

Form over Substance

The dichotomies in American drug policy are as endless as they are futile. Not only are the drug policies futile, but they are often harmful. The policies are killing people every bit as much as drugs are. Most recently, in the area of harm reduction, we see states finally embracing evidence-based and efficacious practices only to have the laws and policies implemented be so narrowly tailored they are not responsive to the daily changing supply of drugs. Most specifically, we are seeing this with regard to the legalization of fentanyl testing strips, but remaining illegality of test strips for other drugs and analogs, such as xylazine.

The most prominent dichotomy which causes extreme inequity in rates of incarceration is crack and cocaine. According to the Anti-Drug Abuse Act of 1986, sentencing disparities including a 100:1 ratio required a federally mandated minimum of 5 years imprisonment for possessing 5 grams (g) of crack—which inevitably incriminated people suffering addictions—whereas it took the possession of 500g of powdered cocaine to receive a similar sentence (ACLU, 2012). Despite the Fair Sentencing Act of 2010 reducing the disparity to 18:1, the long-debated unequal penalization of crack cocaine versus powder cocaine has been comingled with the present response of the United States government to the contemporary opioid crisis, which has further revealed discriminatory federal responses to substance-use disorders.¹ One may ask, what is the difference between crack and cocaine which justifies this vastly different treatment under the criminal laws of America? The answer is none. Crack and cocaine are the exact same substance pharmacologically. They are different forms of the same drug.²

In partial acknowledgement of this pointless differentiation of the same substances, United States Attorney General Merrick Garland issued new Department of Justice guidance for charging, plea deals, and sentencing policies via two memos: one providing general policies for all criminal cases and a second providing additional policies for drug cases.³ Most notably, Attorney General Garland’s Drug Memo seeks to remove the disparity by calling for federal prosecutors to “promote the equivalent treatment of crack and powder cocaine offenses” and directs prosecutors to charge crack offenses as if they were cocaine offenses by using the quantity for cocaine rather than crack.⁴ While this may seem like a victory, it is performative only. Prosecutors remain free to charge as they wish, vesting them with unbridled discretion. It also begs the question why Congress has failed to pass the EQUAL Act which would reduce the penalties for federal crack cocaine offenses to the same level for powder cocaine offenses, and it

¹ Tyriesa, H. H. (2019). Are Substance-Use Disorders in the USA a Crime or Crisis? Restorative Justice to Reclaim Voting Rights for Disenfranchised Nonviolent Offenders. *Journal of Human Rights and Social Work*, 4(2), 103-107. <https://doi.org/10.1007/s41134-018-0069-0>

² See Id.

³ Vinegrad, A., & Berman, D. A. (2023). More Justice from Justice: The DOJ’s Latest Charging, Plea, and Sentencing Policies. *Federal Sentencing Reporter*, 35(3), 153-156. <https://doi.org/10.1525/fsr.2023.35.3.153>

⁴ See Id.

would have made those changes retroactive, meaning federal crack offenders currently serving prison sentences would be eligible to have their sentences reduced.⁵

Another example of the incongruous nature of America's failed drug policy is the distinction between "legal" or "illegal" drugs, placing them into different schedules by the federal government. First, let us consider marijuana. According to the Drug Enforcement Administration, Schedule I drugs, substances, or chemicals are defined as drugs with no currently accepted medical use and a high potential for abuse.⁶ However, according to National Conference of State Legislatures, as of April 24, 2023, 38 states, three territories and the District of Columbia allow the medical use of cannabis products.⁷ In response to California's Prop 215, the Institute of Medicine issued a report that examined potential therapeutic uses for cannabis. The report found that: "Scientific data indicate the potential therapeutic value of cannabinoid drugs, primarily THC, for pain relief, control of nausea and vomiting, and appetite stimulation; smoked marijuana, however, is a crude THC delivery system that also delivers harmful substances. The psychological effects of cannabinoids, such as anxiety reduction, sedation, and euphoria can influence their potential therapeutic value. Those effects are potentially undesirable for certain patients and situations and beneficial for others. In addition, psychological effects can complicate the interpretation of other aspects of the drug's effect."⁸ So, are the medicinal properties of marijuana dependent on where one is geographically? One day, cannabis is illegal and the next, it is legal. These are true examples of the contradictory drug policies in America.

Next, let us examine "legal" versus "illegal" drugs, a meaningless distinction clearly not connected to the lethality of each categorization. Tobacco use is the leading cause of preventable disease, disability, and death in the United States.⁹ An estimated 28.3 million U.S. adults smoke cigarettes, and about 4.7 million middle and high school students use at least one tobacco product, including e-cigarettes. Every day, about 1,600 U.S. youth younger than 18 years smoke their first cigarette.¹⁰ Each year, nearly half a million Americans die prematurely of smoking or exposure to secondhand smoke. Another 16 million live with a serious illness caused by smoking.¹¹ Each year, the United States spends more than \$225 billion on medical care to treat smoking-related disease in adults.¹²

The incongruity continues by having alcohol considered "legal" and other less deadly drugs "illegal." An estimated 95,000 people die from alcohol-related causes annually, according

⁵ Ciaramella, C.J. Congress Yet Again Fails to Pass Crack Cocaine Sentencing Reforms: A compromise to cram crack sentencing reform into the year-end omnibus spending bill fell apart at the last minute. 2022, December, 20. Reason.com. <https://reason.com/2022/12/20/congress-yet-again-fails-to-pass-crack-cocaine-sentencing-reforms/>

⁶ <https://www.dea.gov/drug-information/drug-scheduling>

⁷ <https://www.ncsl.org/health/state-medical-cannabis-laws>

⁸ See id.

⁹ https://www.cdc.gov/tobacco/data_statistics/index.htm

¹⁰ See Id.

¹¹ See Id.

¹² See Id. See also <https://www.samhsa.gov/find-help/atod>

to the National Institute on Alcohol Abuse and Alcoholism (NIAAA).¹³ Alcohol is the third-leading preventable cause of death in the United States. More than 14 million adults ages 18 and older had alcohol use disorder in 2019, according to the NIAAA.¹⁴ While “illegal” drugs can be deadly too, the total amount of lives lost to a combination of all illegal drugs, was, in fact, less than the people who were killed by legal drugs, nicotine and alcohol, individually. Drug overdose deaths rose nearly 30% in 2020 to 93,000, according to preliminary statistics released in July by the Centers for Disease Control and Prevention.¹⁵

The inconsistencies, incongruencies, and failures of American drug policy are again on display by limiting which “substances” can be detected with “test strips” and which cannot. To its credit, Pennsylvania has written a proactive and malleable harm reduction law to account for the ever-changing drug market. Sadly, it took daily advocacy and the loss of life to achieve the same. In 2014, Pennsylvania state Rep. James Struzzi lost his younger brother to a drug overdose.¹⁶ Representative Struzzi recalls sending articles about fentanyl to colleagues daily in 2019, so they would understand the importance of legalizing fentanyl test strips. In addition, during the hearings on fentanyl test strips, experts explained that new substances are constantly introduced into the market and argued it would be helpful for the law to be broad and proactive.¹⁷ Because of this testimony, lawmakers amended the bill to legalize not only fentanyl test strips, but all future drug test strips for any other substances.¹⁸

The wisdom of such prophecy by those experts has come to fruition via a drug called xylazine. However, xylazine is not a new drug, and furthermore, it is legal. Xylazine is a powerful, long-acting tranquilizer that is approved by the Food and Drug Administration for use in animals such as horses and elephants. Xylazine is linked to horrific side effects and a growing number of deadly overdoses across the country, as well as an increase in assaults and other crimes committed against people who have used xylazine due to the length and acuity of its sedative effects. The United States Drug Enforcement Administration issued an alert about a “sharp increase in the trafficking of fentanyl mixed with xylazine”, saying it had seized xylazine and fentanyl mixtures in 48 out of 50 states, including New Jersey. More recently, the Office of National Drug Control Policy (ONDCP), officially designated fentanyl adulterated or associated with xylazine as an emerging threat to the United States. While these are all important strategies in responding to xylazine, the results will not be immediate. In the interim, the response efforts should be focused on awareness, safety, and other evidence-based principles of harm reduction to reduce the impact xylazine will have on the already treacherous drug crisis we face here in New Jersey. This must include widespread distribution of xylazine test strips.

¹³ <https://www.niaaa.nih.gov/alcohols-effects-health>

¹⁴ See id.

¹⁵ https://www.cdc.gov/nchs/pressroom/nchs_press_releases/2021/20210714.htm

¹⁶ <https://www.publicsource.org/fentanyl-test-strips-pittsburgh-pennsylvania-legislation-legal-xylazine/>

¹⁷ See id.

¹⁸ See id.

Sadly, it seems New Jersey might be following the federal lead on incoherent position and policy regarding the legality of xylazine testing strips. This will be deadly and cost human beings to suffer needlessly. Furthermore, the position seems contrary to existing law. New Jersey has embraced principles of harm reduction. More specifically, N.J.S.A. 26:5C-26.1 defines harm reduction supplies as "any materials or equipment designed to identify or analyze the presence, strength, effectiveness, or purity of controlled dangerous substances or controlled substance analogs, including, but not limited to, fentanyl test strips ; opioid antidotes and associated supplies; and any other materials or equipment that may be used to prevent, reduce or mitigate the harms of disease transmission, overdose, and other harms associated with personal drug use as are designated through rules prescribed by the Commissioners of Health or Human Services." Seemingly the clear and unambiguous phrase "including, but not limited to" would necessarily be interpreted to include tests strips for any substance. However, the NJ Office of the Attorney General noted another statute to consider, pointing to N.J.S.A. 2C:36-1 "Drug paraphernalia defined; determination", which outlines what objects constitute illegal drug paraphernalia to support the notion that xylazine test strips are illegal drug paraphernalia even though xylazine itself is legal. As per 2C:36-1(a)(4) illegal drug paraphernalia includes, *inter alia*: testing equipment other than fentanyl test strips, used or intended for use identifying, or in analyzing the strength, effectiveness or purity of controlled dangerous substances or controlled substance analogs." While section (b) of this law also sets forth a list of factors to consider in determining whether an object is drug paraphernalia, subjecting people trying to detect poison to criminal penalties without a chance to present a defense, is simply nonsensical. The uncertainty is chilling.

Outreach to the Division of Administration, Office of the Attorney General via its Office of Constituent Services but was advised the Department of Health would be responsible to address this critical issue. Outreach to Department of Health Commissioner Judith Persichilli has remained unanswered. Various other entities have been contacted in an effort to establish the responsibility of issuing guidance on this issue and protecting New Jersey residents, but unfortunately, there has been a lack of clarity or accountability.

Form over substance is a long-standing legal principle that the United States Supreme Court first espoused in 1935. It has long been invoked to support the commonsense approach that courts and authorities will ignore subjective labels and formats in determining the meaning of contested contractual provisions. Instead, decision makers will offer their own determination of meaning by examining context and actual effect of the arrangement. This time-tested approach invalidates self-serving semantics and solarity of personal interests. In the context of harm reduction, form over substance will save lives and decrease the horrific consequences of xylazine, an animal tranquilizer, on human beings. Imagine if there was suspicion of xylazine in coffee. Clearly, we would allow people to check their coffee before ingesting it. New Jersey and America must let go of cognitive distortions about people who use drugs and embrace life. Embrace humanness. Most of all, leadership must not use semantics or any other means to endanger lives. Until then, NCAAR will advocate for the most expansive interpretation of the statute embracing the evidence-based and life-saving concept of harm reduction.