caring for smokers.<sup>83</sup> However, evidence suggests that the \$206 billion tobacco MSA did not substantially impact the tobacco industry.<sup>84</sup> Therefore, while the tobacco MSA may be the groundwork large scale corporate responsibility, experts suggest in the opioid context, funds from the agreement should be allocated "exclusively for proven public health approaches to directly address the opioid epidemic."<sup>85</sup>

### 3. Heightening the Charges For Fentanyl Dealers

On February 6, 2018, the Drug Enforcement Administration (DEA) and their colleagues in the FDA, through a collaborative effort, placed all fentanyl-related substances under Schedule I on a temporary two-year period.<sup>86</sup> Before this temporary scheduling, fentanyl was regulated under Schedule II.<sup>87</sup> 21 U.S.C.A. § 812 defines Schedule II substances as drugs that have a currently accepted medical use or treatment in the U.S., but have a high potential for abuse, and, when abused, the drug may lead to severe psychological or physical dependence.<sup>88</sup> However, Schedule I substances have no currently accepted medical treatment in the U.S., high potential for abuse, and lack an accepted safe use under medical supervision.<sup>89</sup>

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<sup>81</sup> Heaton, *supra* note 79, at 2071.

<sup>82</sup> Walter Jones & Gerard Silvestri, *The Master Settlement Agreement and Its Impact on Tobacco Use 10 Years Later*, 137 CHEST 692.

<sup>83</sup> *Id.* at 695.

<sup>84</sup> *Id.* ("The general consensus of researchers has been that the MSA has not significantly harmed the tobacco industry, especially when the growth in the international sales of US tobacco products is taken into account").

<sup>85</sup> Heaton, *supra* note 79, at 2071.

<sup>86</sup> 83 Fed. Reg. 5188 (effective Feb.6, 2018 until Feb. 6, 2020).

<sup>87</sup> Chester, *supra* note 56, at 1.

<sup>88</sup> 21 U.S.C.A. § 812 (b)(2) (LexisNexis 2018).

<sup>89</sup> 21 U.S.C.A. § 812 (b)(1) (LexisNexis 2018).

Although fentanyl has a currently accepted medical use in the United States for managing chronic pain, the DEA Administrator found that temporarily scheduling fentanyl as a Schedule I substance was necessary to “avoid an imminent hazard to public safety.”<sup>90</sup>

Because fentanyl is lethal, there has been a trend amongst prosecutors to bring second-degree manslaughter and criminally negligent homicide charges against dealers.<sup>91</sup> However, the evidentiary burden is not easy. Prosecutors must:

[ . . . ] Tie the medical evidence about the drugs ingested to a fatal overdose which requires careful dissection of toxicology reports. And they must present evidence that a dealer knew the risks of the drugs yet provided them anyway, something defense lawyers can argue is anathema to dealers aims: to propagate customers, not kill them.<sup>92</sup>

While the United States domestically is beefing up its borders, strengthening access for treatment, and attempting to eliminate domestic supply, fentanyl is still killing daily nationally and globally. This further points to the conclusion that there is a need for an international solution well beyond the United States’ borders.

#### 4. Domestic Postal Oversight

Gary Barksdale, the Chief Postal Inspector for the U.S. Postal Inspection, before congress stated that “winning the battle against

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<sup>90</sup> 21 C.F.R. § 1308 (2019).

<sup>91</sup> See Mark Neil, *Prosecuting Drug Overdose Cases: A Paradigm Shift*, 3 NAGTRI J. 26-29, 26 (2018) (“For many years, most prosecutors charged only those drug-related deaths involving rival drug gang fights as being homicides. But the focus has now broadened to also examine overdose deaths as prosecutable homicides against those who sold and distributed the drugs causing the overdose.”)

<sup>92</sup> Al Baker, *New Tactic in War on Opioids: Charging Dealers in Overdose Deaths*, N.Y. TIMES (July 23, 2017), <https://www.nytimes.com/2017/07/23/nyregion/new-tactic-in-war-on-opioids-charging-dealers-in-overdose-deaths.html>.

illicit drugs in the mail stream is a top priority for the Postal Service and the Inspection Service.”<sup>93</sup>

For many years a loophole has allowed foreign illicit drug manufacturers to ship without detection. Commercial shippers such as FedEx and UPS have historically been required by federal law to send information about packages to Customs and Border Protection before packages were shipped.<sup>94</sup> Historically, there was no such requirement for shipments through the Postal Service.<sup>95</sup> Shipments from the United States Postal Service were instead inspected manually.<sup>96</sup>

The Synthetics Trafficking and Overdose Prevention (STOP) Act of 2017, later incorporated into the 2018 Substance Use-Disorder Prevention that Promotes Opioid Recovery and Treatment (SUPPORT) for Patients and Communities Act, requires the Postal Service by 2021 to transmit information known as advanced electronic data (AED) to Customs and Border Protection on 100 percent of international packages.<sup>97</sup> While there is no guarantee that the data shared will be accurate, it is a step in the correct direction.

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<sup>93</sup> *Oversight of Fed. Efforts to Combat the Spread of Illicit Fentanyl: Hearing before the H.Comm. on Energy and Commerce, H. Subcomm. on Oversight and Investigations*, 116th Cong. (2019) (statement of Gary R. Barksdale, Chief Postal Inspector U.S. Postal Inspection Serv.), available at [https://about.usps.com/news/testimony/2019/pr19\\_cpi0716.htm](https://about.usps.com/news/testimony/2019/pr19_cpi0716.htm).

<sup>94</sup> Ron Nixon, *Online Sales of Illegal Opioids from China Surge in the U.S.*, N.Y. TIMES (Jan. 24, 2018), <https://www.nytimes.com/2018/01/24/us/politics/senate-investigation-china-mail-opioids.html>.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> Tom Ridge, *Fighting Opioids in the Mail*, WASH. POST (Oct. 24, 2018), <https://www.washingtontimes.com/news/2018/oct/24/why-the-synthetics-trafficking-and-overdose-preven/>; Substance Use-Disorder Prevention That Promotes Opioid Recovery And Treatment For Patients And Communities Act, Pub. L. No. 115-271, 132 Stat. 3894 (2018).

### 5. Thwarting the Demand

Many critics and experts have posited that the only way to combat opioid abuse and destruction is to address the demand.<sup>98</sup> In its statements, China, has frequently claimed that the U.S. demand is at the heart of the issue, not a lack of Chinese oversight.<sup>99</sup> Chinese Foreign Ministry spokesman Geng Shuang concluded that since the U.S. consumes eighty percent of the world's opioids despite having only five percent of the population, “[w]hen it comes to reducing demand for fentanyl the U.S. government absolutely can do even more,” and that the U.S. should “respect the facts, and stop pinning the blame on others.”<sup>100</sup>

## III. BARRIERS TO CURTAILING FENTANYL TRAFFICKING

### A. U.S.–China Relationship

While China denies that most of the illicit fentanyl in the United States originates within its borders, U.S. officials say China is the main source of illicit fentanyl and fentanyl analogs.<sup>101</sup> The U.S.–China Economic and Security Review Commission in a 2018 report stated that China remains “the largest source of illicit fentanyl and fentanyl-like substances” in the United States, and “illicit

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<sup>98</sup> Nora Volkow, *Addressing the Opioid Crisis Means Confronting Socioeconomic Disparities*, NAT'L INST. ON DRUG ABUSE (Oct. 25, 2017), <https://www.drugabuse.gov/about-nida/noras-blog/2017/10/addressing-opioid-crisis-means-confronting-socioeconomic-disparities>.

<sup>99</sup> *China Pushes Back at Trump in War of Words Over Opioid Flows*, BLOOMBERG (Aug. 27, 2019, 5:00 PM), <https://www.bloomberg.com/news/articles/2019-08-27/china-pushes-back-at-trump-in-war-of-words-over-opioid-flows>.

<sup>100</sup> Ben Blachard, *China Says U.S. Can Do More to Reduce Fentanyl Demand*, REUTERS (Aug. 26, 2019, 4:55 AM), <https://www.reuters.com/article/us-usa-china-fentanyl/china-says-u-s-can-do-more-to-reduce-fentanyl-demand-idUSKCN1VG0PF>.

<sup>101</sup> Ben Blachard, *China Says Has Only 'Limited' Cooperation with U.S. On Fentanyl*, REUTERS (Sept. 2, 2019, 11:26 PM), <https://www.reuters.com/article/us-usa-china-fentanyl/china-says-has-only-limited-cooperation-with-u-s-on-fentanyl-idUSKCN1VO0AD>.

manufacturers create new substances faster than they can be controlled.”<sup>102</sup>

China announced in April 2019 that it would begin treating all variants of fentanyl as controlled substances.<sup>103</sup> The regulation took effect on May 1, 2019.<sup>104</sup> In August 2019, a few months after China’s regulations took effect, 30 kilograms of fentanyl were confiscated by U.S. law enforcement, enough to kill 14 million people.<sup>105</sup> Additionally, in August 2019, U.S. Treasury Department sanctioned three Chinese nationals and a pharmaceutical company for running an alleged narcotics trafficking operation.<sup>106</sup> The three nationals have now been indicted and face a maximum possible sentence of life imprisonment.<sup>107</sup> However, their extradition is unlikely as China and the United States do not have an extradition treaty.<sup>108</sup> United States Attorney William M. McSwain stated: “Make no mistake: China is waging an undeclared war on our country and our American way of life, with deadly drugs serving as its weapon of choice.”<sup>109</sup> Chinese President Xi Jinping has repeatedly responded that the United States’ opioid problem is mainly caused by “domestic reasons.”<sup>110</sup>

President Trump has responded by increasing tariffs on China. Although President Trump delayed the original start date on the tariff as of October 15, 2019, the newly imposed tariffs brought the average tariffs on Chinese imports to 21.2 percent, up from only

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<sup>102</sup> O’Connor, *supra* note 7, at 1.

<sup>103</sup> Ingber, *supra* note 13.

<sup>104</sup> *Id.*

<sup>105</sup> Lauren del Valle, *Law Enforcement Seize Enough Fentanyl to Kill 14 Million People*, CNN (Aug. 30, 2019, 4:18 PM), <https://www.cnn.com/2019/08/30/us/virginia-fentanyl-drug-bust/index.html>.

<sup>106</sup> Talal Ansari, *Three Chinese Nationals Charged with Fentanyl Trafficking*, WALL ST. J. (Oct. 1, 2019, 2:57 PM), <https://www.wsj.com/articles/three-chinese-nationals-charged-with-fentanyl-trafficking-11569956265>.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Three Chinese Nationals Using the Alias “Alex” Indicted in the United States for Conspiring to Import and Distribute Deadly Opioids*, U.S. DEP’T OF JUSTICE, U.S. ATT’Y’S OFF. E.D. PA (Oct. 1, 2019), <https://www.justice.gov/usao-edpa/pr/three-chinese-nationals-using-alias-alex-indicted-united-states-conspiring-import-and>.

<sup>110</sup> Ingber, *supra* note 13.

3.1 percent when President Trump took office.<sup>111</sup> The increase of tariffs and lack of regulatory response frustrated both China and the United States.

#### B. China's Complex Regulation and Agency Oversight

Fentanyl is an incredibly deadly drug that can easily and clandestinely be altered by chemists so that it goes undetected as its new chemical make-up no longer make it controlled.<sup>112</sup> Therefore, to have a chance at controlling fentanyl and its analogs, there must be strict regulatory oversight. Currently, China's infrastructure is not conducive for such regulatory scrutiny.

China is responsible for overseeing more than an estimated 400,000 producers and distributors inside the vast chemical and pharmaceutical industries.<sup>113</sup> China produces not just chemicals for the United States, but supplies chemicals globally. China's chemical market is the largest in the world.<sup>114</sup> Although China is typically at the forefront of innovation, its regulatory system of monitoring fentanyl is antiquated and inefficient. Ben Westhoff, author of *Fentanyl, Inc.: How Rogue Chemists Are Creating the Deadliest Wave of the Opioid Epidemic*, stated that due to "insufficient staffing, bureaucratic confusion, and competing interests between layers of government, China's regulatory agencies are unable to properly monitor these companies, and have, at times, refused to let American agencies do so."<sup>115</sup> Westhoff further

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<sup>111</sup> Ana Swanson, *As Trump Escalates Trade War, U.S. and China Move Further Apart with No End in Sight*, N.Y. TIMES (Sept. 1, 2019), <https://www.nytimes.com/2019/09/01/world/asia/trump-trade-war-china.html?module=inline>.

<sup>112</sup> Armenian et al., *supra* note 41, at 1.

<sup>113</sup> Jonathan Landay, *Trade Frictions Raise Questions About China's Fentanyl Promise*, REUTERS (May 9, 2019, 3:33 PM), <https://www.reuters.com/article/us-usa-china-fentanyl/trade-frictions-raise-questions-about-chinas-fentanyl-promise-idUSKCN1SF2GK>.

<sup>114</sup> Yin Chen & Thomas Luedi, *Strategies for China's Increasingly Competitive Chemicals Market*, BAIN & CO. (May 6, 2019), <https://www.bain.com/insights/strategies-for-china-s-increasingly-competitive-chemicals-market/>.

<sup>115</sup> Ben Westhoff, *Opinion: Trump Wants China to Rein in Fentanyl Producers. Good Luck with That*, L.A. TIMES (Sept. 6, 2019), <https://www.latimes.com/opinion/story/2019-09-05/trump-fentanyl-china-incentives-production>.

posits that China is not just failing at regulating the dangerous chemicals, but it is “actively encouraging” their illicit production through “tax breaks” and subsidies.<sup>116</sup>

The Chinese State Council oversees the nation’s administrative functions, executes its laws, and is the primary policy-making agency.<sup>117</sup> There has been considerable restructuring among China’s regulatory agencies which regulate chemical manufacturing.<sup>118</sup> In 2018, as part of China’s 2018 government administration overhaul known the agency formerly known as the China Food and Drug Administration (CFDA), changed to National Medical Products Administration (NMPA).<sup>119</sup> The NMPA is responsible for: the supervision of quality and safety regarding medicines, medical devices and cosmetics; drafting regulations and national standards for medicines, medical devices and cosmetics; the registration of medicines, medical devices, and cosmetics; the post-marketing risk control of medicines, medical devices and cosmetics; and the registration of licensed pharmacists and more.<sup>120</sup> China’s hopes in restructuring were to provide more structure and to centralize the agency’s foci.<sup>121</sup>

Regulatory structure change is not new to China. Before the 1950s, the Chinese government directly operated much of the pharmaceutical industry.<sup>122</sup> However, there was a large shift in the

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<sup>116</sup> *Id.*

<sup>117</sup> THE PEOPLE’S REPUBLIC OF CHINA, THE STATE COUNCIL (March 17, 2018), [http://english.www.gov.cn/archive/china\\_abc/2014/08/23/content\\_281474982987314.htm](http://english.www.gov.cn/archive/china_abc/2014/08/23/content_281474982987314.htm).

<sup>118</sup> Haona Li et al., *The Historical Evolution of China’s Drug Regulatory System*, 17 VALUE IN HEALTH A30 (2014), [https://regulatory.usc.edu/files/2014/08/Evolution\\_China\\_Reg\\_system\\_2014.pdf](https://regulatory.usc.edu/files/2014/08/Evolution_China_Reg_system_2014.pdf).

<sup>119</sup> NMPA - *National Medical Products Administration*, EMERGO BY UL, <https://www.emergobyul.com/resources/china/china-food-drug-administration> (last visited Jan. 11, 2020).

<sup>120</sup> *Main Responsibilities of the National Medical Products Administration*, CHINA’S NAT’L MEDICAL PRODUCTS ADMIN. (July 18, 2019), [http://english.nmpa.gov.cn/2019-07/18/c\\_377587.htm](http://english.nmpa.gov.cn/2019-07/18/c_377587.htm).

<sup>121</sup> Ellen Daniel, *China FDA Replaced By State Drug Administration In Proposed Reform*, PHARM. TECH. (Mar. 18, 2019), <https://www.pharmaceutical-technology.com/news/cfda-reform/>.

<sup>122</sup> Li, *supra* note 118.

1970s due to an economic incentive to develop the pharmaceutical industry.<sup>123</sup> Lax regulations followed, and the government had less of an impetus to supervise the quality and the safety of manufactured drugs because it could impede economic development.<sup>124</sup> Critics of China's regulatory structure often cite the conflict of economic interest as one of the main reasons why China is reluctant to toe the line of strict enforcement on illicit fentanyl.<sup>125</sup> If the regulatory system is mainly concerned with the industry's economic development, China will be reluctant to shut down any growing businesses, including pharmaceutical firms.<sup>126</sup>

### C. The Changing of Hands at the Mexico And Canadian Borders

While most of the fentanyl and fentanyl analogs in the United States originate from China initially, Mexico and Canada also contribute to the fentanyl pipeline.<sup>127</sup>

#### 1. Mexican Border

According to the 2018 National Drug Threat Assessment, Fentanyl seizures at the southwest borders have increased by 135 percent—from 223 kilograms to 524 kilograms—between 2016 and 2017.<sup>128</sup> Additionally, in 2017, a fentanyl laboratory was seized, supporting the conclusion that Mexico and not just China is a source of the deadly synthetic opioid.<sup>129</sup>

While there is evidence that fentanyl is sometimes manufactured in Mexico, it predominantly serves as a stop on the fentanyl pipeline from China.<sup>130</sup> Because fentanyl and fentanyl analogs can be so potent in small doses, it is easier to ship the illicit

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<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> Landay, *supra* note 113.

<sup>126</sup> *Id.*

<sup>127</sup> O'Connor, *supra* note 7.

<sup>128</sup> U.S. DRUG ENFORCEMENT ADMIN., 2018 NATIONAL DRUG THREAT ASSESSMENT 34 (2018), <https://www.dea.gov/press-releases/2018/11/02/dea-releases-2018-national-drug-threat-assessment-0>.

<sup>129</sup> *Id.* at 33.

<sup>130</sup> *Id.*

drug without detection. An estimated eighty percent of the fentanyl is funneled through the San Diego-Mexico border before dispersing throughout the United States.<sup>131</sup> The smuggling of fentanyl through Mexico to the United States' border primarily is conducted by the long-established Sinaloa Cartel and the Cartel Jalisco Nueva Generación, or CJNG.<sup>132</sup>

While the extent of Mexico's role in the production of fentanyl is less known and not as prominent as China's role,<sup>133</sup> Mexico's role in fentanyl trafficking is "increasingly well documented" and a significant contributor to the opioid epidemic.<sup>134</sup> Mexican cartels "are switching over from heroin to fentanyl as fast as they can," likely because heroin "comes from the opium poppy, a natural plant that must be grown in a field, which takes a great deal of time, effort, and cost, and is very susceptible to discovery by law enforcement."<sup>135</sup> In November of 2019, the DEA released a statement saying that "Mexican drug cartels are making mass quantities of fake prescription pills containing the synthetic opioid fentanyl with the intention to sell them to users throughout North America."<sup>136</sup> The DEA further found that 27 percent of counterfeit pills found between January and March of 2019 contained a potentially lethal amount of fentanyl.<sup>137</sup>

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<sup>131</sup> Kristina Davis & Sandra Dibble, *Fentanyl Has Taken Over America's Drug Market. Where Is It Coming From?*, SAN DIEGO UNION TRIBUNE (June 17, 2018, 5:00 AM), <https://www.sandiegouniontribune.com/news/public-safety/sd-mefentanyl-pipeline-20180617-story.html>.

<sup>132</sup> June S. Beittel, CONG. RESEARCH SERV., R41576, MEXICO: ORGANIZED CRIME AND DRUG TRAFFICKING ORGANIZATIONS 31 (2019), <https://fas.org/sgp/crs/row/R41576.pdf>.

<sup>133</sup> *Id.* at 13.

<sup>134</sup> *Id.* at 11.

<sup>135</sup> *Inside the Dark Hidden World of The Fentanyl Industry*, FORBES (Nov. 6, 2019, 1:17 PM), <https://www.forbes.com/sites/quora/2019/11/06/inside-the-dark-hidden-world-of-the-fentanyl-industry/#724ac894f65e>.

<sup>136</sup> David Alire Garcia, *Mexico's Drug Gangs Churning Out Deadly Fentanyl-Laced Pills: DEA*, REUTERS (Nov. 4, 2019, 6:15:14 PM), <https://www.reuters.com/article/us-mexico-drugs-dea/mexicos-drug-gangs-churning-out-deadly-fentanyl-laced-pills-dea-idUSKBN1XF012>.

<sup>137</sup> *Id.*

Fentanyl will likely continue to be trafficked through Mexico, especially since the Mexican government has not seen fentanyl as a significant issue and, as such, has not “devoted significant resources towards finding the principal drivers of the trade inside its borders.”<sup>138</sup> Another concern is that as enforcement and pressures increase in China, a shift in production could move to Mexico.<sup>139</sup>

## 2. Canadian Border

Like the United States, Canada has taken a hit from the opioid crisis, albeit not to the same extent. Fentanyl is entering the Canadian population from the theft of pharmaceutical fentanyl products (mainly skin patches), illegal import from other countries (predominantly China), and production by illegal clandestine laboratories in Canada.<sup>140</sup>

Canadian law enforcement has concluded that much of the fentanyl found within its borders is produced in factories in Southern China and then sent to North America via shipping containers and in the mail.<sup>141</sup> However, some police experts stated that Canada does not have the “human resources or aggressive policing strategies needed to mount complicated transnational organized crime investigations.”<sup>142</sup> The lack of infrastructure could lead to a continuance of fentanyl flow as Chinese manufacturers will recognize this as an area that can be exploited and circumvent detection.

China might be creating the illicit fentanyl, but significant quantities are shipped daily through Canadian and

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<sup>138</sup> Steven Dudley, *Fentanyl: Summary and Major Findings*, INSIGHT CRIME (Feb. 12, 2019), <https://www.insightcrime.org/investigations/fentanyl-summary-major-findings/>.

<sup>139</sup> *Id.*

<sup>140</sup> *Fentanyl*, GOV'T OF CAN., <https://www.canada.ca/en/health-canada/services/substance-use/controlled-illegal-drugs/fentanyl.html> (last visited Jan. 10, 2020).

<sup>141</sup> Stewart Bell et al., *An Introduction to Fentanyl: Making a Killing*, GLOBAL NEWS (Nov. 26, 2018), <https://globalnews.ca/news/4658156/fentanyl-making-a-killing-introduction/>.

<sup>142</sup> *Id.*

Mexican borders. With more than 12,800 apparent opioid-related deaths occurring in Canada between January 2016 and March 2019, evidence suggests a deep need for international cooperation to defeat the epidemic.<sup>143</sup>

#### D. The Dark Web

Since the rise and fall of Silk Road—the first major marketplace for illicit goods on the dark web which was brought down by the FBI in 2013—similar markets have emerged on a continual basis to fill the void on the dark web platform.<sup>144</sup> The terms “dark web” or “darknet” refer to networks and sites hidden from most internet visitors because they cannot be accessed from search engines, and are accessible only to users shrouded in anonymity.<sup>145</sup> On the dark web, anonymous servers mask the original IP address of the user, and anonymity is further ensured by the use of cryptocurrencies like Bitcoin, meaning that it is extremely difficult to regulate.<sup>146</sup> Illicit fentanyl manufacturers are utilizing the dark web to sell their deadly product and have it delivered to the buyer’s doorstep, undetected.<sup>147</sup> Experts have posited that the change in legal status from “legal” to “controlled” combined with new strict enforcement of regulations has meant that sales of illegal drugs and substances have increasingly migrated to marketplaces on the dark web.<sup>148</sup> In the

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<sup>143</sup> *Opioid-Related Harms in Canada*, *supra* note 23.

<sup>144</sup> KRISTY KRUTHOF ET AL., INTERNET-FACILITATED DRUGS TRADE: AN ANALYSIS OF THE SIZE, SCOPE AND THE ROLE OF THE NETHERLANDS 61 (2016), [https://www.rand.org/content/dam/rand/pubs/research\\_reports/RR1600/RR1607/RAND\\_RR1607.pdf](https://www.rand.org/content/dam/rand/pubs/research_reports/RR1600/RR1607/RAND_RR1607.pdf).

<sup>145</sup> Dan Whitcomb, *Former U.S. Army Interpreter from Iraq Gets 30 Years for Dealing Fentanyl on Dark Web*, REUTERS (Oct. 3, 2019, 7:53 PM), <https://www.reuters.com/article/us-crime-fentanyl/former-u-s-army-interpreter-from-iraq-gets-30-years-for-dealing-fentanyl-on-dark-web-idUSKBN1W12KR>.

<sup>146</sup> Nick Grimm & Scott Mitchell, *Fentanyl Is Being Sold on The Dark Web, Raising Fears Of An Australian Opioid Crisis*, ABC NEWS (Apr. 11, 2019, 11:12:10 PM), <https://www.abc.net.au/news/2019-04-12/dark-web-fentanyl-sales-spark-fears-of-australian-opioid-crisis/10996602>.

<sup>147</sup> *Health, Inc: Fentanyl as A Dark Web Profit Center, From Chinese Labs to U.S. Streets*, NPR (Sept. 4, 2019, 1:04 PM), <https://www.npr.org/transcripts/757089868>.

<sup>148</sup> Nikita Malik, *How Criminals Exploit the Dark Net to Sell Drugs*, FORBES (June 10, 2019, 11:30 AM), <https://www.forbes.com/sites/nikitamalik/2019/06/10/how-criminals-exploit-the-darknet-to-sell-drugs/#748f8dff1db2>.

U.K. alone, an average of 1,000 sales of fentanyl took place on the dark web between April and October 2017.<sup>149</sup> The dark web is a vessel to transport fentanyl and its analogs, and it is not just selling to U.S. citizens. Anyone who has access to the dark web is able to have deadly illicit drugs shipped to them directly.

#### E. Lagging International Regulations

Currently, the U.S. is a party to the Single Convention on Narcotic Drugs of 1953, which was created to “establish effective control over international and domestic traffic in narcotics, coca leaf, cocaine, and cannabis.”<sup>150</sup> A second treaty, the Convention on Psychotropic Substances of 1971, which was ratified by Congress in 1980, is “designed to establish comparable control over stimulants, depressants, and hallucinogens.”<sup>151</sup>

In June of 2018, the United Nations Office of Drugs and Crime (UNDOC) initiated a global strategy to support countries such as the United States who are struggling with a synthetic opioid crisis.<sup>152</sup> The strategy includes coordinating the international response, reducing the supply of opioids for non-medical use, supporting the implementation of scheduling decisions of the Commission on Narcotic Drugs (CND), promoting rational use of opioids, access to opioids for medical and scientific purposes, and promoting effective prevention strategies and treatment options.<sup>153</sup>

In theory, the strategy is sound; but, in practice, it may be ineffective without an updated treaty. Each country has its individualistic regulatory framework. Thus, without an international

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<sup>149</sup> Sarah Marsh, *UK Accounts for Largest Share of Darknet Fentanyl Sales in Europe*, THE GUARDIAN (Oct. 16, 2017, 7:02 AM), <https://www.theguardian.com/society/2017/oct/16/uk-accounts-for-largest-share-of-darknet-fentanyl-sales-in-europe>.

<sup>150</sup> *Drugs of Abuse*, *supra* note 49, at 10.

<sup>151</sup> *Id.*

<sup>152</sup> *The Strategy*, U.N. OFF. ON DRUGS AND CRIME, <https://www.unodc.org/unodc/en/opioid-crisis/the-strategy.html> (discussing the plan to help combat the opioid crisis).

<sup>153</sup> *Id.*

standardized approach to tackling the synthetic opioid market, it is easier for producers to identify weak regulatory blind spots.

In 1961 the United Nations wrote a treaty entitled the “Single Convention on Narcotic Drugs.”<sup>154</sup> This convention attempted to limit the possession, use, trade, distribution, import, export, manufacture and production of the drugs for only medical and scientific purposes.<sup>155</sup> Secondly, the convention attempted to combat drug trafficking by encouraging international cooperation.<sup>156</sup>

The United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 (CAIT) was enacted to support the 1961 Convention and 1971 Convention on Psychotropic Substances Act. Under CAIT, at the request of the United States, NPP and 4-ANPP were added to the list of internationally controlled drugs.<sup>157</sup> NPP and 4-ANPP are fentanyl precursors that the DEA has identified as most commonly used in the production of fentanyl.<sup>158</sup> While the precursors mentioned above are not illicit drugs on their own, they are essential components in the production of fentanyl.

The International Narcotics Control Board (INCB), established by the Single Convention on Narcotic Drugs of 1961, was created to monitor the international drug control treaties’ implementation.<sup>159</sup> As part of its purview, the INCB identifies weaknesses in national and international control systems, which allow

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<sup>154</sup> See Single Convention on Narcotic Drugs, 1961, as amended by the Protocol Amending the Single Convention on Narcotic Drugs, 1961, scheds. I-IV, Aug. 8, 1975, 976 U.N.T.S. 105.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> BEN WESTHOFF, FENTANYL, INC. 131 (Atlantic Monthly Press, 2019).

<sup>158</sup> U.S. WHITE HOUSE, ADVISORY TO THE CHEMICAL MANUFACTURING INDUSTRY ON ILLICIT ACTIVITY AND METHODS RELATED TO THE MANUFACTURING OF FENTANYL AND SYNTHETIC 4 (2019), <https://www.whitehouse.gov/wp-content/uploads/2019/08/Fentanyl-Advisory-Manufacturing-Tab-A.pdf>.

<sup>159</sup> Int’l Narcotics Control Bd., Precursors and Chemicals Frequently Used in the Illicit Manufacture of Narcotic Drugs and Psychotropic Substances 2018 59, U.N. Doc., E/INCB/2018/1 (2018).

illicit manufacturing and trafficking, and then assists in finding solutions.<sup>160</sup> The INCB composition consists of:

13 members who are elected by the Economic and Social Council and who serve in their personal capacity, not as government representatives. Three members with medical, pharmacological or pharmaceutical experience are elected from a list of persons nominated by the World Health Organization (WHO) and 10 members are elected from a list of persons nominated by Governments.<sup>161</sup>

Currently, David Johnson is a member who is representing the U.S. and has a term until 2022.<sup>162</sup> While the INCB, which oversees all of the UN treaties, has the authority to control and regulate down to every microgram of exported fentanyl, it proves to be incredibly challenging in practice due to all the precursors, new variants, and analogs.

In October 2018, President Trump announced his intention to withdraw the U.S. from the Universal Postal Union (UPU).<sup>163</sup> The UPU, established in 1874, is the “primary forum for cooperation between postal sector players.”<sup>164</sup> The UPU “sets the rules for international mail exchanges and makes recommendations to stimulate growth in mail, parcel and financial services volumes and improve quality of service for customers [internationally].”<sup>165</sup> Although President Trump ultimately decided against withdrawing from the UPU, the White House was not shy about voicing its opinion that the UPU needed to update its regulations, as they feel as

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<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> David T. Johnson, INT’L NARCOTICS CONTROL BD.,, [http://www.incb.org/incb/en/about/members/david\\_johnson.html](http://www.incb.org/incb/en/about/members/david_johnson.html) (last visited Jan. 10, 2020).

<sup>163</sup> Glenn Thrush, *Trump Opens New Front in His Battle with China: International Shipping*, N.Y. TIMES (Oct. 17, 2018), <https://www.nytimes.com/2018/10/17/us/politics/trump-china-shipping.html>.

<sup>164</sup> *About UPU*, UNIVERSAL POSTAL UNION, <https://www.upu.int/en/Universal-Postal-Union> (last visited Jan. 11, 2020).

<sup>165</sup> *Id.*

if they unfairly benefit countries like China.<sup>166</sup> The provision for which the Administration felt was unfair was created in 1969, when developed members of the UPU agreed to charge poorer nations a discounted fee to process small packages (those weighing less than 4.4 pounds) in hopes of aiding economies.<sup>167</sup> Therefore, countries like China, whose economy has since changed drastically, “have been able to pay far less to send a small package to the United States than what it costs American businesses to ship one from Los Angeles to New York.”<sup>168</sup> While President Trump’s push for UPU change could be intertwined with his intentions surrounding trade, there is no doubt that it also affects illicit fentanyl trafficking. Fentanyl is very potent in small quantities. Therefore, fentanyl is a prime candidate to be shipped in small packages, and as evidenced above, clandestine labs in China utilize the mail to ship to clients in both Mexico, Canada, and the United States directly. While the UPU treaty may not have engendered Chinese manufacturers to utilize the mail as its primary source of trafficking, it is not dissuading them, as it is cheap.

Many believe that these treaties are antiquated and ineffective, such as J. Stephen Morrison, the Senior Vice President and Director, Global Health Policy Center. He claimed that the “UN drug control structure, established in the early 1960s, struggles to keep up with the synthetic opioids threat and is in visible need of reform.”<sup>169</sup> Thus, the

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<sup>166</sup> See Nick Cumming-Bruce, *U.S. Will Remain in Postal Treaty After Emergency Talks*, N.Y. TIMES (Sept. 25, 2019), <https://www.nytimes.com/2019/09/25/business/universal-postal-union-withdraw.html> (Contending the White house is concerned with the sliding scale of fees that allow “China, the world’s second-largest economy, to take advantage of lower rates that are available to developing countries. As a result, manufacturers in countries like China and Cambodia have been able to pay far less to send a small package to the United States than what it costs American businesses to ship one from Los Angeles to New York.”).

<sup>167</sup> *Trump Made the Right Call to Withdraw from the Universal Postal Union*, WASH. POST (Oct. 28, 2018), [https://www.washingtonpost.com/opinions/trump-made-the-right-call-to-withdraw-from-the-universal-postal-union/2018/10/28/7dbdde34-d3cb-11e8-83d6-291fceed2ab1\\_story.html](https://www.washingtonpost.com/opinions/trump-made-the-right-call-to-withdraw-from-the-universal-postal-union/2018/10/28/7dbdde34-d3cb-11e8-83d6-291fceed2ab1_story.html).

<sup>168</sup> Cumming-Bruce, *supra* note 166.

<sup>169</sup> J. Stephen Morrison & Emily Munden, *Fentanyl Opens a Grave New Health Security Threat: Synthetic Opioids*, CTR. FOR STRATEGIC & INT’L STUD. (Jan. 18, 2019), <https://www.csis.org/analysis/fentanyl-opens-grave-new-health-security-threat-synthetic-opioids>.

solution cannot be to rely on frameworks already in place because they are failing.

#### IV. RECOMMENDATIONS FOR SUBDUING THE FLOW OF ILLICIT FENTANYL AND ITS ANALOGS

##### A. The United States Must Act in Cooperation With Chinese Counterparts

While there is still immense room for improvement for stopping the flow of fentanyl, success is found when the U.S. and China work cooperatively.

In a hearing before the United States Senate Committee on the Judiciary in 2019, Amanda Liskamm, Director of the Opioid Enforcement and Prevent Efforts, and Greg Cherundolo, Chief of Operations for the Office of Global Enforcement Drug Administration said this:

Department and DEA, which has an active Beijing-based country office, have engaged Chinese counterparts on the control of emerging fentanyl-like substances and other new psychoactive substances. When China controls a drug or precursor chemical, we see a significant drop in the use of that substance for illicit purposes in the United States. It is through these bilateral communications and bridge building efforts that we can work to reduce the supply of illegal substances around the world.<sup>170</sup>

The escalation of trade frictions between China and the U.S. is counterintuitive to the end goal, curtailing fentanyl flow. China's pharmaceutical industry, both legitimate and illicit, is massive. Bolstering China's regulatory procedures will take an immense amount of manpower, money, and time. If tensions between China and the U.S. continue to rise, China may respond by refusing to enforce stricter regulations. In 2016, China's pharmaceutical industry made up 3 percent of China's national economy, with over \$100

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<sup>170</sup> *The Countdown: Fentanyl Analogues*, *supra* note 56.

billion in profits annually.<sup>171</sup> Therefore, China has a vast financial interest in protecting its industry. Some U.S. officials and trade experts have posited that China cooperates only when it believes it will get something in return.<sup>172</sup> Comments made by Chinese officials likely are beginning to foreshadow less compliance with U.S. demands. It seems unlikely that the United States will be able to curtail the Chinese fentanyl pipeline as tensions between the two nations are high.

The increase in tariffs proposed by President Trump could have the unintended effect of pushing the fentanyl industry further underground. Critics claim that China is primarily concerned with the economic development of the pharmaceutical industry, especially since China domestically does not have a problem with fentanyl consumption.<sup>173</sup> Therefore, the tariffs could disincentivize China to regulate strictly, since sales from the chemicals bring money into the national economy.

However, on November 7, 2019, China held a very public sentencing of nine members of a cross-border fentanyl smuggling ring.<sup>174</sup> The White House Office of National Drug Control Policy Director, Jim Carroll, said it was a “direct result” of pressure by the U.S. and President Donald Trump, thus, seemingly supporting the contrary claim that economic pressure from the ongoing trade war will force China to comply with stricter enforcement and regulation.<sup>175</sup>

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<sup>171</sup> Alex W. Palmer, *The China Connection: How One D.E.A. Agent Cracked a Global Fentanyl Ring*, N.Y. TIMES (Oct. 24, 2019), <https://www.nytimes.com/2019/10/16/magazine/china-fentanyl-drug-ring.html>.

<sup>172</sup> Landay, *supra* note 113.

<sup>173</sup> VANDA FELBAB-BROWN, FENTANYL AND GEOPOLITICS: CONTROLLING OPIOID SUPPLY FROM CHINA 3, 12 (Brookings Inst. 2020), [https://www.brookings.edu/wp-content/uploads/2020/07/8\\_Felbab-Brown\\_China\\_final.pdf](https://www.brookings.edu/wp-content/uploads/2020/07/8_Felbab-Brown_China_final.pdf).

<sup>174</sup> Steven Jiang & Ben Westcott, *China Sentences Fentanyl Drug Ring in Rare Public Trial Amid US Trade Talks*, CNN (Nov. 7, 2019, 10:52 PM), <https://www.cnn.com/2019/11/07/asia/china-us-fentanyl-trump-hebei-intl-hnk/index.html>.

<sup>175</sup> *Id.*

However, Yu Haibin, Deputy Head of China's National Narcotics Control Commission, the country's top drug law enforcement agency, denied Carroll's statement that the sentencing was in response to the trade talks.<sup>176</sup> Yu stated, "[d]rug cases are about saving lives, and they shouldn't be linked to trade or any other issues. Nothing is more important than human lives."<sup>177</sup> While Yu claims that the trade relations did not influence the decision for the maximum punishment sentencing, compelling evidence suggests this public sentencing came after the U.S. and China were close to reaching an agreement on "phase one," rolling back tariffs on each other's goods.<sup>178</sup> This agreement reinforces the notion that China likely has an economic incentive in regulating the flow of fentanyl only if there will be less of a net loss. This means China's impetus likely came from an incentive, not a punitive trade pressure.

Experts such as Derek Scissors, a resident scholar at the American Enterprise Institute, have also held that trade frictions could hinder the effort to stop the flow of fentanyl.<sup>179</sup> He stated that the Chinese have effectively said that "[i]f they don't like the trade situation, the fentanyl and related products will continue to flow."<sup>180</sup> Along with expert's claim, China's history with Australia also reiterates the notion that since the opioid epidemic is not plaguing Chinese nationals, it likely will be less motivated to act.<sup>181</sup> China and Australia banned together in the early 2000s to combat illicit methamphetamine; however, it was not really until meth smugglers started entering Chinese cities that the Chinese government cracked down on enforcement.<sup>182</sup> Thus, it would behoove both current and future Administrations to deescalate trade frictions and instead,

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<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> *U.S. Says Phase-One China Deal Would Include Tariff Rollback*, BLOOMBERG (Nov. 7, 2019, 2:28 AM), <https://www.bloomberg.com/news/articles/2019-11-07/china-says-it-agreed-with-u-s-to-roll-back-tariffs-in-phases>.

<sup>179</sup> Jonathan Landay, *Trump Accuses China's Xi of Failing to Halt Fentanyl Exports to U.S.*, REUTERS (Aug. 2, 2019, 10:00 AM), <https://www.reuters.com/article/us-usa-china-fentanyl/trump-accuses-chinas-xi-of-failing-to-halt-fentanyl-exports-to-u-s-idUSKCN1US1WI>.

<sup>180</sup> *Id.*

<sup>181</sup> Felbab-Brown, *supra* note 173, at 10.

<sup>182</sup> *Id.*

potentially look for economical ways to incentivize China's compliance with suggested regulations.

## B. Need for an International Crusade Against the Dark Web

Critics of this recommendation have three key rationales. First, critics of the crusade against the dark web think that the government cannot be faster than the dark web and its users. Second, critics assert that governments need to remove demand: if there is no demand, then there is no need for illicit supply. Third, critics argue that enforcement of a dark web crusade is an infringement on individual rights and could deny individuals due process rights. Although these critics voice valid concerns, an international task force destabilizing the dark web could have immense benefits, as outlined below.

The dark web is continually evolving and changing and allows users to utilize its “technological shield” power to preserve anonymity.<sup>183</sup> Fentanyl dealers might be dissuaded if they had to move merchandise face-to-face rather than feeling protected by the “technological shield” provided by the dark web.<sup>184</sup> However, despite efforts to remove illicit drug selling platforms from the dark web, new marketplaces continuously reemerge. After the 2013 Silk Road takedown, another colossal illicit drug platform arose: AlphaBay, which claimed it “serviced over 200,000 users and 40,000 vendors,” rendering it even larger than Silk Road.<sup>185</sup> Since the 2017 AlphaBay takedown, however, new platforms have again emerged.<sup>186</sup> With every new emergence often comes another layer of encryption, which makes it difficult for authorities to “fingerprint” users by hiding location and website visits.<sup>187</sup> The Joint Criminal Opioid and Darknet Enforcement known as (J-CODE) was created in 2018 to be the new

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<sup>183</sup> BEN WESTHOFF, FENTANYL, INC. 131 (Atlantic Monthly Press 2019).

<sup>184</sup> *Id.*

<sup>185</sup> Press Release, U.S. Dep't of Just., Off. of Pub. Aff., AlphaBay, the Largest Online ‘Dark Market,’ Shut Down (July 20, 2017), <https://www.justice.gov/opa/pr/alphabay-largest-online-dark-market-shut-down>.

<sup>186</sup> Andy Greenberg, *Feds Dismantled the Dark-Web Drug Trade—but It's Already Rebuilding*, WIRED (May 9, 2019, 7:00 AM), <https://www.wired.com/story/dark-web-drug-takedowns-deepdotweb-rebound/>.

<sup>187</sup> TOR, <https://www.torproject.org/> (last visited Jan. 11, 2020).

and improved law enforcement tool to combat illegal online sales of opioids.<sup>188</sup> J-CODE has succeeded in bringing down individuals and platforms that utilized the dark web to sell illicit opioids such as fentanyl and its analogs.<sup>189</sup> Directors of J-CODE acknowledge J-CODE's success is largely due to its collaborative structure.<sup>190</sup> FBI Director Christopher Wray said:

Criminals have always adopted innovations and new technologies to achieve their illicit goals, and it's our job to adapt and remain ahead of the threat. Operation SaboTor demonstrates not only the strength of our partnerships across the U.S. government and abroad but how we're able to capitalize on those partnerships to disrupt criminal activity, even when they try to hide it on the Darknet.<sup>191</sup>

Therefore, J-CODE is a practical framework or base model for a larger-scale international team utilized to combat the trafficking of illicit opioids via the dark web. The United States has already taken action towards this suggested solution by working with Europol, which has its own task force dedicated to regulating the dark web, to bring down illicit opioid selling platforms.<sup>192</sup> However, if there was an international team dedicated to monitoring and regulating dark web sales of illicit fentanyl, there will likely be even stronger outcomes since vendors can sell from any nation through the dark web.

Some critics argue that governments cannot beat the illicit selling of opioids via the dark web because as long as there is a demand, the supplier will continue to supply.<sup>193</sup> Therefore, they argue

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<sup>188</sup> Press Release, U.S. Dep't of Just., Off. of Pub. Aff., Attorney General Sessions Announces New Tool to Fight Online Drug Trafficking (Jan. 29, 2018), <https://www.justice.gov/opa/pr/attorney-general-sessions-announces-new-tool-fight-online-drug-trafficking>.

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> See Nathaniel Popper, *Dark Web Drug Sellers Dodge Police Crackdowns*, N.Y. TIMES (June 11, 2019), <https://www.nytimes.com/2019/06/11/technology/online-dark-web-drug-markets.html>.

<sup>193</sup> Rosalie Liccardo & Pacula David Powell, *A Supply-Side Perspective on the Opioid Crisis*, 37 J. POL'Y ANALYSIS & MGMT. 438, 439 (2018).

what is really needed is a stifling of the demand. The National Institute on Drug Abuse (NIDA) in a statement released in 2019 encapsulated this logic, stating:

[R]educing the demand for opioids by addressing the reasons people turn to them and become addicted in the first place is just as vital and fundamental to ensuring that a new drug epidemic does not follow once the opioid crisis is contained.<sup>194</sup>

However, only focusing on demand-side solutions could have disastrous consequences because opioid users are prone to relapse, and statistically utilization of treatment for substance abuse has not increased much even though there has been a vast amount of funding and focus on expanding access to such treatment.<sup>195</sup> In their article published in the *Journal of Policy Analysis and Management*, Rosalie Liccardo Pacula, a Senior Fellow at the USC Schaeffer Center, and David Powell, a senior economist at the RAND Corporation, argue that efforts must continue and strengthen to limit the supply in black markets.<sup>196</sup> They argue that:

Serious efforts and resources must be given to developing improved monitoring and tracking tools for illicit drug markets and effectively intervening in them in a manner that reduces supply, given such a large group of new addicted consumers have shifted to these markets. Investments in alternative methods of surveillance, data collection, and drug identification are needed to keep up with the evolving supply and delivery methods and could assist in interdicting new supplies. Efforts to track and intercept precursor chemicals or technology that can be used to detect the development of new synthetic opioids are also desperately needed.<sup>197</sup>

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<sup>194</sup> Nora Volkow, *The Importance of Prevention in Addressing the Opioid Crisis* (, NAT'L INST'T. ON DRUG ABUSE (June 27, 2019), <https://www.drugabuse.gov/about-nida/noras-blog/2019/06/importance-prevention-in-addressing-opioid-crisis>.

<sup>195</sup> Liccardo, *supra* note 193, at 439.

<sup>196</sup> *Id.* at 444.

<sup>197</sup> *Id.* at 444.

Such findings support a need for an international solution to curb the supply, thus not just focusing on curtailing the demand. However, a concern against this approach, especially amongst U.S. citizens, might be that capturing criminals utilizing the dark web is an infringement on individual rights and could deny due process of the law. Should law enforcement be allowed to use hacking tools in order to track unlawful activity and capture user's information without their knowledge or consent?

The dark web is not only used for illegal conduct or malicious conduct. It can be used to benefit and protect individuals searching in countries where there are restrictions on internet access.<sup>198</sup> Some U.S. citizens argue that the dark web offers a platform for complete and total free speech, and therefore their privacy and conduct should be protected by the First Amendment.<sup>199</sup> Others argue that procedurally, the U.S. should not be able to track individuals that are outside their jurisdiction.<sup>200</sup> However, the Federal Rules of Criminal Procedure 41 states that magistrates are allowed to issue search warrants to search and seize electronic media and information in an outside district if “the district where the media or information is located has been concealed through technological means.”<sup>201</sup> This rule can be interpreted to mean that law enforcement is allowed to go beyond their jurisdiction into other nations, which is often the case to track and conduct covert operations.<sup>202</sup> Differences in interpretation can lead to grey areas. Thus, law enforcement can utilize “network investigative techniques” (NITs) that could encroach on another

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<sup>198</sup> Michael Chertoff, *A Public Policy Perspective of the Dark Web*, 2 J. CYBER POL'Y 26, 28-29 (2017) (stating “it is important to note that the vast majority of Tor's users are not necessarily accessing the Dark Web for illegal purposes. They may be using it to browse the Surface Web anonymously, often because they are located in a country that does not have free and open access to the internet.”).

<sup>199</sup> Steve Symanovich, *How to Safely Access the Deep and Dark Webs*, NORTON, <https://us.norton.com/internetsecurity-how-to-how-can-i-access-the-deep-web.html> (last visited Jan. 10, 2020).

<sup>200</sup> Chertoff, *supra* note 198.

<sup>201</sup> FED. R. CRIM. P. 41(b)(1)-(5) (stating that a search warrant may be issued by “a magistrate judge with authority in the district”).

<sup>202</sup> Ahmed Ghappour, *Searching Places Unknown: Law Enforcement Jurisdiction on the Dark Web*, 69 STAN. L. REV. 1075 (2017).

nation's boundaries.<sup>203</sup> Again, because of the international nature of the dark web, it is necessary that there is an international treaty or task force to ensure that procedural requirements are being maintained and ensure that no one nation's sovereignty is being encroached upon during a dark web investigation which inevitably is going to cross multinational boundaries.

The dark web is an intricate and ever-evolving network. Thus, it is imperative for an international joint commission force to be structured to regulate its illegal activity, especially with something as deadly as fentanyl or fentanyl analogs. If nations are able to work together, like the FBI and Europol did previously on a much grander scale, it is likely that fentanyl producers and manufactures will increasingly be deterred and prevent the fentanyl or analogs from reaching some of the public. Eradication of the dark web is not likely due to public sentiment for free speech and access and its ability to be regenerated and rebuilt from any person anywhere in the world. However, if a joint task force could deter even one supplier or one buyer, it could mean the difference between life and death.

#### C. A Pact Between China, Mexico, Canada, and the United States is Needed

While China is the largest manufacturer of synthetic opioids, and the U.S. is the largest consumer, they are not the only players that must work together to halt the trafficking.<sup>204</sup> While China might be the largest manufacturer, Mexican cartels are capitalizing on the U.S. and Canadian demand and making fake "prescription pills containing synthetic opioids with the intention of selling them throughout North America."<sup>205</sup> While Mexico primarily buys fentanyl from illegal Chinese manufactures, cartels are now following China's footsteps and manufacturing the deadly but relatively cheap synthetic opioids in clandestine labs.<sup>206</sup> However, even if there is a shift away from China as the sole manufacturer, most of the precursor

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<sup>203</sup> Orin S. Kerr & Sean D. Murphy, *Government Hacking to Light the Dark Web, Risks to International Relations and International Law?*, 70 STAN. L. REV. 58 (2017).

<sup>204</sup> O'Connor, *supra* note 7.

<sup>205</sup> Garcia, *supra* note 136.

<sup>206</sup> Meyer, *supra* note 73.

chemicals are still being bought from China and brought to Mexico and Canada and then smuggled into the United States.<sup>207</sup>

Because fentanyl and its precursors can be shipped from China in such small quantities and still be effective, it is easier for deadly chemicals to evade detection.<sup>208</sup> Earl Anthony Wayne, a former U.S. Ambassador to Mexico, and David Luna suggest there be a “Quadrilateral Commission against Illicit Opioids and International Organized Crime (Q-IOC2) between the U.S., China, Mexico and Canada.”<sup>209</sup> They posit that the establishment of Q-IOC2 would reduce the trafficking and flow of deadly illicit fentanyl and its analogs.<sup>210</sup> Further they argue that the Q-IOC2:

Would regularly review results of enhanced law enforcement and justice cooperation and of targeting and detecting dangerous synthetic drugs at ports of entry in North America and at other vulnerable entry points along the northern and southern U.S. borders. This diplomatic and security mechanism could identify areas for improvement as well as successes. Such a four-party confidence-building process would reinforce the homeland security of each country. Part of a successful effort to reduce smuggling must also involve more effective use of sanctions and asset seizures by the U.S. and the other three countries. Breaking the corrupting influence of these massive illicit enterprises by seizing property and financial assets of traffickers and their associates must be high priority for cooperation.<sup>211</sup>

The standardization of regulation and sanctions would act as disincentives for players who currently profit from loopholes created by the lack of international cohesion. Mexico, China, Canada, and the U.S. have all been affected by the opioid epidemic, albeit in different capacities. However, criminality is never conducive for a nation in the

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<sup>207</sup> *Id.*

<sup>208</sup> Earl Anthony Wayne & David Luna, *Attack Fentanyl Flows Across Borders: A Real Emergency*, WILSON CTR. (Mar. 18, 2019), <https://www.wilsoncenter.org/article/attack-fentanyl-flows-across-borders-real-emergency>.

<sup>209</sup> *Id.*

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

long run as it can create destabilization; therefore, it would be beneficial for all parties to work together on a united front to disrupt the illegal trafficking of fentanyl and its analogs.<sup>212</sup>

## V. GLOBAL RAMIFICATIONS OF NO GREATER INTERNATIONAL COOPERATION TO COMBAT SYNTHETIC OPIOIDS

### A. Global Trends

While the opioid epidemic has hit the U.S. the hardest, global trends show other nations are likely susceptible. Additionally, current data suggests that soon China may not be the only powerhouse fentanyl producer.<sup>213</sup>

Within the European Union, Estonia has been hit hard by the effects of fentanyl injection use, which is accompanied by “high levels of overdose deaths and increased risk of HIV infection among users.”<sup>214</sup> Since 2011, Germany has experienced an increase in overdose deaths likely linked to fentanyl.<sup>215</sup> According to the European Drug Report, an estimated 8,200 people were killed by overdose in 2018, with opioids, which made up 78 percent of deaths.<sup>216</sup> The U.K. is experiencing “increased rates of drug-related deaths and growing evidence from law enforcement agencies of fentanyl entering European drug markets,” evidence that this issue is not isolated to North America and is not going away.<sup>217</sup>

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<sup>212</sup> *Id.*

<sup>213</sup> U.S. WHITE HOUSE, ADVISORY TO THE CHEMICAL MANUFACTURING INDUSTRY ON ILLICIT ACTIVITY AND METHODS RELATED TO THE MANUFACTURING OF FENTANYL AND SYNTHETIC OPIOIDS (August 3 (Aug. 21, 2019), <https://www.whitehouse.gov/wp-content/uploads/2019/08/Fentanyl-Advisory-Manufacturing-Tab-A.pdf> (“Manufacturers in other countries, such as India, the Netherlands, and Bangladesh, have the potential to become increasingly involved in supplying illicit synthetic opioids and their precursors.”))

<sup>214</sup> EUROPEAN MONITORING CTR. FOR DRUGS AND ADDICTION, FENTANYL IN EUROPE EMCDDA TRENDSPOTTER STUDY (2012).

<sup>215</sup> *Id.*

<sup>216</sup> EUROPEAN MONITORING CTR. FOR DRUGS AND ADDICTION, EUROPEAN DRUG REPORT 2019: TRENDS AND DEVELOPMENTS (2019).

<sup>217</sup> Marsh, *supra* note 25.

Additionally, U.S. Pharmaceutical companies are expanding foreign sales.<sup>218</sup> Mundipharma, which is owned by Purdue Pharma, is active all over the world in countries such as Australia, Mexico, Spain, and China. This means that they likely can use the same “aggressive sales tactics” that they employed in the United States, such as running seminars to “encourage doctors to overcome their ‘opioidphobia.’”<sup>219</sup> The Mayo Clinic argues that the odds an individual will still be on opioids a “year after starting a short course increases after only five days on opioids.”<sup>220</sup> Once addiction starts, it is likely only a matter of time before individuals start looking to illegally obtain more powerful drugs such as fentanyl. If the pharmaceutical companies are employing their opioid agendas across the borders, why should policy and regulations, employed to combat their strategies, be bound to just the United States border?

Big Pharma’s tactics are not the only foreshadowing of a potential global problem. According to the former director of the DEA’s Special Operations Division, Derek Maltz, the opioid crisis is becoming a national security emergency.<sup>221</sup> The U.S. Pentagon in April 2019 was even considering classifying fentanyl as a weapon of mass destruction.<sup>222</sup> In a memo, the Department of Homeland Security voiced its concerns on how fentanyl would be “disturbingly easy” to weaponize and use in a chemical attack.<sup>223</sup> Fentanyl could be used as a weapon against any nation; it is cheap to manufacture and

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<sup>218</sup> Humphreys, *supra* note 74.

<sup>219</sup> Humphreys, *supra* note 74.

<sup>220</sup> MAYO CLINIC, *supra* note 34.

<sup>221</sup> Olivia Gazis, *Former DEA Special Agent: U.S. Opioid Epidemic Becoming A ‘National Security Emergency’*, CBS NEWS (Nov. 7, 2018), <https://www.cbsnews.com/news/former-dea-special-agent-u-s-opioid-epidemic-becoming-a-national-security-emergency/>.

<sup>222</sup> David Shortell, *Pentagon, DHS Considering Designating Fentanyl A WMD, Memo Says*, CNN (Apr. 21, 2019, 1:17 PM), <https://www.cnn.com/2019/04/21/politics/dhs-fentanyl-wmd/index.html>.

<sup>223</sup> Paul Szoldra, *Exclusive: DHS Is Considering Classifying Fentanyl as A ‘Weapon of Mass Destruction’*, TASK & PURPOSE (Apr. 15, 2019), <https://taskandpurpose.com/dhs-fentanyl-wmd>.

more inconspicuous than nuclear weapons, considering a lethal dose of fentanyl is around two milligrams.<sup>224</sup>

Additionally, while many nations may not struggle with fentanyl and its analogs *per se*, it is becoming increasingly common for heroin, cocaine, and sedatives to be laced with fentanyl.<sup>225</sup> Thus, without action, countries could be allowing their citizens to unknowingly be exposed to fentanyl.<sup>226</sup>

## VI. CONCLUSION

Fentanyl and its analogs are lethal, and the problems surrounding the illicit sale and use of synthetic opioids are not bound to the U.S. borders. While the U.S. certainly has felt the brunt of the opioid epidemic, as evidenced above, there is a growing concern that other nations may soon be in the crossfire. Therefore, the solutions to combat the fentanyl problem should not be bound to U.S. borders. The fight must become international. The solution must be multifaceted and work in tandem like three legs of a stool.

Firstly, the U.S. must cooperate with China to economically incentivize the nation to enforce stricter regulations. Amid a trade war, China is likely less motivated to create costly new structural oversight when the pharmaceutical industry provides massive income, over \$100 billion annually.<sup>227</sup> The current White House administration, as well as future administrations, should focus on cooperative incentive approach instead of a punitive hostile approach when negotiating with China with regards to fentanyl and fentanyl analogue production and trafficking. The former approach will likely

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<sup>224</sup> U.S. DRUG ENFORCEMENT ADMIN., FENTANYL SIGNATURE PROFILING PROGRAM REPORT (2019), [https://www.dea.gov/sites/default/files/2019-10/DEA\\_Fentanyl\\_Signature\\_Profiling\\_Program\\_Report-Oct-2019.pdf](https://www.dea.gov/sites/default/files/2019-10/DEA_Fentanyl_Signature_Profiling_Program_Report-Oct-2019.pdf).

<sup>225</sup> *New York City Issues Health Advisory About Overdoses from Fentanyl Added to Cocaine*, NAT'L INST. ON DRUG ABUSE (2017), <https://archives.drugabuse.gov/emerging-trends/new-york-city-issues-health-advisory-about-overdoses-fentanyl-added-to-cocaine>.

<sup>226</sup> Claire Fleiz et al., *Fentanyl Is Used in Mexico's Northern Border: Current Challenges for Drug Health Policies*, 115 ADDICTION 4 (2019).

<sup>227</sup> Felbab-Brown, *supra* note 173.

increase positive action from the Chinese government since historically, they are economic opportunists.

Secondly, an international task force should be created to monitor and regulate the dark web for illicit synthetic opioid sells. As evidenced above, the fentanyl problem is devastating, and the dark web creates avenues that make fentanyl virtually accessible to anyone. While the complete eradication of the dark web is unlikely, a bolstered international task force with the sole purpose of monitoring and regulating the dark web for fentanyl and fentanyl analogs could close multiple avenues currently available to drug dealers. While the U.S. should certainly address the demand for illicit drug use on its home front, investing funds and providing highly skilled individuals to a joint international task force could save hundreds if not thousands of lives.

Lastly, a pact between China, Mexico, Canada, and the U.S. should be created to standardize regulations. Once created, it is likely that the pact would cause a decrease in user demand along with a decrease in the sale and consumption of illicit synthetic opioids. Fewer loopholes equal more of an opportunity for users to get caught and punished. It is not enough for the U.S. to just address the main production country, China, as both shipments and some production are flowing in from Mexico and Canada. Mexico and Canada are increasingly also experiencing the negative side effects of fentanyl, which likely makes them more inclined to join a united front.

The best tactic would be for the United States to employ all three of the solutions mentioned above. China is likely to feel more pressure to regulate if there is a pact between multiple nations and economic incentives from the United States. to engage. Additionally, the United States leading an international task force to regulate and the dark web for illicit fentanyl distribution creates an external layer that does not rely on China's direct involvement. If the United States supports an international framework used to disrupt distribution flow, and many other nations join, it is also likely that China will want to comply. It could be economically harmful for China to be the player that is enabling a common international enemy, the fentanyl

dealer. If the United States wants to save its citizens from the opioid epidemic, it has to continue to seek solutions beyond its borders; the U.S. must use its position to negotiate with China and other impacted countries to create a united front against the deadly foe, fentanyl.