

# Trends in Prosecutorial Response to the Opioid Epidemic

Catching Up With COSSAP, February 2021

## Introduction

In the United States, almost half a million people have died from opioid-involved overdoses over the past 20 years.<sup>1</sup> These deaths have been attributed to the overprescribing of medical pain relievers, an increase in the use and sale of heroin, and the introduction of fentanyl and other powerful synthetic drugs into the illicit drug market.<sup>1</sup> In responding to the opioid epidemic, many prosecutors' offices have reduced criminal sanctions imposed on people who use drugs and acknowledged that addiction is a chronic disease, not a moral failing. This realization has also spurred the establishment of diversion programs, drug courts, and other harm-minimization measures. At the same time, more severe penalties have been imposed on people who sell drugs, including pharmaceutical companies that developed and aggressively marketed addictive pain relievers. The purpose of this article is to provide an overview of current and ongoing trends in the field of prosecution, particularly on the county level.

## Prosecution Trends Among Counties With High Overdose Death Rates

Baltimore City, Maryland, and Cabell and Boone counties in West Virginia are among the jurisdictions with the highest overdose death rates in the country. But whereas Baltimore is one of the largest metropolitan areas in the United States, both of the West Virginia counties are rural.<sup>2</sup> Notwithstanding these geographic differences, all three have reduced criminal sanctions imposed on people who use drugs.

- Baltimore has instituted programs for people struggling with opioid use disorder (OUD), including alternatives to incarceration.<sup>3</sup> In addition, the Baltimore State's Attorney Office recently signed an amicus brief supporting the legality of safe injection sites.<sup>4</sup>



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*Many jurisdictions that experienced the most opioid-related overdose deaths in 2018 are steadily increasing their implementation of empathetic measures toward people struggling with addiction.*

- In Cabell County, the district attorney serves on a drug court for female sex workers with OUDs,<sup>5</sup> and in 2018, its office fought to charge an opioid dealer with homicide in a case in which a customer died of an overdose.<sup>6</sup>
- The Boone County prosecutor is part of the West Virginia Board of Pharmacy Database Review Committee, which works to identify overprescribing physicians and those who “doctor shop” for more opioid prescriptions than they can obtain from one physician.<sup>7</sup>

Among other counties ranked in the top ten for opioid-involved overdose deaths, nearly all have expressed support for the amnesty of people who use (but do not sell) drugs, drug courts as an alternative to jail, and clean-needle exchanges. As in Cabell County, some counties are simultaneously concentrating on the prosecution of people who are known to sell drugs.

## Paraphernalia Laws

Paraphernalia laws allow or disallow the possession of “works” for drug use, such as syringes used to inject heroin or pipes used to smoke crack cocaine. Paraphernalia laws that allow the possession of works are becoming more common nationwide.

*The United States is experiencing a prosecutorial trend of decreased sanctions for individuals who use drugs and increased sentencing for those who sell them.*

In contrast, the presence of works on one’s person is increasingly accepted as evidence of use.<sup>8</sup> However, possession of opioids has historically been met with greater sanctions than possession of paraphernalia, since it is impossible to tell whether an individual intends to sell a substance or not. Nevertheless, most U.S. states have relaxed basic drug possession laws.<sup>9</sup> Penalties for possession of a controlled substance were reduced in nine states between 2015 and 2020, and eight states have reduced the severities of their possession-related mandatory sentencing laws.<sup>9</sup>

The establishment of laws that decriminalize or allow drug paraphernalia requires cooperation between policymakers, law enforcement, and prosecutors. This is because policies are successful only if they are enforced. For instance, police officers on the ground need to be aware of a nonarrest policy for individuals carrying certain objects and decline to arrest those who meet this definition. If such a person were to be arrested, the prosecuting entity would need to decline the case as well.

## Increasing Sanctions on Drug Dealers and Manufacturers

While prosecutors have increased moderation toward those who use drugs, they have added sanctions on those who deal drugs. For example, the Commonwealth of Pennsylvania has begun prosecuting as homicides the sale of opioids resulting in deaths.<sup>10</sup> Fifteen other states have instituted harsh laws specifically aimed at drug trafficking. Among other measures, various states have doubled mandatory minimum sentences for heroin sales, instituted higher sentences for selling fentanyl-laced heroin than those for selling simple heroin, and established new trafficking-related crimes.<sup>9</sup> There has also been a recent increase in local and state lawsuits against Big Pharma, those companies that have historically created and promoted addictive medications.<sup>11</sup>

Within the past few years, an unprecedented amount of litigation has been enacted against manufacturers of opioid painkillers across the United States.<sup>12</sup> Forty-eight states or regions have sued Purdue Pharma, the manufacturer of

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OxyContin, and 44 have sued Teva Pharmaceuticals, another large opioid manufacturer.<sup>13</sup> Notably, Purdue Pharma reached settlements with 23 different states in 2019 that will require both the company and its proprietary family to pay billions of dollars, including future profits, over time.<sup>14</sup>

*Most U.S. states and many counties have participated in recent lawsuits against several specific pharmaceutical companies, claiming intentional false advertising about the addictive properties of these firms' opioid painkiller medication.*

Some counties have pursued litigation against multiple companies at once. For example, in 2018, the Philadelphia District Attorney's Office sued ten different opioid manufacturers, stating that "[t]he City of Philadelphia has been hurt, more than any other city in the nation, by the scourge of opioids."<sup>15</sup> Still ongoing is the National Prescription Opiate Legislation, a consolidation of 2,500 lawsuits nationwide, placed in an Ohio federal district for ease of litigation.<sup>16</sup> Continuing litigation against Big Pharma is expected, with outcomes that may include further pleas and settlements, as well as bankruptcy for multiple companies.<sup>16</sup>

## Conclusion

The national cost of the opioid crisis is estimated to be in the tens of billions of dollars.<sup>1</sup> With the continual worsening of the opioid epidemic come multiple prosecution-related trends. District attorneys' offices increasingly show forbearance toward individuals who use opioids, especially when the presence of paraphernalia indicates an intent to use rather than to sell. At the same time, prosecutors are turning the spotlight toward those who sell these drugs on a local scale and those who manufacture opioids on a nationwide scale.

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