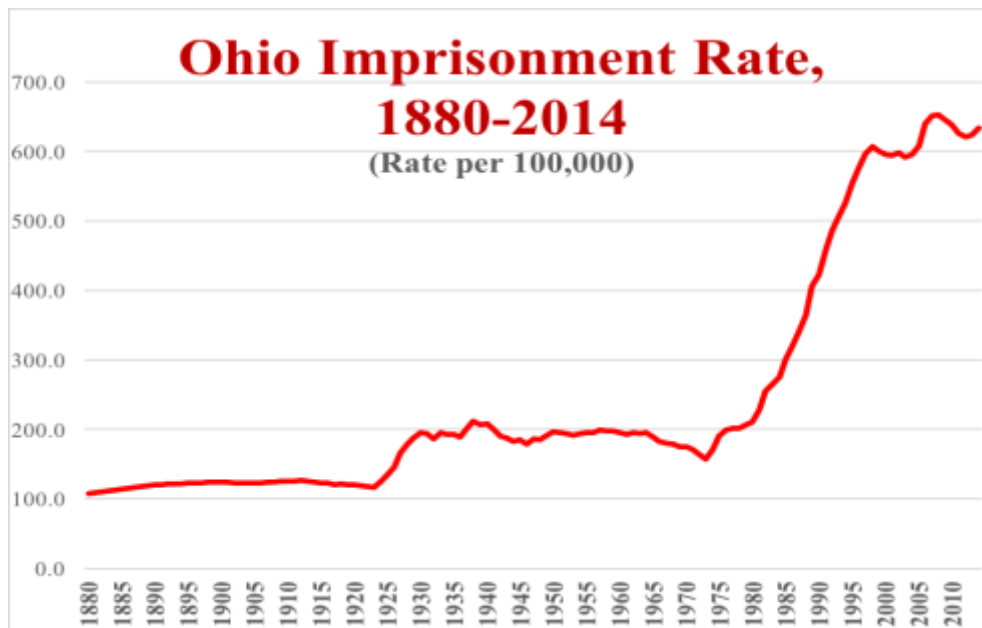


SB 1 Testimony, March 7, Ohio Senate Judiciary Committee

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Chairman Bacon, Vice Chair Dolan, Ranking Member Thomas and members of the Judiciary Committee. My name is Dennis Cauchon. I'm a journalist who's lived in Granville for 15 years. I was a national reporter for USA TODAY until taking a buyout in 2013. In 40 years as a reporter, I've researched drugs, drug markets and criminal justice extensively, including interviewing hundreds of drug offenders and countless police officers, prosecutors and doctors. I don't use illicit drugs. I don't drink alcohol. Today, I speak as a journalist whose interest is entirely based on the destruction I've witnessed from the drug war and mass incarceration. I believe I was the first writer, more than 20 years ago, to label mass incarceration as a phenomenon. I have tracked the data for a long time and recently did this Ohio-specific chart.



I have covered dozens, perhaps hundreds, of criminal laws being passed but have never heard an elected official say what's shown this chart was a goal or would occur. And that's why I asked to speak to you about SB 1.

SB 1 is well-meaning but destructive and counterproductive. It will perpetuate and expand mass incarceration. It will generate harsh sentences with a randomness that makes Ohio's justice system less fair and contributes to the destruction of some communities that you sincerely desire to help. It will not increase public safety. Sadly, it will likely increase overdose deaths, not prevent them.

1) Mandatory minimums. SB 1 is straight out of the 1980s. It stacks mandatory sentences on top of mandatory sentences – then adds sentence lengtheners and classifications -- in ways that

make no public policy sense. As mandatory sentencing does by design, it transfers authority from judges to prosecutors. The bill has countless sentencing rules that will interact in ways that nobody in this room understands – except that sentences will be longer than expected, more numerous than expected, and cover a wider swath of offenders, drugs and behaviors than expected.

At an earlier hearing, Sen. Skindell asked the local prosecutor behind this bill whether SB 1 would turn a misdemeanor marijuana offense into a felony subject to prison time if the pot had been laced with fentanyl – all, I might add, without the knowledge of the buyer or seller. The prosecutor answered he did not know, then said, no, he did not think so. I assert the prosecutor was wrong. SB 1 absolutely does that. The senator’s question was on target. Perhaps I’m wrong. Responsible lawmaking requires that you know the answer to this question – does this law unintentional convert minor offenders into harshly punished felons? -- and adjust the law’s language accordingly.

SB 1 increases sentences across-the-board, all without making any offsetting reductions elsewhere in law to reflect a shifting in imprisonment priorities. Further, SB 1 makes some sentences consecutive, requires maximum sentences be given for some F1 felonies, creates additions to Major Drug Offender cases, prohibits reductions for earned credits or an 80% release credit in some parts of sentences and so on and so on. This is why the legislature created a Recodification Committee. SB 1 is an incomprehensible slew of harsher penalties added to an already incomprehensible stew of a criminal code. Do you, as lawyers and legislators, truly understand Ohio’s 1,180-page criminal code, much less the 157 pages in SB1?¹ Can the punishments you seek to add be understood by everyday Ohioans, particularly the working class drug sellers and users you seek to influence? Law understood only by lawyers (and not even then) is not good law.

Recommendation: Demand an LSC prison population estimate. This is a mass incarceration bill. The Legislative Service Commission did not make estimates on SB 1’s effect on the prison population, sentence lengths or the long-term cost to taxpayers. It is sloppy and irresponsible lawmaking to pass harsh new sentencing laws in an era of mass incarceration without an understanding of the law’s effect.

2) Fentanyl’s role in the drug trade. The DEA calls fentanyl an “adulterant.” That is correct. Fentanyl is an exceedingly small, cheap additive to make drugs seem more potent. It is rarely the drug people want. Fentanyl generates less euphoria than heroin and morphine but delivers more pain relief and respiratory depression.² Ohioans know fentanyl mostly as a heroin additive, but it is also commonly used to boost cocaine, MDMA, amphetamines, counterfeit pills and other illicit drugs. Fentanyl is mostly made in other countries, especially China, and added to drugs

¹ Title 29: Crimes-Procedures is 1,180 pages and 638,433 words, longer than Dickens’ *Bleak House* and Dostoyevsky’s *Crime and Punishment*, combined. Title 27: Courts-General Provisions is another 1,477 pages and 745,130 words.

² European Monitoring Center for Drugs and Addiction: [Fentanyl Drug Profile](#). The EMCDDA is the drug research arm of the European Union.

mostly (but not always) in their country of origin or transport, such as Mexico.³ Retail buyers and sellers may suspect some unknown amount of fentanyl is in heroin but seldom expect fentanyl in cocaine, a stimulant.

Does this matter? Very much. SB 1 elevates the sentencing weight of cocaine offenses by 5, 10 and 25 times if the drug is laced with fentanyl – even if neither the buyer nor seller knew of the adulteration or desired it. In Ohio, 50 grams of powder cocaine is an F3 felony subject to a mandatory minimum of 9 months. If that same cocaine is laced with fentanyl – without the knowledge of buyer or seller – the offense becomes an elevated F1 felony subject to a mandatory sentence of 11 years. Is this fair? Is this intended? The same is true for marijuana, as Sen. Skindell noted, although in the real-world marijuana is rarely laced with fentanyl, media reports notwithstanding. However, it's possible to lace any drug, drink or food with fentanyl, and, under SB 1, even trace amounts of fentanyl would convert a minor drug offense into a serious felony -- all without the knowledge or intent of buyer or seller.

Recommendation. Add a *mens rea* requirement. Few laws need a *mens rea* requirement more than SB 1. The specification that a defendant acted “knowingly” or “with intent” is crucial for establishing culpability and ensuring rational outcomes and fairness. This is especially so when judges, who know the case best, are stripped of discretion through mandatory minimums. Ohio prosecutors should not have unrestricted power to hand out long prison sentences to defendants who did not know and could not have known they were selling fentanyl. The legislature’s *mens rea* reform of 2014 is an appropriate addition to this otherwise grandfathered drug law.

3) Fentanyl weight in sentencing scheme. The nearly microscopic nature of fentanyl means sentencing can't work the old-fashioned, down-and-dirty way: that is, weigh everything in bulk, then sentence based on this rough proxy for offense severity. To apply this antiquated idea to fentanyl will generate arbitrary and unjust punishments that have little connection to the offender or the offense.

Compare fentanyl to heroin. The DEA reports that heroin purity at the retail level ranged from 11% to 80% and averaged 31% in 2015. Thus, heroin made up roughly one-third of the mixture on average at sentencing time, and the entire weight variance was eight-fold, a poor reflection on the accuracy of the justice system but a true example of “good enough for government work.”

Fentanyl doesn't work this way. Ever. All fentanyl must be significantly diluted, whether of illicit manufacture or a prescription drug. The therapeutic dose of fentanyl begins at 25 micrograms -- 0.025 milligrams⁴ -- and a lethal dose for a first time-user is estimated at 2 milligrams. An anesthesiologist might use 0.8 milligrams to put a patient under general anesthesia for major surgery.⁵

³ China made fentanyl and its analogs controlled substances effective March 1, which likely will disrupt the supply, at least temporarily. However, fentanyl is not difficult to make and production could move to other countries or be done domestically. China currently dominates fentanyl production for economic reasons: it produces and sells fentanyl at low prices, about \$3,500 per gram when mailed to the United States.

⁴ Sold by prescription.

⁵ A snorted dose of pure heroin for a novice user would be 10 to 20 milligrams, an IV dose 5 to 10 milligrams.

Lethal dose, first-time or returning user:	
codeine	800 mg
morphine	200 mg
heroin	75 mg
Vitamin A	70 mg
Vitamin D	21 mg
fentanyl	2 mg

The tiny size of fentanyl doses -- and the enormous variance in potency and danger that results from small volume differences -- makes prison terms based on a mixture's bulk weight unjust and a deadly public policy error. *We want fentanyl diluted.* The more dilution, the better. Punishing the positive behavior of dilution incentivizes the supply chain to *minimize* dilution. This is a reckless and lethal approach. It will kill Ohioans.

This point was made forcefully by conservative federal appeals court judge Richard Posner. In a case he handled, wholesalers had diluted fentanyl to less than 1%. Retailers diluted it another 11 to 16 times. As a result, the higher rungs on the supply chain qualified for lighter sentences than low-level dealers.⁶ Posner noted "the perverse effect of giving drug dealers an incentive to possess and sell drugs of high purity or potency." Fentanyl should never make up even 1% of a drug mixture and, when reaching retail buyers and sellers, should be a fraction of that fraction. In Posner's case, non-fentanyl materials accounted for 99.93% of the drug's weight while fentanyl accounted for less than one-tenth of one percent – or 0.067%. Bulk-mixture sentencing schemes cannot work when 99.9% of the sentencing formula is based on something other than the crime.

The problem can be seen visually with counterfeit pills. It's easy to buy a near-perfect fentanyl-laced replica of an OxyContin pill or a Percocet tablet. Only the pill makers, usually in foreign countries, truly know counterfeit pills' ingredients. Sellers and buyers can only guess. And when the pill looks authentic and generates a market price similar to a diverted pill, that's a good sign that buyers and sellers believe it is authentic.⁷ All pills weigh more than their inactive ingredient. Drugs need binders, hardening agents, capsules for containers, etc. A legitimate Percocet tablet that contains 10 milligrams of oxycodone might weigh more than 600 milligrams. (The chart assumes 550 milligrams.) SB 1 makes every person caught with a fentanyl-laced pill a felon. This includes college kids with a fentanyl-laced fake ADD pill, a construction worker who buys a fake Percocet to treat his back pain and an addict trying to get high. Today, a person caught with a real but diverted Percocet would likely face a misdemeanor charge. But, under SB 1, if that person got sold fentanyl-laced counterfeit, the offender is automatically converted into a felon for the same transaction. Additional pills escalate quickly into serious prison time.

Counterfeit Percocet -- 550mg		
Offense	Weight	Pills
F5	Less than 1 gram	1
F4	1-5 grams	2
F3	5-10 grams	9
F2	10-20 grams	18
F1	20-50 grams	36
F1 Max	50-100 grams	90
F1 MDO	F1 MDO	181

As Judge Posner noted, a fentanyl sentencing scheme creates a perverse incentive to keep the pills pure, potent and deadly. Smart sellers, especially with large amounts of fentanyl, will push

⁶ "Hence, for sentencing purposes the retailers were selling much more fentanyl than their suppliers, who are defendants in this case...Adjusting for potency makes more sense than adjusting for weight. Emphasis on the weight of a defendant's drugs (in this case the weight of drugs sold by customers or defendants) whether or not they are diluted, had the perverse effect of giving drug dealers an incentive to possess and sell drugs of high purity or potency and makes the length of the sentences depend perversely on the weight of inactive ingredients in the drugs." – U.S. v. Alvarado-Tizoc (2011)

⁷ Pills normally go for about \$1 per perceived milligram of oxycodone, or \$30 for a fake 30 mg OxyContin pill, the most common counterfeit.

the dilution responsibility down the supply chain in a form of risk arbitrage. Dilution avoidance will become baked into the supply chain, pushing responsibility to the least knowledgeable and least qualified to handle dilution: users. SB 1 tells drug dealers that Ohio wants distributors to keep fentanyl potent and dangerous and the state will add years to sentences if fentanyl is diluted to improve safety.

It is a myth that drug dealers don't care about customers. Dealers and users are largely the same people, part of the same small culture. In Ohio towns, most sellers and buyers went to school together and have known each other most of their lives. Sellers don't want to kill people. Customers don't want to die. Punishing dilution is an unforgivable public health error. You've heard of harm reduction. This is a harm production approach.

Recommendation. Punish fentanyl only, dilutants not at all. All drug sentences should be based on the actual drug. For fentanyl, justice and overdose prevention require it. The cost of a lab test is a small price to pay when prison sentences cost \$25,000 a year, mass imprisonment imposes enormous destruction on children, families and communities and thousands of Ohioans are dying overdose deaths from poorly diluted fentanyl.

SB1 is #1 on your legislative docket because overdoses are killing Ohioans by the thousands. You urgently want to stop the slaughter, to keep people alive. SB 1 seeks to put people in jail and prison. That's not the same thing. In fact, it's quite the opposite.

Trafficking							
Penalty	Fentanyl (current)	Fentanyl (proposed)	Heroin	Cocaine	Crack	Marijuana	Hashish
F5		Less than 1 gram	Less than 1 gram	Less than 5 grams	Less than 1 gram	Less than 200 grams	Less than 10 grams
F4	Less than 20 grams	1-5 grams	1-5 grams	5-10 grams	1-5 grams	200-1,000 grams	10-50 grams
F3	20-100 grams	5-10 grams	5-10 grams	10-100 grams	5-10 grams	1,000 to 20,000 grams	50-1,000 grams
F2	100-1,000 grams	10-20 grams	10-50 grams	100-500 grams	10-25 grams	20,000+ grams	1,000+ grams
F1 standard	1,000-2,000 grams	20-50 grams	50-250 grams	500-1,000 grams	25-100 grams		
F1 Maximum		50-100 grams					
F1 Major Drug Offender	2,000+ grams	100+ grams	250+ grams	1,000+ grams	100+ grams		
Possession							
Penalty	Fentanyl (current)	Fentanyl (proposed)	Heroin	Cocaine	Crack	Marijuana	Hashish
F5	Less than 20 grams	Less than 1 gram	Less than 1 gram	Less than 5 grams	Less than 1 gram	200-1,000 grams	10-50 grams
F4		1-5 grams	1-5 grams	5-25 grams	1-5 grams		
F3	20-100 grams	5-10 grams	5-10 grams	25-100 grams	5-10 grams	1,000-20,000 grams	50-1,000 grams
F2	100-1,000 grams	10-20 grams	10-50 grams	100-500 grams	10-25 grams	20,000+ grams	1,000+ grams
F1 standard	1,000-2,000 grams	20-50 grams	50-250 grams	500-1,000 grams	25-100 grams		
F1 Maximum		50-100 grams					
F1 Major Drug Offender	2,000+ grams	100+grams	250 grams	1,000+ grams	100+ grams		