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Focused Accountability: A Bilateral Response to the International Proliferation of Fentanyl Analogues

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Cover Page Footnote

Candidate for Juris Doctor, Notre Dame Law School, 2021. I would like to thank my brother, parents, classmates, and friends for encouraging me in my calling to become a lawyer. Thanks to Professor Jimmy Gurulé for his valuable feedback and my colleagues on the Notre Dame Journal of International and Comparative Law for their diligent editing assistance. Finally, a very special thanks to my former supervisors Katie Crytzer and Tim Goobic for inspiring me to further study the opioid crisis during my 2019 summer clerkship at the U.S. Department of Justice. All errors are my own.

FOCUSED ACCOUNTABILITY: A BILATERAL RESPONSE TO THE INTERNATIONAL PROLIFERATION OF FENTANYL ANALOGUES

RAZI LANE*

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I. INTRODUCTION

Raised in Portsmouth, New Hampshire by middle-class parents, 27-year-old “Adam Moser was popular, adventurous, athletic, a college grad, a top fisherman and a World War II history buff who fluently spoke French.”¹ A football star with the Exeter High School Blue Hawks, Moser excelled academically and earned his degree in Actuarial Science from Temple University in 2011. After college, he appeared on “Wicked Tuna, a reality television series featured by National Geographic, and earned a small degree of fame and fortune from the opportunity.”² By all accounts, Moser had a loving family, kind friends, and a promising life. On September 19, 2015, much to the horror of his parents and loved ones, Moser unexpectedly passed away. Autopsy reports revealed a disturbing cause of death. Moser had self-injected a substance that he *believed* at the time of his purchase to be heroin, but what was actually its sinister cousin: synthetic fentanyl. This misunderstanding cost him his life.

The story of Adam Moser relates just one among the thousands of heartbreaking realities brought on by America’s opioid epidemic. From

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1 DEA-360 Online, *True Story: Adam Moser 27, Portsmouth, N.H., Fentanyl*, JUST THINK TWICE (2015), <https://www.justthinktwice.gov/manchester/true-stories/true-story-adam-moser-27-portsmouth-nh-fentanyl>.

2 *Id.*

teenagers in high school hallways³ to celebrities idolized in popular culture,⁴ this crisis does not discriminate among the communities it ravages. Moser's story also offers anecdotal support for the fact that opioid abuse remains a dire public health emergency and has visited destruction upon American⁵ and international populations alike.⁶ The current epidemic developed in three waves: "[t]he first wave was prescription opioids, the second wave was heroin, and the third—and ongoing—wave is synthetic opioids."⁷ The unrivaled lethality of this final wave, and the rate at which it has accelerated, shocks the conscience.⁸ A 2018 study in the Health Policy Review conducted by six physicians explains:

Data on opioid overdose deaths shows 42,000 deaths in 2016. Of these, synthetic opioids other than methadone were responsible for over 20,000, heroin for over 15,000, and natural and semi-synthetic opioids other than methadone responsible for over 14,000. *Fentanyl deaths increased 520% from 2009 to 2016 (increased by 87.7% annually between 2013 and 2016)*, and heroin deaths increased 533% from 2000 to 2016.⁹

The high potency of *synthetic* opioids, chief among them illicitly manufactured fentanyl ("IMF")¹⁰ and their near-identical cousins known as fentanyl analogues, places them in a class all their own within the opioid family of narcotics.¹¹ Between IMF and its analogues, the latter contributed most to the

3 See, e.g., Benjamin Romano & Brendan Kiley, 'Fentanyl is a Death Drug': Public-Health Warning Issued After Pills Kill 3 Local Teens, SEATTLE TIMES (Oct. 5, 2019, 11:23 AM), <https://www.seattletimes.com/seattle-news/health/schools-issue-warning-after-seattle-teen-dies-from-fentanyl-laced-pill/> (explaining that three high school teenagers in Seattle fatally overdosed on pills laced with illicit fentanyl, which they believed to be oxycodone).

4 See, e.g., Daniella Silva, *Prince Died After Taking Fake Vicodin Laced with Fentanyl*, NBC NEWS, (Apr. 19, 2018, 5:36 PM), <https://www.nbcnews.com/news/us-news/no-criminal-charges-prince-s-overdose-death-prosecutor-announces-n867491> ("Music legend Prince died after taking what he thought was Vicodin but was actually a counterfeit painkiller that was laced with fentanyl . . . 'In all likelihood, Prince had no idea he was taking a counterfeit pill that could kill him' . . .").

5 See THE WHITE HOUSE, *Ending America's Opioid Crisis* (2018), <https://www.whitehouse.gov/opioids/> (declaring a public health emergency because 64,000 Americans died from opioid overdoses in 2016).

6 See WORLD HEALTH ORG., *Information Sheet on Opioid Overdose* (Aug. 28, 2020), https://www.who.int/substance_abuse/information-sheet/en/ (declaring that in 2016 275 million people worldwide used drugs, 34 million of those used opioids, 27 million suffered from opioid abuse disorders (addiction), and 450,000 died from a direct result of drug overdoses).

7 BRYCE PARDO ET AL., *THE FUTURE OF FENTANYL AND OTHER SYNTHETIC OPIOIDS*, RAND Corp. xv (2019).

8 See Leo Beletsky & Corey Davis, *Today's Fentanyl Crisis: Prohibition's Iron Law Revisited*, 46 INT'L J. DRUG POL'Y 156 (2017).

9 Laxmaiah Manchikanti et al., *Reframing the Prevention Strategies of the Opioid Crisis: Focusing on Prescription Opioids, Fentanyl, and Heroin Epidemic*, 20 HEALTH POL'Y REV. 309 (2018) (emphasis added).

10 This Note addresses the need to combat *illicit* fentanyl from a law enforcement perspective. Contrariwise, *licit* fentanyl, as prescribed and administered by licensed medical practitioners consistent with their best practices, finds no criticism here. See *What is Fentanyl*, CENTER FOR DISEASE CONTROL AND PREVENTION (2019), <https://www.cdc.gov/drugoverdose/opioids/fentanyl.html> (" . . . the sharp rise in fentanyl-related deaths may be due to increased availability of illegally made, non-pharmaceutical fentanyl, and not prescribed fentanyl.").

11 See *The Countdown: Fentanyl Analogues & The Expiring Emergency Scheduling Order: Hearing Before the Comm. on the Judiciary U.S. Sen.*, 116 Cong. 1 (2019) (statement by Amanda Liskamm,

recent spike in opioid overdose deaths.¹² These analogues, primarily concocted by chemists overseas, eventually find their way to American shores through international narco-trafficking channels. According to the U.S. Department of Justice (“DOJ” or “Main Justice”), “China is the principal source country of fentanyl-like substances and other synthetic opioids, producing most illicit fentanyl and fentanyl-like substances that reach U.S. users.”¹³ Nonetheless, current efforts to hold China accountable for turning a blind eye to fentanyl diversion have largely failed.

Despite reinvigorated efforts by the DEA to quell domestic distribution of IMF and its analogues, the United States cannot make lasting progress in counternarcotics without international cooperation.¹⁴ Consequently, an effective strategy to combat the opioid crisis must be international in scope and tailored to address IMF and analogue trafficking from their primary source: Chinese manufacturers. Therefore, although the Trump Administration has won a series of praiseworthy battles in what has become a years-long war against the proliferation of illegal opiates, its victories should spur additional action rather than apathy.¹⁵

Counsel, U.S. Dep’t of Justice) (“The lethality of fentanyl is virtually unmatched. It is 30-50 times more potent than heroin, which is quite lethal in its own right.”); Rachel L. Rothberg & Kate Stith, *Fentanyl: A Whole New World*, 46 J. L. MED. & ETHICS 314 (2018) (“Fentanyl . . . is fifty times more potent than heroin and one hundred times more so than morphine. It is so dangerous that . . . first responders who unknowingly come into contact with it . . . can be put at serious risk.”). See also Erika Kinetz & Paisley Dodds, *Deadly Drug Fentanyl Has Been Tested as Chemical Weapon by Military for Decades*, GLOBAL NEWS, (Oct. 8, 2016, 11:16 AM), <https://globalnews.ca/news/2991712/deadly-drug-fentanyl-has-been-tested-as-chemical-weapon-by-military-for-decades/>.

12 See Harold E. Schueler, *Emerging Synthetic Fentanyl Analogs*, ACADEMIC FORENSIC PATHOLOGY (2017) (“Synthetic fentanyl analogs are the most potent substances to enter the illicit drug market.”). See also Lawrence Scholl et al., *Drug and Opioid-Involved Opioid Deaths—United States, 2013-2017*, 67 MORBIDITY & MORTALITY WEEKLY REPORT 1419 (2018), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6334822/pdf/mm675152e1.pdf> (“From 2016 to 2017, overdose deaths involving all opioids and synthetic opioids increased, but deaths involving prescription opioids and heroin remained stable. The opioid overdose epidemic continues to worsen and evolve because of the continuing increase in deaths involving synthetic opioids.”).

13 Liskamm, *supra* note 11, at 5. See also Liz Schroyer, *We Can’t Fight Our Opioid Crisis Alone. We Need Help from Countries Around the World*, USA TODAY (Aug. 2, 2018, 2:11 PM), <https://www.usatoday.com/story/opinion/2018/08/02/fighting-american-opioid-crisis-international-help-needed-column/850333002/> (“Most fentanyl in America comes from China.”); *Illicit Supply of Fentanyl and Other Synthetic Opioids: Transitioning Markets and Evolving Challenges: Testimony Before the Comm. on Homeland Sec. Subcomm. on Intelligence and Counterterrorism and Subcomm. on Border Sec., Facilitation, and Operations*, 116th Cong. 9 (2018) (statement by Bryce Pardo, RAND Corp.) (“Currently, U.S. authorities believe China to be the primary source for fentanyl, fentanyl analogues, precursor chemicals, and press machines used in the manufacture of counterfeit tablets.”). See also Alex W. Palmer, *The China Connection*, N.Y. TIMES (last updated Oct. 24, 2019), <https://www.nytimes.com/2019/10/16/magazine/china-fentanyl-drug-ring.html> (“China remains the center of the global fentanyl economy”).

14 Schroyer, *supra* note 13 (“When it comes to combating the opioid epidemic, we simply don’t have the luxury of battling this crisis on the homefront alone.”); See also Christopher Battiloro, Note, *Fentanyl: How China’s Pharmaceutical Loopholes are Fueling the Opioid Crisis*, 46 SYRACUSE J. INT’L L. & COM. 343-44 (2019) (“The root of the opioid crisis lies in China, where synthetic opioids and their precursors are manufactured before being shipped overseas. While some changes are being made domestically, thanks to the internet, this issue has no borders and cannot be unilaterally controlled.”).

15 See Manchikanti et al., *supra* note 9, at 317 (“In recent years, prescription opioid usage has decreased with the development of a multitude of federal, state, and local regulations.”). But see Jeffrey Miron, Greg Sollenberger & Laura Nicolae, *Overdosing on Regulation: How Government Caused the Opioid Epidemic*, THE CATO INST. (2019), (explaining opioid prescription regulations pushed consumers to black market dealers at their peril and suggests “that the United States should scale back restrictions on opioid prescribing, perhaps to the point of legalization.”).

This Note addresses the international legal landscape of the opioid epidemic, specifically illicit transboundary trafficking of fentanyl and fentanyl analogues from chemists in China into the hands of American consumers. First, it assesses the seriousness of the opioid crisis, as exacerbated by emerging threats posed by IMF and related analogues. Second, it offers an explanative account of current domestic law enforcement efforts to address fentanyl by the United States and China respectively. This explanation precedes a short discussion that relates the successes and failures of each regime in their efforts to combat narco trafficking. Third, this Note evaluates the inability of extant multinational drug conventions to effectively address transboundary fentanyl trafficking from China. Finally, it proposes that the United States and China adopt a bilateral self-executing treaty that would class-wide schedule IMF and its analogues consistent with the policy announced by China in May 2019 and as advocated by counsel at the DOJ. This Note contends that such a proposal would grant the DOJ new jurisdiction to prosecute known Chinese chemists who divert synthetic opioids into the global trafficking rings that distribute them to Americans.

II. BACKGROUND

Although opioid abuse has existed for several decades, the recent escalation in opioid addiction began after influential pharmaceutical companies prevailed in their campaign to bring opiate painkillers to medical facilities in the 1990s.¹⁶ According to the National Institute on Drug Abuse (“NIDA”), opioids primarily affect areas of the brain that control pleasure, pain, and emotion, and they stimulate dopamine releases responsible for the euphoria experienced by recreational users.¹⁷ These experiences inevitably become less satisfying as the brain acclimates to the drug over time.¹⁸ Consequently, users will crave stronger doses with continued opioid use and eventually become addicted.¹⁹ A linear trajectory exists between individuals who become addicted to prescription painkillers (acquired licitly by prescription or illicitly through diversion) and those addicted to illegal opiates. Indeed, prescription opioid abuse often precedes an addiction to heroin²⁰ and, if allowed to progress, synthetic opioids

16 See U.S. DEP’T OF HEALTH AND HUM. SERVS., *What is the U.S Opioid Epidemic?* (last updated Sept. 4, 2019), <https://www.hhs.gov/opioids/about-the-epidemic/index.html> (explaining big pharmaceutical companies “reassured the medical community that patients would not become addicted to opiate pain relievers” which precipitated a rise in prescriptions and, accordingly, more cases of addiction).

17 See NAT’L INST. ON DRUG ABUSE, *How Do Opioids Affect the Brain and Body* (last visited Nov. 23, 2019), <https://www.drugabuse.gov/publications/misuse-prescription-drugs/what-classes-prescription-drugs-are-commonly-misused> (“When [opiates] attach to their receptors, they inhibit the transmission of pain signals. Opioids can also produce . . . nausea, constipation, and respiratory depression, and since these drugs also act on brain regions involved in reward, they can induce euphoria, particularly when they are taken at a higher-than-prescribed dose . . .”).

18 *Id.*

19 See generally E. Salsitz & T. Wiegand, *Pharmacotherapy of Opioid Addiction: Putting a Real Face on a False Demon*, 12 J. MED. TOXICOLOGY 58-63 (2016).

20 See Shelby Leheny, *The Connection Between Prescription Opioids and Heroin*, PHARMACY TIMES (Sept. 12, 2016, 6:46 AM), <https://www.pharmacytimes.com/contributor/shelby-leheny-pharmd-candidate-2017/2016/09/the-connection-between-prescription-opioids-and-heroin> (pharmacist

like fentanyl and its analogues.²¹ Therefore, some scholars have attributed America's high demand for IMF to recent spikes in opioid prescriptions.²²

Before IMF and its analogues can be sold domestically and consumed, they must be manufactured, diverted, and—in most cases—internationally trafficked. According to the DEA, the “vast majority” of IMF originates with licensed chemists in China.²³ Many of these suppliers are gainfully employed at legitimate taxpaying chemical companies, many of which receive praise from the Chinese government.²⁴ These entities divert large quantities of fentanyl and drug ‘precursors’—substances used to enhance or create narcotics—into the hands of dark web retailers.²⁵ Ben Westhoff describes transactions in these forums as “shockingly easy” to negotiate.²⁶ Westhoff, an investigative journalist, disguised himself under an online alias and contacted several Chinese sellers on the dark web about purchasing underground fentanyl. These chemists replied promptly and were notably “well-accustomed to Western buyers, who are the bulk of their clients.”²⁷ Once concocted in China, IMF can be trafficked into the United States through a variety of mediums. Mexican cartels²⁸ and postal

explaining that “[r]esearch has proven a connection between opioid abuse and heroin use.”); BEN WESTHOFF, FENTANYL, INC.: HOW ROGUE CHEMISTS ARE CREATING THE DEADLIEST WAVE OF THE OPIOID EPIDEMIC 145 (2019) (explaining that “when people’s OxyContin supplies ran out, they turned to heroin”).

21 See Leslie Cooley Dismukes, *How Did We Get Here? Heroin and Fentanyl Trafficking Trends: A Law Enforcement Perspective*, 79 N.C. MED. J. 181-83 (2017) (explaining how a rise in prescription opioids precipitated a demand for heroin and later fentanyl in North Carolina). See generally Nabarun Dasgupta, Leo Beletsky & Daniel Ciccarone, *Opioid Crisis: No Easy Fix to Its Social and Economic Determinants*, 108 A.J.P.H. PERSPECTIVES 182-84 (2018) (explaining the opioid crisis in three phases: over-prescription of opiate painkillers, heroin abuse, and fentanyl).

22 *Id.* at 181-82.

23 *Tackling Fentanyl: The China Connection: Hearing Before the Subcomm. on Africa, Global Health, Global Hum. Rts. and Int’l Orgs.*, 116th Cong. 2 (2018) (statement by Paul Knierim, Deputy Chief of Operations at the Office of Global Enforcement, U.S. DEA) (“Over the past several years, DEA has identified numerous illicit fentanyl class substances and hundreds of synthetic drugs from at least eight different drug classes, the vast majority of which are manufactured in China.”). See also *Fentanyl Crisis: Is China a Major Source of Illegal Drugs?*, BBC NEWS (Sept. 23, 2018), <https://www.bbc.com/news/world-45564744> (quoting DEA spokeswoman Katherine Pfaff who explained that counternarcotic intelligence indicates a “significant amount of [IMF] comes from China.”). See Dismukes, *supra* note 21, at 183 (“Clandestinely produced fentanyl and its analogues originate in China.”).

24 See WESTHOFF, *supra* note 20, at 168 (explaining, that in addition to Chinese shadow supply enterprises, other chemical companies which supply fentanyl to dark markets “have been able to operate in the open . . . in China for years. They pay their taxes and occasionally receive plaudits from the government.”).

25 Rothberg & Stith, *supra* note 11, at 317 (explaining use of online dark markets by Chinese chemists to proliferate IMF).

26 WESTHOFF, *supra* note 20, at 171.

27 *Id.*

28 See Josh Meyer, *What are Mexican Drug Cartels Fighting Over? The Chance to Sell Fentanyl Here*, WASH. POST (Nov. 7, 2019, 6:00 AM), <https://www.washingtonpost.com/outlook/2019/11/07/what-are-mexican-drug-cartels-fighting-over-chance-sell-fentanyl-here/> (“More recently, according to DEA, CDC and United Nations data, the cartels have been spiking their U.S.-bound cocaine, methamphetamine and counterfeit pain pills with fentanyl, too, to pack a bigger punch and hook whole new cadres of users.”). See Rothberg & Stith, *supra* note 11, at 316-17.

smuggling,²⁹ often facilitated by digital dark markets,³⁰ constitute the most favored channels.

Were drug smuggling an Olympic sport, Mexican cartels would bring home the gold. In fact, “Mexican drug cartels are the primary channel for Chinese fentanyl destined for the U.S.”³¹ Already North America’s top supplier of illicit heroin since the 1990s,³² “Mexican drug trafficking organizations are importing fentanyl and fentanyl precursors from China.”³³ These distributors capitalize on the availability of Chinese fentanyl to handsomely profit at the peril of American opioid addicts. “Synthetic opioids, which can be readily made in a lab, are attractive alternatives to poppy-based heroin, which is susceptible to blight, drought, eradication, and labor shortages. Also, the very high potency-to-weight ratio of fentanyl makes it ideal for smuggling.”³⁴ Moreover, “[f]entanyl is a unique drug in several ways. The profit margin is remarkable: A \$3,000 investment can produce \$1,500,000 in earnings.”³⁵ Consequently, Mexican traffickers began to supplement—or “cut”—their heroin with synthetic fentanyl and fentanyl analogues,³⁶ a process which has enabled them to “stretch their heroin supply and obtain a larger profit.”³⁷ Known colloquially as “China White,” fentanyl-heroin hybrids have proven themselves a deadly blend because neither street dealers nor consumers appreciate their extraordinary potency.³⁸

29 See Sari Horwitz & Scott Higham, *The Flow of Fentanyl: In the Mail, Over the Border*, WASH. POST (Aug. 29, 2019), <https://www.washingtonpost.com/investigations/2019/08/23/fentanyl-flowed-through-us-postal-service-vehicles-crossing-southern-border/?arc404=true>.

30 See Patil Armenian et al., *Fentanyl, Fentanyl Analogs and Novel Synthetic Opioids: A Comprehensive Review*, 134 NEUROPHARMACOLOGY 121, 125 (2018) (“Modern internet e-commerce has enabled individual players, small-scale drug trafficking organizations (DTOs) and largescale DTOs with their own production facilities to flood the illicit drug market with fentanyl.”).

31 *Id.* at 126. See also Liskamm, *supra* note 11, at 1 (“Whether delivered via mail, express consignment, or through Mexico, China is the principal source country of fentanyl-like substances and other synthetic opioids, producing most illicit fentanyl and fentanyl-like substances that reach U.S. users.”).

32 See Sarah G. Mars, Daniel Rosenblum & Daniel Ciccarone, *Illicit Fentanyls in the Opioid Street Market: Desired or Imposed*, 114 ADDICTION 780 (2018) (“Since the mid-1990s almost all US heroin originated in Mexico and Colombia, but between 2000 and 2009, estimated Colombian production of opium, the raw ingredient that is refined into heroin, fell by 90%. Meanwhile, estimated Mexican opium production rose by more than 1900% from its low point in 2000 to dominate the US market, with total production for the US market quadrupling. This rise was followed by a 46% decline in combined estimated opium production in 2009–13, leading up to the current US fentanyl wave.”).

33 Pardo, *supra* note 13, at 9.

34 *Id.*

35 Hans A. von Spakovsky & Peyton Smith, *China is Poisoning America with Fentanyl*, THE HERITAGE FOUND. (Mar. 5, 2019), <https://www.heritage.org/crime-and-justice/commentary/china-poisoning-america-fentanyl>.

36 Knierim, *supra* note 23, at 1 (“Once in the Western Hemisphere, fentanyl or its analogues are prepared for mixing into the heroin supply. . . and then moved into the illicit U.S. market where demand for prescription opioids and heroin remains at epidemic proportions.”).

37 Dismukes, *supra* note 21, at 183.

38 Katarzynac Kuczyńska et al., *Abuse of Fentanyl: An Emerging Problem to Face*, 289 FORENSIC SCI. INT’L 207, 212 (2018) (“Recent years have seen an unprecedented increase in fentanyl-related intoxications, some fatal, in various parts of the world, but notably in North America. The majority have been attributed to the use of heroin laced with illicit fentanyl, a far more potent opioid. Some users are unaware of this adulteration, thus the risk of overdose and poisoning is very high.”). See also Maggie Fox, *Why Would Anyone Cut Heroin with Fentanyl? It’s Cheap*, THESE RESEARCHERS SAY, NBC NEWS (Dec. 4, 2018, 5:45 PM), <https://www.nbcnews.com/storyline/americas-heroin-epidemic/why-would-anyone-cut-heroin-fentanyl-it-s-cheap-these-n943796> (“Drug overdose deaths are skyrocketing . . . [and] are caused by synthetic opioids such as fentanyl. These lab-made drugs can be very potent and they are increasingly showing up in supplies of drugs that buyers believed were heroin. Because the fentanyl and related drugs are so powerful, it’s easy to overdose. That’s why so many users die.”).

Chinese chemists also interact directly with American consumers and street dealers through dark web forums and crypto markets.³⁹ In fact, “almost 70 percent of fentanyl seized by C[ustoms and] B[order] P[atrol] in FY 2018 arrived by air, mostly at mail and express consignment carrier facilities.”⁴⁰ According to DEA, “[f]rom China, [IMF] substances are shipped primarily through express consignment carriers or international mail directly to the United States. . . .”⁴¹ Investigative journalist Scott Higham and Sari Horwitz, his Pulitzer Prize winning colleague, explained this process clearly in early 2019:

Chinese drug traffickers had some advice for American buyers of fentanyl: Let us ship it to you by regular mail. It might be slower than FedEx or UPS, but the opioid is much more likely to reach its destination through the U.S. Postal Service. These cyber drug dealers wrote their U.S.-based customers—in emails later uncovered by federal investigators—that private delivery companies electronically tracked packages, allowing the easy identification of mail from suspect addresses and creating a bright trail connecting sellers and buyers of illegal fentanyl.⁴²

The high potency of illicit fentanyl and its analogues—to the tune of 500 lethal doses in a parcel the size of a sugar packet—“means it can be smuggled through the mail in what officials call micro-shipments that are far harder to identify and interdict than bulkier loads of heroin, cocaine or marijuana.”⁴³ These facts, combined with concerted efforts by Chinese chemists to conceal their drug diversion schemes, illustrate the formidable challenge posed by opioid smuggling for U.S. customs and postal enforcement.⁴⁴ Somewhat ironically, China cracks down on illicitly distributed fentanyl domestically, yet tacitly

39 See generally Usha Lokala, et. al, *Global Trends, Local Harms: Availability of Fentanyl-Type Drugs on the Dark Web and Accidental Overdoses in Ohio*, 25 COMPUTATIONAL AND MATHEMATICAL ORG. THEORY 48-59 (2018) (examining correlations between advertising for the sale of IMF on dark crypto-markets and increased presence of IMF in the United States). *But see* Mars, et al., *supra* note 32, at 777 (explaining that crypto markets are unlikely to contribute to significant amounts of fentanyl entering the United States).

40 Pardo, *supra* note 13, at 6.

41 Knierim, *supra* note 23, at 1. See Palmer, *supra* note 13 (“The Postal Service suddenly became perhaps the largest drug-transportation network in the world, delivering fentanyl from China straight to American homes. Catching an illicit shipment in transit was nearly impossible.”).

42 Horwitz & Higham, *supra* note 29.

43 Del Quentin Wilbur, *Fentanyl Smuggled from China is Killing Thousands of Americans*, L.A. TIMES (Oct. 19, 2018, 3:00 AM), <https://www.latimes.com/politics/la-na-pol-china-fentanyl-20181019-story.html>; Spakovsky & Smith, *supra* note 35 (“A laboratory-made drug, fentanyl requires less time and space to produce than its agricultural counterpart, heroin. Chemists can manufacture fentanyl in small labs and use easy shipment methods.”).

44 Pardo, *supra* note 13, at 7 (“To avoid detection by customs authorities, Chinese producers or distributors often use technically legal workarounds and, when necessary, outright deception.”). See also Meyer, *supra* note 28 (“Massive amounts of fentanyl are being seized at the border now, and far more is getting through. Thomas Overacker, executive director of cargo and conveyance security for U.S. Customs and Border Protection, told Congress in July that seizures of illicit fentanyl had significantly increased, from about two pounds in fiscal 2013 to about 2,170 pounds in fiscal 2018. CBP had seized as much in the first half of 2019 as it did in all of the prior year, he said, but the agency is able to inspect about 2 percent of cars and 16 percent of commercial vehicles that come across ports of entry at the southwest border.”).

permits its exportation to unsuspecting locations around the world.⁴⁵ Therefore, the Chinese government has not only allowed synthetic opioid proliferation, but the regime's lax enforcement policies have also enabled it.⁴⁶

III. DOMESTIC EFFORTS AND LEGAL LANDSCAPE

A. *THE UNITED STATES*

The United States currently regulates fentanyl proper (excluding analogues) as a Schedule II narcotic under the 1970 Controlled Substances Act ("CSA"). The CSA, a law swiftly enforced by federal authorities and their international partners, has been used to quash previous outbreaks of illicit fentanyl in the United States before they could reach epidemic magnitude.⁴⁷ The enumerated classification of fentanyl as a controlled substance under Schedule II authorizes DEA action. However, America's opioid crisis has been fueled more by fentanyl *analogues* than the original drug. While fentanyl itself has been permanently scheduled as a controlled substance under the CSA, its analogues have only been temporarily scheduled under Schedule I. Should Congress allow this temporary scheduling order to lapse in May 2021, the legal authority under which analogue traffickers may be prosecuted would no longer exist. As Amanda Liskamm, counsel for the Director of the Opioid Prevention Unit of the Criminal Division at the DOJ, explained to the U.S. Senate during the summer of 2019:

DEA expects savvy clandestine manufactures and traffickers to respond to the reemerging gap in U.S. law by again producing novel fentanyl-like substances. This is the normal response of traffickers who wish to avoid prosecution and still profit from peddling poison, and is consistent with previous attempts to circumvent reactive substance-specific control measures.⁴⁸

Before Congress temporarily scheduled fentanyl analogues in 2020, DOJ responded to "savvy clandestine manufacturers and traffickers" with an emergency scheduling order in 2018.⁴⁹ This order, as authorized by the 1984

45 WESTHOFF, *supra* note 20, at 170.

46 Spakovsky & Smith, *supra* note 35 ("China's inadequate regulation of drugs has left room for an estimated 160,000 chemical companies there with the ability to produce and export fentanyl."). See also WESTHOFF, *supra* note 20, at 206-208 (explaining how the Chinese government has conferred tax incentives among other benefits upon chemical companies that facilitate proliferation of illicitly manufactured fentanyl and fentanyl analogues).

47 Pardo, *supra* note 13, at 5 ("During a brief period in the mid-2000s, illicitly manufactured fentanyl appeared in major heroin markets in the Midwest and mid-Atlantic, claiming about 1,000 lives. Federal and local response was swift, expanding access to naloxone and seizing product from the street. In May 2006, Mexican law enforcement and the DEA identified and closed the illicit manufacturing operation in Toluca, Mexico. Illicitly manufactured fentanyl would not return to drug markets until late 2013.")

48 Liskamm, *supra* note 11, at 4-5.

49 *Schedules of Controlled Substances: Temporary Placement of Fentanyl-Related Substances in Schedule I*, U.S. DRUG ENFORCEMENT ADMIN. (2018),

Comprehensive Crime Control Act,⁵⁰ temporarily scheduled fentanyl analogues as Schedule I controlled substances and granted DOJ authority to prosecute traffickers until May 2021.⁵¹

Pursuant to this emergency order, the United States introduced a variety of measures to address transboundary IMF trafficking that included heightened law enforcement efforts coordinated by the DOJ. This crackdown enjoyed relative success. For example, the DOJ announced in 2018 a series of darknet website seizures that forestalled efforts of domestic IMF dealers and consumers to purchase illegal opioids and, in 2019, the DEA prosecuted a Chinese IMF ring; the latter event illuminated the scale and seriousness of international fentanyl trafficking while exposing the degree to which China has perpetuated the ongoing opioid epidemic.⁵² Furthermore, “[t]he U.S. Postal Service (USPS) has stepped up tracking, detection and interdiction efforts to curb fentanyl trafficking into the U.S. through the mail [and] . . . witnessed a 1,000% increase in the number of parcels seized containing synthetic opioids between 2016 and 2018.”⁵³

Federal prosecutors across the United States have also ramped up their efforts to prosecute fentanyl traffickers, thereby sending a strong message to actual and would-be coconspirators that America will not sit idly while its citizens are poisoned with IMF and associated analogues.⁵⁴ Moreover, in 2017 the Trump Administration declared the opioid epidemic a National Health Emergency, a title for which the crisis “unquestionably qualifies.”⁵⁵ This decision swept in a variety of benefits, including approval by the U.S. Food and

https://www.deadiversion.usdoj.gov/fed_regs/rules/2018/fr0206_4.htm. See Sarah N. Lynch, *U.S. House Passes Bill to Extend Temporary Ban on Fentanyl Look-Alikes for 15 Months*, REUTERS (Jan. 29, 2020, 7:34 PM), <https://www.reuters.com/article/us-usa-congress-drugs/u-s-house-passes-bill-to-extend-temporary-ban-on-fentanyl-look-alikes-for-15-months-idUSKBN1ZT01Z> (discussing congressional adoption of a temporary class-wide schedule for fentanyl analogues, effective until May 2021).

50 See 21 U.S.C. § 811 (1980) (providing that the Attorney General may temporarily schedule substances for a period of up to two years if he believes such action is appropriate and “necessary to avoid an imminent hazard to the public safety.”).

51 The DEA called upon Congress to class-wide schedule all fentanyl analogues in 2020 because temporary scheduling could launch the DOJ into uncharted territory regarding its pending prosecutions under that authority. Without emergency scheduling, the DOJ would have to invoke the process outlined in the Analogue Act for prosecution. This process has proven too resource intensive and time consuming to effectively curtail the volatile fentanyl market. See Liskamm, *supra* note 11, at 4-6 (“Analogue Act prosecutions are time-consuming, resource-intensive, and difficult for investigators, drug testing laboratories, prosecutors, courts, juries, and the entire criminal justice system.”).

52 *First Nationwide Undercover Operation Targeting Darknet Vendors Results in Arrests of More Than 35 Individuals Selling Illicit Goods and the Seizure of Weapons, Drugs and More Than \$23.6 Million*, U.S. DEP’T OF JUSTICE (June 26, 2018), <https://www.justice.gov/opa/pr/first-nationwide-undercover-operation-targeting-darknet-vendors-results-arrests-more-35>. *Treasury Targets Chinese Drug Kingpins Fueling America’s Deadly Opioid Crisis*, U.S. DEP’T OF TREASURY (Aug. 21, 2019), <https://home.treasury.gov/news/press-releases/sm756>.

53 Celina Realuyo, *Countering the Evolving Drug Trade in the Americas*, WILSON CTR. 5 (Jan. 2020), <https://www.wilsoncenter.org/sites/default/files/media/uploads/documents/Countering%20the%20Evolving%20Drug%20Trade%20in%20the%20Americas.pdf>.

54 See Benjamin Glassman, *Justice Department Focus on Fentanyl Yields Results in Montgomery County*, U.S. DEP’T OF JUSTICE (2019), <https://www.atf.gov/news/pr/justice-department-focus-fentanyl-yields-results-montgomery-county> (explaining efforts by nine U.S. Attorneys across America who participated in “Operation Synthetic Opioid Surge” which specifically targeted the distribution of fentanyl and fentanyl-like substances pursuant to the DEA emergency scheduling order).

55 James Hodge, Jr., Sarah Wetter, et al., *Redefining Public Health Emergencies: The Opioid Epidemic*, 58 JURIMETRICS 15 (2017).

Drug Administration (“FDA”) to authorize emergency use of Naxalone, otherwise known as Narcan, a drug which can reverse the effects of an opioid overdose, saving lives.⁵⁶ “Absent a national emergency declaration, opioid-related mortality may continue unabated, leading to continued loss of lives.”⁵⁷ Accordingly, the national emergency declaration at least spotlighted the opioid crisis in a new way that may have kickstarted life-saving reforms for real people plagued by addiction.

America has also taken the fight against illicit fentanyl into the financial arena. The “U.S. Department of the Treasury’s Office of Foreign Assets Control (OFAC) and Treasury’s Financial Crimes Enforcement Network (FinCEN) announced coordinated actions to bring additional financial pressure upon those who manufacture, sell, or distribute synthetic opioids or their precursor chemicals.”⁵⁸ This approach has also enjoyed some success. For example, in August 2018 OFAC “targeted a massive Chinese IMF trafficking network” masterminded by the Zheng Family. The Zheng dynasty had a significant influence, trafficking deadly fentanyl, fentanyl analogues, cannabinoids, and cathinones to 37 U.S. States and 25 countries. Because the details of the Zheng Drug Trafficking Organization (DTO) are essential to understanding its impact and scope, a summary provided by the Department of Treasury has been provided below:

Zheng DTO manufactures and distributes hundreds of controlled substances, including fentanyl analogues such as carfentanil, acetyl fentanyl, and furanyl fentanyl. Zheng created and maintained numerous websites to advertise and sell illegal drugs in more than 35 languages. The Zheng DTO touted its ability to create custom-ordered drugs and avoid detection from customs and law enforcement officials when shipping the drugs through express mail and the U.S. Postal Service. The Zheng DTO also used its chemical expertise to create analogues of drugs with slightly different chemical structures but the same or even more potent effect. The Zheng DTO even agreed to manufacture adulterated cancer medication, creating counterfeit pills that replaced the active cancer-fighting ingredient with dangerous synthetic drugs. The Zheng DTO laundered its drug proceeds in part by using digital currency such as bitcoin, transmitted drug proceeds into and out of bank accounts in China and Hong Kong, and bypassed currency restrictions and reporting requirements.⁵⁹

OFAC enabled federal law enforcement to crack down on this international conspiracy and put an end to the Zheng enterprise. FinCEN has also proven a valuable tool in America’s domestic efforts to quash the opioid epidemic because it releases reports, formally known as “advisories”, that synthesize the financial transactions of suspected chemists and traffickers. This information

⁵⁶ *Id.*

⁵⁷ *Id.* at 13.

⁵⁸ TREASURY, *supra* note 52.

⁵⁹ *Id.*

may be used to identify patterns of suspicious behavior that can help federal agents and prosecutors to identify perpetrators and bring them to justice. These advisories, “which also serve[] as the monetary advisory on the financial aspects of the illicit trafficking of fentanyl and synthetic opioids, provide information relevant for financial institutions to gain a more comprehensive understanding of the fentanyl crisis and take action to protect the homeland from this deadly threat.”⁶⁰ Therefore, the United States has in recent months taken comprehensive efforts to combat the IMF crisis, both on the ground and in cyberspace.

B. CHINA

Motivated in part by a recent series of economic tariffs,⁶¹ China has taken several steps to combat the opioid epidemic. First, effective May 1, 2019, China class-wide scheduled fentanyl analogues, a policy shift that subjected purveyors of IMF and similar substances to harsh prosecution by the Chinese government.⁶² This decision arose amid unsuccessful efforts by the DOJ to secure class-wide scheduling of fentanyl analogues in the United States,⁶³ and has been applauded by drug enforcement officials at the White House.⁶⁴ Later, in November 2019, China joined forces with the United States in an unprecedented collaborative effort to prosecute nine perpetrators affiliated with an IMF trafficking ring based in China.⁶⁵

Second, the Chinese government has instituted new supervisory measures for domestic narcotics distributors. “Following a tightening of drug controls that took effect May 1, the [Chinese] government put 91 manufacturers and 234 individual distributors under ‘strict supervision,’ warning them not to export fentanyl or related drugs . . .”⁶⁶ This heightened supervision has deterred some illicit providers from trafficking IMF to potential international customers, including prospective buyers in the United States.⁶⁷ Moreover, China’s National Narcotics Control Commission (“NNCC”), “reports that Chinese authorities have arrested ‘dozens’ of synthetic drug exporters, confiscated eight illegal labs,

⁶⁰ *Id.*

⁶¹ James Mayger & Zhe Huang, *China Touts Fentanyl Convictions, Tackling Key Trade Talks Issue*, BLOOMBERG NEWS (Nov. 6, 2019, 9:56 PM), <https://www.bloomberg.com/news/articles/2019-11-07/china-punishes-fentanyl-smugglers-after-joint-probe-with-u-s>.

⁶² Liskamm, *supra* note 11, at 1-2.

⁶³ *Id.* at 3-5.

⁶⁴ *Tackling the Opioid Crisis: A Whole-of-Government Approach, Hearing Before the U.S. Sen. Comm. on the Judiciary*, 116 Cong. 12 (Dec. 17, 2019) (Statement by Kemp L. Chester, U.S. Office of Nat’l Drug Control Pol’y), <https://www.judiciary.senate.gov/imo/media/doc/Chester%20Testimony1.pdf>.

⁶⁵ Steven Jiang & Ben Wescott, *China Sentences Fentanyl Drug Ring in Rare Public Trial Amid U.S. 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> (“Thursday’s sentencing was presented as the culmination of the first case China and the US had worked on together that led to a successful conviction.”). *See also China Sentences 9 in Fentanyl Trafficking Case After U.S. Tip*, L.A. TIMES (Nov. 6, 2019, 11:00 PM), <https://www.latimes.com/world-nation/story/2019-11-06/china-sentences-fentanyl-us-tip>.

⁶⁶ 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>.

⁶⁷ *Id.* (explaining that some IMF distributors “claimed to be complying with the new rules banning the overseas sale of synthetic opioids” while “[o]thers appeared to have shut down their operations, disconnecting numbers which had previously reached salespeople offering to mail the drugs to the United States.”).

and seized about two tons of various psychoactive substances.”⁶⁸ While China’s attempt to crackdown on fentanyl trafficking has been considered a “positive step” by the United States,⁶⁹ claims of victory in the battle against Chinese drug proliferation would be premature.⁷⁰

Despite the efforts sketched above, this Note maintains “the measures China has taken have had little to no impact on curbing illicit opioid production.”⁷¹ China’s unilateral efforts have failed because they employ a lackluster regulatory enforcement framework that enables licensed pharmaceutical companies to divert fentanyl into illicit markets, circumventing national protocols.⁷² Jeremy Haft, a professor at Georgetown University, has determined China’s second-rate enforcement infrastructure fails to deter illicit manufacturers because, when threatened with prosecution, illicit drug operations simply “shut down quickly and disappear, only to open up again in another form somewhere else.”⁷³ As the U.S.-China Economic Review Commission explained in its 2017 annual report:

Chinese law enforcement and drug investigators are unable to effectively regulate the high volume of drugs and chemicals the country produces. In many cases, the chemicals used to produce fentanyl and fentanyl-like products are illegally diverted from legitimate pharmaceutical uses, with criminals taking advantage of inadequate enforcement protocols to produce unregulated chemicals and [new psychoactive substances].⁷⁴

Consequently, unilateral efforts by China to confront distribution of IMF will continue to fail until the regime overhauls its regulatory infrastructure. Until that time, shrewd chemists will almost certainly continue to exploit China’s clumsy anti-drug bureaucracy to export fentanyl and fentanyl analogues abroad through illicit channels.⁷⁵ Therefore, the current state of the opioid crisis presents

68 Associated Press, *China Bans Drug So Deadly It’s Considered a Terrorist Threat*, N.Y. POST (Feb. 16, 2017, 8:11 PM), <https://nypost.com/2017/02/16/china-bans-drug-so-deadly-its-considered-a-terrorist-threat/>. *Contra* Battiloro, *supra* note 14, at 359 (“Chinese regulators have also obstructed the United States’ ability to conduct drug inspections by delaying visa approvals for Federal Drug Association (“FDA”) officials.”).

69 Jim Carroll, *ONDCP Statement on Chinese Prosecution and Sentencing of Fentanyl Traffickers and Producers*, U.S. OFFICE OF DRUG CONTROL POL’Y (Nov. 7, 2019), <https://www.whitehouse.gov/briefings-statements/ondcp-statement-chinese-prosecution-sentencing-fentanyl-traffickers-producers/>.

70 Myers, *supra* note 66 (“Experts and officials in the United States warned, however, that it was far too soon to declare a victory in China’s fight against fentanyl.”).

71 Battiloro, *supra* note 14, at 351; Pardo, *supra* note 7, at 2 (“China’s export-led economic strategy and *lack of regulatory oversight* have created favorable conditions for the production and exportation of synthetic opioids and related chemicals.”) (emphasis added).

72 Battiloro, *supra* note 14, at 355-56.

73 David Ovalle & Jay Weaver, *South Florida’s Source for Synthetic Drugs: The China Pipeline*, MIAMI HERALD (last updated Nov. 20, 2015, 9:20 PM), <http://www.miamiherald.com/news/local/crime/article35417625.html>.

74 Sean O’Connor, *Fentanyl: China’s Deadly Export to the United States*, U.S.-CHINA ECON. AND SEC. REV. COMM. 8 (Feb. 1, 2017).

75 WESTHOFF, *supra* note 20, at 183-85.

a unique opportunity for an international law remedy, ideally one informed by drug enforcement entities in the United States and around the world.

IV. CURRENT LANDSCAPE OF INTERNATIONAL EFFORTS

International law, principally as established by the United Nations (“U.N.”), has a reputation as “the cornerstone for domestic drug laws” in the United States, China, and elsewhere.⁷⁶ Its legal framework differs from domestic drug enforcement because it binds *nations*, not individuals.⁷⁷ The work of the U.N. in this space originated with three global treaties that govern the Commission on Narcotic Drugs (“CND”) and the International Narcotics Control Board (“INCB”), as well as all nations that have ratified it.⁷⁸ Although the first two treaties established an international regulatory framework for narcotics, they merely “include general provisions on illicit drug trafficking and drug abuse.”⁷⁹ The U.N. would not expound on these provisions until 1988.⁸⁰

First enacted in 1961, and amended in 1972, the Single Convention on Narcotic Drugs marked the first serious international attempt to regulate narcotics. It established a four-tiered drug schedule maintained by the INCB⁸¹ and commanded all signatories “to limit exclusively to medical and scientific purposes the production, manufacture, export, import, distribution of, trade in, use and possession of drugs.”⁸² 184 nations joined the Convention, a decision that required them to incorporate its provisions into their domestic laws.⁸³ However, the flexibility afforded by the Convention’s non-self-executing design undermined its purpose because member nations retained domestic legal

76 Naomi Burke-Shyne, Joanne Csete, et al., *How Drug Control Policy and Practice Undermine Access to Controlled Medicines*, 19 HEALTH AND HUM. RTS. J. 238 (2017). See also G.A. Res. 66/183 (Apr. 3, 2012).

77 Robert Beck, *International Law and International Relations*, OXFORD RES. ENCYCLOPEDIAS (2018), <http://internationalstudies.oxfordre.com/view/10.1093/acrefore/9780190846626.001.0001/acrefore-9780190846626-e-406?product=oreisa#acrefore-9780190846626-e-406-bibItem-21> (last visited Feb. 12, 2020).

78 UNITED NATIONS, *Drug Trafficking*, <https://www.un.org/ruleoflaw/thematic-areas/transnational-threats/drug-trafficking/> (last visited Feb. 02, 2020) (“The UN work in countering the world drug problem is based on three major international drug control treaties, the Single Convention on Narcotic Drugs of 1961 (as amended in 1972), the Convention on Psychotropic Substances of 1971, and the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988. These three conventions attribute important functions to the Commission on Narcotic Drugs and to the International Narcotics Control Board.”). See also Alexander Henderson, *Portuguese Defiance: Analyzing the Strenuous Relationship Between Drug Decriminalization and International Law*, 24 MICH. STATE INT’L L. REV. 725, 729 (2016), <https://digitalcommons.law.msu.edu/cgi/viewcontent.cgi?article=1198&context=ilr>.

79 *Legal Framework for Drug Trafficking*, U.N. OFFICE ON DRUGS AND CRIME, <https://www.unodc.org/unodc/en/treaties/psychotropics.html> (last visited Feb. 02, 2020).

80 UNITED NATIONS, *supra* note 78 (explaining that the 1988 Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances extended the regime initiated by the 1961 and 1971 Conventions).

81 Single Convention on Narcotic Drugs, art. 2, 1961, https://www.unodc.org/pdf/convention_1961_en.pdf. [hereinafter *1961 Convention*].

82 *Id.* at art. 4.

83 *Id.* at art. 36(4) (“Nothing contained in this article shall affect the principle that the offences to which it refers shall be defined, prosecuted and punished in conformity with the domestic law of a Party.”).

autonomy to redefine material terms, penalties, and priorities.⁸⁴ Consequently, “it should be no surprise that, despite commitments to international legislation, national governments still find a way to bend the law in a manner consistent with their views.”⁸⁵ Predictably, this unfaithful application came at the expense of the Convention’s ability to accomplish its intended goals and international actors concluded additional action would be necessary in the future.

In 1971, the U.N. decided to update its 1961 drug control framework with the Convention on Psychotropic Substances. This Convention “establishe[d] an international control system for psychotropic substances” and “introduced controls over a number of synthetic drugs.”⁸⁶ Although it contributed to the extant infrastructure established by the Single Convention, the 1971 Convention granted the CND new freedom to “place the substance concerned under a control regime, change the control regime, or free a substance from a control regime.”⁸⁷ Consequently, the CND would no longer be subject to oversight by the World Health Organization (“WHO”) and “[b]y the mid-1980s it was apparent that global drug abuse had reached unprecedented dimensions.”⁸⁸ Despite its drafters’ admirable goals, the 1971 Convention lacked mechanisms to hold signatories accountable and the General Assembly tasked the CND to devise further measures to address this concern.⁸⁹

Three years of deliberation produced the 1988 U.N. Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.⁹⁰ The crowning achievement of the 1988 Convention involved new drug controls that transcended all aspects of the transactional chain, from precursor distribution at the outset to post-sale money laundering.⁹¹ This Convention also redefined drug trafficking as a “criminal” offense,⁹¹ a noteworthy departure from the 1961

84 David Bewley-Taylor & Martin Jelsma, *Regime Change: Re-visiting the 1961 Single Convention on Narcotic Drugs*, INT’L J. OF DRUG POL’Y 72, 76 (2011) (explaining that signatories “can impose administrative penalties, such as fines or censure, or choose to *avoid penalties altogether*” providing they cite “best endeavors” to comply with the stated objectives of the Convention) (emphasis added).

85 Battiloro, *supra* note 14, at 364.

86 UNITED NATIONS OFFICE ON DRUGS AND CRIME, *Convention on Psychotropic Substances*, <https://www.unodc.org/unodc/en/treaties/psychotropics.html> (last visited Feb. 07, 2020).

87 Daniel Heilman, *The International Control Of Illegal Drugs And The U.N. Treaty Regime: Preventing Or Causing Human Rights Violations?*, 19 CARDOZO J. COMP. L. 237, 247 (2011), http://biblioteca.cejamerica.org/bitstream/handle/2015/3560/cjicl_19.2_heilmann_article.pdf?sequence=1&isAllowed=y.

88 *Id.* at 248-249.

89 See generally William C. Gilmore et al., *Commentary on The United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, E/CN.7/590 at 1-12 (1988).

90 Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 28 I.L.M. 497, Dec. 19, 1988, https://www.unodc.org/pdf/convention_1988_en.pdf [hereinafter *1988 Convention*].

91 See Harmonie Michelot, Shanlin Fu, et al., *Effect of Drug Precursors and Chemicals Relevant to Clandestine Laboratory Investigation on Plastic Bags Used for Collection and Storage*, 273 FORENSIC SCI. INT’L 106, 107-110 (2017) (explaining precursors are compounds or solvents used to manufacture drugs both legal and illicit and can be difficult to detect). China is a ready distributor of fentanyl precursors, as well as IMF. See Armenian, *supra* note 31, at 3 (“The rise in the production of counterfeit pills and NPF-laced heroin and cocaine is expected to continue due to the ease of manufacturing and readily available precursors shipped from China.”).

91 1988 Convention, *supra* note 90, at art. 3(2), https://www.unodc.org/pdf/convention_1988_en.pdf (“[E]ach Party shall adopt such measures as may be necessary to establish as a *criminal offence under its domestic law*, when committed intentionally, the possession, purchase or cultivation of narcotic drugs or psychotropic substances for personal consumption contrary to the provisions of the 1961 Convention, the 1961 Convention as amended or the 1971 Convention.”) (emphasis added).

Convention's "punishable" offense⁹² language. This shift in terminology effectively required signatories to rewrite portions of their domestic counternarcotics statutes to comply with international law. The 1988 Convention relied upon "the underlying philosophy . . . that improving the effectiveness of domestic criminal justice systems in relation to drug trafficking is a precondition for enhanced co-operation."⁹³ Therefore, international law scholars viewed the 1988 Convention as a bridge to future global collaboration that they hoped would hold criminal enterprises responsible for the illicit manufacturing and dissemination of synthetic drugs.

Consistent with their misapplication of earlier Conventions discussed above, signatory nations interpreted the binding articles of the 1988 Convention loosely and cited licit drug manufacturing as a justification for relaxed domestic enforcement.⁹⁴ Consequently, criminal law scholars did not observe a decrease in international drug use after the 1988 Convention⁹⁵ and, in 1998, the U.N. General Assembly convened a Special Session ("UNGASS") to address the issue. The UNGASS produced a political declaration that refocused international attention on narcotrafficking in particular.⁹⁶ This Declaration "link[ed], for the first time, the illicit production and trafficking of drugs with terrorism and arms trafficking," consistent with the U.N.'s drug enforcement trajectory.⁹⁷ However, although the Declaration encouraged countries to submit biannual updates to the CND, it did not create new measures for compliance or a "formal sanction system"; accordingly, it has been an at best "soft instrument" in the international war on drugs.⁹⁸ In addition to enforcement issues, increases in Afghani opium production scuttled what little progress the international community did make against global narcotrafficking.⁹⁹ Therefore, charitably stated, international entities have struggled to effectively combat the opioid epidemic.

The *status quo* international regime fails to thwart IMF traffickers because it lacks sufficient means to hold offending nations accountable. This dearth of accountability arose because the 1961 Convention and its progeny are non-self-executing treaties designed to appease multiple nations.¹⁰⁰ Patil Armenian and

92 1961 Convention, *supra* note 81, at art. 36.

93 Heilman, *supra* note 87, at 250 n. 68.

94 Gilmore, *supra* note 89, at 296.

95 See generally Claudia Costa Storti & Paul De Grauwe, *The Cocaine and Heroin Markets in the Era of Globalization and Drug Reduction Policies*, 20 INT'L J. DRUG POL'Y 488 (2009).

96 U.N. Gen. Assemb., Special Session of the General Assembly Devoted to the Countering of the World Drug Problem Together (June 8-10, 1998), *Political Declaration, Guiding Principles of Drug Demand Reduction and Measures to Enhance International Cooperation Counter the World Drug Problem*, GAOR, 20th Spec. Sess., Supp. No. 1 (A/S-20/4), ch. V (1998), www.unodc.org/pdf/report_1999-01-01_1.pdf [hereinafter *Political Declaration*].

97 Heilman, *supra* note 87, at 252.

98 *Id.*

99 *Id.*

100 Thomas Michael McDonnell, *Defensively Invoking Treaties in American Courts – Jurisdictional Challenges Under the U.N. Drug Trafficking Convention by Foreign Defendants Kidnapped Abroad by U.S. Agents*, 37 WM. & MARY L. REV. 1401, 1405 (1995) ("When domestic law requires implementing legislation to make the provision effective locally, the treaty provision is 'non-self-executing.'"); *Renkel v. United States*, 456 F.3d 640, 643 (6th Cir. 2006) ("'[N]on-self-executing' treaties do require domestic legislation to have the force of law."); See also Bewley-Taylor, *supra* note 84, at 76 ("... the non-self-executing nature of the Convention leaves the offences and penalties to be applied up to the Parties themselves."); Restatement (Third) of Foreign Relations Law of the United States, § 111(4) (1987) (an international agreement is non-self-executing "if the agreement manifests

his colleagues at the University of California-San Francisco explain, “[s]ince the Single Convention is not self-executing, parties must pass laws to carry out its provisions, and the UNODC works with countries’ legislatures to ensure compliance.”¹⁰¹ The extent of such cooperation varies among nations and some signatories either lack the ability to monitor and accurately report drug diversion,¹⁰² or decline to enforce penalties altogether.¹⁰³ Noncompliant countries lack an incentive to comply with extant international drug conventions because they do not face credible threats of enforceable sanctions. Thus, although the conventions ostensibly set meaningful standards, they have historically been—at least in practice—paper tigers. Alex Kreit, a Professor at Thomas Jefferson School of Law, agrees. As Kreit lamented in an interview with Forbes:

The INCB has complained for years . . . but at the end of the day, that’s really all it can do. It doesn’t have any direct enforcement authority over parties to the Single Convention. All it can do is say ‘you’re out of compliance’ and, at worst, recommend that other treaty parties stop the import/export of drugs to the countries it doesn’t like.¹⁰⁴

Such lax authority also allows China to selectively enforce, and therefore circumvent, international law without risk of repercussion from the INCB.¹⁰⁵ Conversely, as explained by intellectual property attorney T. Rao Coca, bilateral treaties are easier to enforce than multilateral conventions because they can be arbitrated.¹⁰⁶ Bilateral treaties also facilitate key law enforcement cooperation that may reduce the chances of material breach. They have been described as “the most important” part of a U.S.-China counternarcotic strategy.¹⁰⁷ Therefore, any solution to the global opioid crisis must not only recognize, but also *focus*

an intention that it shall not become effective as domestic law without the enactment of implementing legislation”).

101 Armenian, et al., *supra* note 31, at 124-125.

102 See generally INTERNATIONAL DRUG CONTROL IN THE 21ST CENTURY CH. 5 (Hamid Ghodse, ed., Ashgate Pub. 2008).

103 Battiloro, *supra* note 14, at 364 (“For example, despite its illegality, the Netherlands eluded international law regarding recreational marijuana use by fostering a policy of non-enforcement.”). See generally Henderson, *supra* note 78, at 754-56 (explaining how Portugal decriminalized illegal drugs, a decision which may violate Article 3(2) of the 1988 Convention).

104 Jacob Sullum, *As Drug War Dissent Mounts, U.N. Agency Rails Against Reforms It Cannot Stop*, FORBES (2014), <https://www.forbes.com/sites/jacobsullum/2014/03/07/as-criticism-of-the-war-on-drugs-mounts-a-u-n-agency-rails-against-reforms-it-is-powerless-to-stop/#78524bef5056>.

105 Battiloro, *supra* note 14, at 365 (explaining that relaxed enforcement has “also provide[d] wiggle room for China to permit chemical companies to continue exploiting regulatory weaknesses for economic advantage.”).

106 T. Rao Coca, *Multilateral vs. Bilateral Trade Agreement: Which is better for U.S. Economy?*, LAS VEGAS BUS. PRESS (Jan. 2, 2018, 8:56 AM), <https://businesspress.vegas/columns/experts-corner/multilateral-vs-bilateral-trade-agreement-which-is-better-for-u-s-economy/> (“The advantages of a bilateral agreement is that it is easier to negotiate since it involves only two countries; goes into effect faster, reaping trade benefits more quickly. *They are easier to enforce*, particularly if arbitration is the specified means to resolve a dispute.”) (emphasis added).

107 YANG SHAOWEN, INTERNATIONAL POLICE COOPERATION: A WORLD PERSPECTIVE 132 (1996) (“Bilateral cooperation is the most important part of all. As of early 1998, the Chinese government has signed agreements with the governments of Russia, Mexico, India, and Pakistan to fight the illegal trafficking of narcotic drugs, psychotropic substances, and chemical precursors.”).

upon, China as the world's primary manufacturer of IMF, its analogues, and fentanyl precursors and then take responsible steps toward accountability for the regime.¹⁰⁸

V. PROPOSED SOLUTION

A. BILATERAL TREATY

The United States and China should adopt a bilateral treaty that would render legally enforceable the categorical and permanent treatment of fentanyl analogues as the equivalent of Schedule I controlled substances.¹⁰⁹ The parties should explicitly declare their mutual intention for the treaty to self-execute.¹¹⁰ Effective May 1, 2019, China “add[ed] fentanyl-related substances to a supplementary list of controlled narcotic drugs and psychotropic substances with non-medical use.”¹¹¹ This action, in conjunction with DEA’s temporary emergency scheduling order, “has resulted in a significant decrease in direct Chinese-origin fentanyl-related substances being encountered in the United States since Fiscal Year 2019.”¹¹² Amanda Liskamm, counsel for the Criminal Division at DOJ, explained in a hearing before the U.S. House of Representatives in January 2020 that:

DEA expects savvy clandestine manufactures and traffickers to respond to the re-emerging gap in U.S. law by again producing novel fentanyl-related substances. This is the normal response of traffickers who wish to avoid prosecution and still profit from peddling poison and is consistent with previous attempts to circumvent reactive substance-specific control measures.¹¹³

These synthetic analogues have ravaged the United States, claiming thousands of lives.¹¹⁴ Federal law enforcement clearly understands the need to

108 Knierim, *supra* note 23, at 2.

109 *Fentanyl Analogues: Perspectives on Classwide Scheduling, Hearing Before the U.S. House Subcomm. on Crime, Terrorism, and Homeland Security*, 116 Cong. 6 (2020) (Statement by Amanda Liskamm, Counsel, Criminal Division, U.S. Dep’t of Justice), <https://docs.house.gov/meetings/JU/JU08/20200128/110392/HHRG-116-JU08-Wstate-LiskammA-20200128.pdf>, (“The class of fentanyl-related substances needs to be categorically and permanently scheduled.”).

110 Treaties “are not domestic law unless Congress has either enacted implementing statutes or *the treaty itself conveys an intention that it be self-executing.*” *Medellin v. Texas*, 552 U.S. 491, 505 (2008) (citing *Igartua-De La Rosa v. United States*, 417 F.3d 145, 150 (C.A.1 2005)) (emphasis added).

111 Yanping Bao, Shiqiu Meng, et al., *Control of Fentanyl-Related Substances in China*, *THE LANCET* (July 2019), [https://www.thelancet.com/pdfs/journals/lanpsy/PIIS2215-0366\(19\)30218-4.pdf](https://www.thelancet.com/pdfs/journals/lanpsy/PIIS2215-0366(19)30218-4.pdf).

112 Liskamm, *supra* note 109, at 2.

113 *Id.* at 5.

114 *The Countdown: Fentanyl Analogues and the Expiring Emergency Scheduling Order, Hearing Before the U.S. Sen. Comm. on the Judiciary*, 116 Cong. 5 (2019) (Statement by Kemp L. Chester, U.S. Office of Nat’l Drug Control Pol’y), <https://www.judiciary.senate.gov/imo/media/doc/Chester%20Testimony1.pdf>. (“ . . . in Florida in 2017, 1,685 deaths involved a fentanyl analogue with the most common analogues being carfentanil

close this loophole in U.S. law; the DOJ's ongoing efforts to stymie synthetic opioid proliferation depend on it. Fifty-two state attorneys general from both major political parties have also voiced support for class-wide scheduling of fentanyl analogues.¹¹⁵ The proposed treaty would adopt the language of China's class-wide fentanyl scheduling measure¹¹⁶ and permanently extend the temporary U.S. scheduling order.¹¹⁷

B. *ASCENSION WOULD BE IN CHINA'S INTERESTS*

Claims that China would balk at this treaty are erroneous. First, while the treaty may establish a new layer of accountability for China to enforce its 2019 scheduling measure, it would not create additional obligations beyond what the regime imposed upon itself in 2019. Rather, the proposed treaty would allow the United States to hold China accountable in international court for failures to enforce its own class-wide scheduling order.¹¹⁸ Because China has already pledged to enforce this mandate, failure to sign a treaty designed to accomplish that exact purpose would raise questions about the sincerity of that pledge and further undermine the regime's global legitimacy. Therefore, soft power and reputational reasons may, perhaps on their own, be sufficient to facilitate China's adoption of a treaty.

Second, in recent months China has demonstrated a clear willingness to cooperate with the United States to curtail opioid proliferation.¹¹⁹ In 2019, China relied upon a tip provided by American intelligence to identify and subsequently prosecute Chinese nationals involved in illicit fentanyl or fentanyl-

(637), furanyl fentanyl (365), and cyclopropyl fentanyl (210). In Maine, in the first six months of 2018, fentanyl analogues were involved in 37 deaths, with acetyl fentanyl and methoxyacetyl fentanyl being the most common. In Ohio, between January and February of 2017 alone, 48 percent (135) of all drug deaths involved acetyl fentanyl, 31 percent (87) involved furanyl fentanyl, and eight percent (22) involved carfentanil.”).

115 Letter to Congressional Leaders, NAT. ASSOC. OF ATTORNEYS GEN. (2018), <https://www.naag.org/assets/redesign/files/sign-on-letter/Letter%20to%20Congress%20-%20SOFA%20Act%208.23.pdf>. (“We, the undersigned Attorneys General, write to express our support for swift passage of the Stopping Overdoses of Fentanyl Analogues (SOFA) Act . . . The SOFA Act will eliminate the current loophole which keeps the controlled substance scheduling system one step behind those who manufacture fentanyl analogues and then introduce these fentanyl analogues into the opioid supply.”).

116 Liskamm, *supra* note 11, at 1-2.

117 Liskamm, *supra* note 109, at 3; Andrew Cass, *President Signs Bill Extending Emergency Classification for Fentanyl Analogs*, NEWS HERALD (Feb. 7, 2020), https://www.news-herald.com/news/president-signs-bill-extending-emergency-classification-for-fentanyl-analogs/article_ecca071c-4940-11ea-832b-f36a43153559.html.

118 Self-executing treaties are judicially enforceable because they carry the force of domestic law. See Stephen P. Mulligan, *International Law and Agreements: Their Effect upon U.S. Law*, RL 32528, CONG. RES. SERV. 2 (last updated Sept. 19, 2018), <https://fas.org/sgp/crs/misc/RL32528.pdf> (“Self-executing treaties have a status equal to federal statute, superior to U.S. state law, and inferior to the Constitution.”).

119 Cui Tiankai, *Chinese Ambassador: We are Doing Our Part to Combat the Opioid Crisis*, USA TODAY (Sept. 30, 2019, 12:21 PM), <https://www.usatoday.com/story/opinion/2019/09/30/chinese-ambassador-we-are-helping-combat-opioid-crisis-column/2291440001/> (“China stands ready to cooperate and coordinate further with the U.S. on the highly complicated issue of fentanyl-like substance abuse. This must be done on the basis of mutual respect and understanding, not misplaced accusations and unfair recrimination. Working closely on this issue—which touches the lives of millions of Americans—also demonstrates China’s continued efforts for a stronger relationship.”).

related enterprises.¹²⁰ The Chinese court that heard the case imposed the harshest sentences allowable.¹²¹ This sentencing approach should be applauded by law enforcement in the United States because “[a]s a result, fewer Chinese vendors are willing to export fentanyl products, according to DHS/Homeland Security Investigations’ transnational organized crime office.”¹²² China has also cooperated with the United States in other ways regarding IMF specifically. Celina Realuyo, a professor specializing in the study of organized crime at the National Defense University, explained in January 2020 that, “[t]hanks to more postal service scrutiny and increased U.S.-China cooperation to stem the flow of illicit fentanyl into the United States, the number of drug seizures involving high-purity fentanyl sent via mail from China dropped precipitously in 2019.”¹²³ This cooperation provides further indicia that China would be willing to enter a bilateral treaty with the United States that addresses the transboundary harms caused by IMF diversion and trafficking.

A bilateral self-executing treaty would benefit the United States in several ways. Most importantly, the DOJ would reassume its legal authority to prosecute traffickers of fentanyl analogues, when traceable to China, just as if Congress had permanently incorporated such analogues into Schedule I. Consequently, the treaty could facilitate efforts by the DOJ to focus on the geographical source of IMF and, by virtue of territorial-effects jurisdiction,¹²⁴ prosecute any illicit manufacturers China does not—a necessary backstop. Even with China’s 2019 scheduling order, the regime’s enforcement capabilities remain at best lackluster. Thus, “[u]nilateral action will have no influence on an industry that remains a step ahead of the law.”¹²⁵ Fortunately for China, the United States may be in a position to help. Alex Palmer, an investigative journalist, explains:

The agency responsible for overseeing production of drugs and detecting malfeasance in China is understaffed and overwhelmed: As of 2017, there were around 2,000 inspectors at the agency, and they conducted a total of only 751 inspections that year, a minuscule figure compared with the enormity of the industry. In the United States, law enforcement and prosecutors have the tools to react quickly to the rise of new copycat drugs that could be used for illicit purposes.¹²⁶

120 Bill Chappell, *China Jails 9 in Fentanyl Trafficking Case That Began with a Tip from the U.S.*, NPR (Nov. 7, 2019, 11:15 AM), <https://www.npr.org/2019/11/07/777173066/china-jails-9-in-fentanyl-trafficking-case-that-began-with-a-u-s-tip>.

121 *Id.* (“The Xingtai Intermediate People’s Court in Hebei province imposed the most severe penalties on three people accused of leading the ring.”).

122 Realuyo, *supra* note 53, at 6.

123 *Id.*

124 Geoffrey R. Watson, *Offenders Abroad: The Case for Nationality-Based Criminal Jurisdiction*, 17 YALE J. INT’L L. 41, 60 (1992) (“[T]he territorial-effects principle applies to crimes committed in foreign states that have a discernible effect on U.S. territory. The importation of narcotics or other contraband is the paradigmatic example.”).

125 Battiloro, *supra* note 14, at 374.

126 Palmer, *supra* note 41, at 4.

Thus, the proposed treaty would serve the national interests of both the United States and China. The United States would be able to hold Chinese chemists accountable for illicit diversion of fentanyl analogues and China would enjoy drug enforcement assistance in its purported crackdown on synthetic opioids. Predictably, Chinese chemists would become much less likely to continue illicit diversion practices.¹²⁷ For example, as one such chemist explained in February 2019: “Anything [China] schedules, we don’t sell. As long as it is scheduled, we won’t sell it. If it’s not scheduled, we can sell it.”¹²⁸ Therefore, one might infer that the downward trend in fentanyl diversion that emerged in the wake of China’s 2019 class-wide scheduling order would continue with additional law enforcement scrutiny by the United States and international partners.

Although the United States has been hit the hardest by opioid overdoses among developed nations, it is not alone.¹²⁹ The proposed treaty, in conjunction with other forms of bilateral cooperation, promises the missing link in accountability to ensure that China honors its 2019 pledge to control fentanyl analogues, especially in a world which “has taught Beijing that faking self-accountability while contesting criticism is a safe strategy.”¹³⁰ A bilateral treaty between the United States and China would also benefit other nations that have been ravaged by transboundary fentanyl trafficking. When less illicit fentanyl flows from its primary source, transboundary harm to residents of other nations predictably decreases.¹³¹

C. DOMESTIC LAW ALONE INSUFFICIENT

Criticisms alleging that Congress can solve this crisis on its own are misplaced for three reasons. First, although the United States temporarily extended its Schedule I classification of fentanyl analogues on February 6, 2020, it did so only for fifteen months, at which time Congress must revisit the question.¹³² Such temporary scheduling is inadequate because it routinely subjects DOJ drug control efforts to the uncertainty wrought by turbulent political tides by demanding that the agency perennially devote resources to lobbying for the renewal of the same policy.¹³³ This process not only squanders

127 Realuyo, *supra* note 124, at 6.

128 WESTHOFF, *supra* note 20, at 227.

129 See generally 2020 *World Drug Report*, U.N. OFFICE ON DRUGS AND CRIME 11-17, https://wdr.unodc.org/wdr2020/field/WDR20_Booklet_3.pdf (last visited Dec. 01, 2020) (explaining the vast spread of the opioid crisis across Europe, the Middle East, and Latin America).

130 Josh Rogin, *The U.S. Shouldn’t Take China at Its Word on Fentanyl*, WASH. POST (May 23, 2019, 7:58 AM), <https://www.washingtonpost.com/opinions/2019/05/23/us-shouldnt-take-china-its-word-fentanyl/>.

131 *Fentanyl Ban in China to Expand to All Drugs Related to the Killer Synthetic Opioid*, CBS NEWS (Apr. 1, 2019, 5:46 AM), <https://www.cbsnews.com/news/fentanyl-china-to-ban-opioids-related-drug-blamed-most-us-overdose-deaths/> (“Data from the U.S. Drug Enforcement Administration have shown that when China bans a variant of fentanyl, seizures of that analog in the U.S. fall.”). See also Vanda Felbab-Brown, *Fentanyl and Geopolitics: Controlling the Opioid Supply from China*, BROOKINGS INST. (July 2020), https://www.brookings.edu/wp-content/uploads/2020/07/8_Felbab-Brown_China_final.pdf (explaining China as the primary source for IMF).

132 Cass, *supra* note 117.

133 *Congress Must Act to Ban Lethal Drugs*, U.S. Dep’t of Justice (Jan. 31, 2020), <https://www.justice.gov/usao-wdmo/pr/congress-must-act-permanently-ban-lethal-drugs> (“Beyond

American taxpayer dollars in needless bureaucratic squabbles, but it also risks the declassification of fentanyl analogues after fifteen months.¹³⁴ Such declassification would deprive the DOJ of necessary prosecutorial authority to bring narcotraffickers to justice.

Second, a bilateral treaty promises territorial-effects jurisdiction that would enable the prosecution of chemists in China who profit from drug diversion that harms Americans.¹³⁵ Domestic law alone cannot realize this benefit and, because most illicit fentanyl originates in China, it would inevitably be less effective because it lacks jurisdiction over the source. Moreover, a unilateral solution would forego diplomatic opportunities to cooperate with Chinese law enforcement. Therefore, whereas domestic law can mitigate the *symptoms* of the opioid crisis, a bilateral treaty would be of special benefit because it proposes to address the problem at its source.

Finally, ratification of the proposed treaty could occur with a simple two-thirds majority vote in the U.S. Senate.¹³⁶ The Senate *unanimously* renewed temporary IMF analogue scheduling in January 2020 for fifteen months,¹³⁷ unlike the House of Representatives where 88 members opposed the measure.¹³⁸ While the Republican Senate may have preferred to permanently schedule fentanyl analogues, prudence prevented it from doing so. Pressed against the February 6, 2020 deadline, the Senate had no choice but to “water down” legislation that would have permanently scheduled fentanyl analogues¹³⁹ to “appease Democrats’ concerns”.¹⁴⁰ Given the now bipartisan support for permanent scheduling in the Senate,¹⁴¹ it appears likely that the chamber would ratify a bilateral treaty that accomplishes this purpose—particularly when

this temporary extension, a permanent legislative solution for class-wide fentanyl scheduling is necessary so that we don’t find ourselves in this position again, on the brink of opening the floodgates to drug traffickers.”).

134 Liskamm, *supra* note 109, at 4-5 (expiration of class-wide scheduling would require DOJ to navigate “uncharted legal and regulatory terrain.”). For additional discussion about predicted consequences, see note 51 and accompanying text.

135 Watson, *supra* note 125, at 60.

136 U.S. CONST. art. II, § 2, cl. 2.

137 David Shortell, *Expiring Tool to Fight Fentanyl Saved in Senate but Faces Uncertain Future in House*, CNN (JAN. 18, 2020, 12:24 PM), <https://www.cnn.com/2020/01/18/politics/fentanyl-analogue-scheduling-doj/index.html>.

138 See Lynch, *supra* note 49 (explaining ratification of the temporary schedule by “a vote of 320-88.”).

139 See, e.g., S.1622 - Stopping Overdoses of Fentanyl Analogues Act, S.1622, 116th Cong. (2019), <https://www.congress.gov/bill/116th-congress/senate-bill/1622/text?r=29&s=1> (bipartisan bill that would permanently schedule fentanyl analogues); S.2701 - Federal Initiative to Guarantee Health by Targeting Fentanyl Act, S.2701, 116th Cong. (2019), <https://www.portman.senate.gov/sites/default/files/2019-10/191024%20FIGHT%20Fentanyl%20Act%20Letter.pdf> (bipartisan bill sponsored by Senators Rob Porter and Joe Manchin that would permanently schedule IMF analogues).

140 Charles Fain Lehman, *As Important Fentanyl Control Set to Expire, House Democrats Drag Feet on Renewal*, WASH. FREE BEACON, (Jan. 28, 2020, 5:40 PM), <https://freebeacon.com/issues/as-important-fentanyl-control-set-to-expire-house-democrats-drag-feet-on-renewal/> (“A GOP Senate aide told the Washington Free Beacon that the Senate bill was ‘watered down like crazy,’ offering only a temporary extension of fentanyl’s scheduling in order to appease Democratic concerns. It also instructs the Department of Justice to prepare a report on the effect of scheduling, seeking input from groups including ‘the civil rights and criminal justice reform communities.’”).

141 See Press Release, United States Senator for California, *Feinstein, Graham, Durbin Bill Keeping Fentanyl Schedule I Signed into Law*, (Feb. 7, 2020), <https://www.feinstein.senate.gov/public/index.cfm/press-releases?id=EF42627F-5253-4030-B214-2E867C968705> [hereinafter *Graham-Feinstein Press Release*].

senators need not appease the ultra-progressive political factions that exert an outsized influence in the House of Representatives.

VI. CONCLUSION

A bilateral self-executing treaty between the United States and China would mark a step forward for diplomacy between the two superpowers and serve longstanding international drug enforcement interests by targeting fentanyl analogues at their distribution point. While some literature on this subject recommends more of the same failed multinational conventions,¹⁴² the alternative proposed here is novel for its tailored focus and simple philosophy: target the source and control the flow. Moreover, 2021 presents a unique opportunity for drug control efforts to acquire a place of prominence in U.S.-China relations, as evinced by new prosecutorial cooperation that has emerged from recent trade talks.¹⁴³

This Note recognizes that its proposed treaty promises only a *first step* in global efforts to combat transboundary fentanyl proliferation. This proposal does not market itself as—nor would it be appropriately labeled—a silver bullet in the global “War on Drugs” (so-called). Additional measures would also be important for the treaty to yield optimal results. The United States and China, in conjunction with international partners, should also consider regulation of fentanyl precursors, many of which originate in China and are subsequently disseminated to American consumers through Mexico.¹⁴⁴ Accordingly, federal law enforcement would benefit from additional cooperation between DOJ entities and the Mexican Government to control transboundary trafficking in fentanyl, its analogues, precursors, and other drugs.¹⁴⁵ Finally, and most importantly, China must take clear action to close loopholes in its drug control regime. Kai Pflug, a consultant in the Chinese chemical industry, explained to the New York Times that drug diversion will persist in some variety until China ramps up supervision over its chemical industry.¹⁴⁶ Research into such reforms must occur without delay.

142 Most such recommendations do not prescribe particular reforms; they merely suggest “stronger” treaties. Contrariwise, the treaty proposed here would schedule all fentanyl analogues, as already scheduled permanently in China and temporarily in the United States, consistent with the Schedule I requirements of the CSA as a matter of international law. See Battiloro, *supra* note 14, at 374 (“A stronger international convention needs to be established that unifies all countries under the same obligations and reduces opportunity to exploit loopholes.”).

143 Rachel Layne, *Joint U.S.-China Opioid Smuggling Bust Could Speed Trade Deal*, CBS NEWS (Nov. 5, 2019, 5:44 PM), <https://www.cbsnews.com/news/us-china-opioid-smuggling-bust-could-speed-trade-deal/> (“Signs of cooperation between the U.S. and China to halt illegal shipments of opioids bodes well for a possible trade deal between the world’s two largest economies, analysts said.”).

144 WESTHOFF, *supra* note 20, at 226.

145 Steven Dudley et al., *Mexico’s Role in the Deadly Rise of Fentanyl*, WILSON CTR. (Feb. 2019), https://www.wilsoncenter.org/sites/default/files/media/documents/publication/fentanyl_insight_crime_final_19-02-11.pdf (“It is vital that Mexican public policy-makers and their US counterparts engage in conversations focusing on counter-fentanyl planning and strategy in order to develop effective means of addressing the problem of the drug in Mexico and in the United States.”).

146 Sui-Lee Wee & Javier C. Hernandez, *Despite Trump’s Plea’s, China’s Online Opioid Bazaar is Booming*, N.Y. TIMES (Nov. 8, 2017), <https://www.nytimes.com/2017/11/08/world/asia/china-opioid-trump.html>.

Synthetic opioids marked a turning point in the opioid crisis, both in America and around the world. Despite best efforts and noble intentions by the international community and the United States to curtail the epidemic, illicit opioid abuse has only worsened in recent years with an estimated over 30,000 deaths directly attributable to synthetic opioid overdoses in 2018.¹⁴⁷ Recent trade talks between the United States and China, combined with DOJ's interest in class-wide scheduling, has rendered the present a pristine opportunity for transnational cooperation on this important issue. Unlike many challenges of our day, the opioid crisis affects people around the world and from among every social class, from renowned musicians like Prince¹⁴⁸ to everyday Americans such as Adam Moser. The urgency of this crisis presents a unique opportunity for bipartisanship in America¹⁴⁹ and global cooperation among rival superpowers.¹⁵⁰ This Note proposes a solution that would not only revolutionize the public policy conversation about synthetic opioids, but also chart a new and *sustainable* path forward. Adoption of the recommendations herein discussed would optimize diplomacy between the United States and China, potentially saving countless lives.

147 Mark Gold, *The Fentanyl Crisis is Only Getting Worse*, ADDICTION POL'Y F. (Nov. 2019), <https://www.addictionpolicy.org/blog/tag/research-you-can-use/fentanyl-crisis-getting-worse> (“Synthetic opioids like fentanyl accounted for around 3,000 deaths in 2013 — by 2018, they accounted for over 30,000. Fentanyl is approximately 100 times more potent than morphine, 50 times more potent than heroin. Breathing can stop after use of just two milligrams of fentanyl. That’s about as much as trace amounts of table salt.”) (emphasis added)).

148 Silva, *supra* note 4.

149 See Graham-Feinstein Press Release, *supra* note 142.

150 See Jiang & Wescott, *supra* note 65.