

**ON WAR AND DRUGS: PROSECUTING HIGH-  
LEVEL FENTANYL TRAFFICKERS UNDER  
FEDERAL AND STATE CHEMICAL WEAPONS  
STATUTES**

*Sean Campbell\**

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ABSTRACT

*The United States is currently facing a public health emergency: the opioid epidemic. Synthetic opioids—primarily illicitly manufactured fentanyl (“IMF”) and its analogues—were involved in nearly 30,000 drug overdose deaths in 2017. Fentanyl and its analogues are so potent that, in addition to causing widespread death among direct users, these substances have injured law enforcement and first responders in the line of duty and have previously been deployed in settings that have yielded mass casualties in the context of chemical warfare. Given these details, this commentary presents a theory for how traffickers of IMF and its analogues could be prosecuted not only under the*

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\*J.D. Candidate, 2019, Rutgers Law School; B.A. in Economics, Macaulay Honors College at Hunter College. Thank you to Prof. Jorge Contesse for his invaluable guidance as my commentary advisor and thank you to Kimberly Rodriguez of the New Jersey Governor’s Council on Alcoholism and Drug Abuse for having an informative conversation with me that led to the idea presented in the commentary.

*Controlled Substances Act—the federal law typically applied to such circumstances—but also under state and federal laws regulating chemical weapons.*

## I. AN OVERVIEW OF FENTANYL'S ROLE IN THE OPIOID EPIDEMIC AND BEYOND

On October 26, 2017, the Acting Secretary of Health and Human Services Eric D. Hargan, under the direction of President Donald Trump, declared a nationwide public health emergency regarding the opioid epidemic.<sup>1</sup> The Centers for Disease Control and Prevention (“CDC”) reported 70,237 drug overdose deaths in America in 2017, roughly twice as many deaths as were reported a decade earlier in 2007.<sup>2</sup> Most notably, 28,466 of the overdoses in 2017 involved the drug class “synthetic opioids other than methadone,” primarily fentanyl and its analogues.<sup>3</sup> Consider that this drug class caused less than one tenth of the 2,213 deaths in 2007.<sup>4</sup>

For decades, physicians have legally prescribed fentanyl for management of severe pain; fentanyl is estimated to be “50-100 times more potent than morphine.”<sup>5</sup> Fentanyl also has a number of analogues—substances with a substantially similar chemical structure and intended effect on the central nervous system.<sup>6</sup> Analogues can be highly potent.<sup>7</sup> The analogue carfentanil, used by veterinarians to tranquilize large

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1. Press Release, U.S. DEPT OF HEALTH AND HUMAN SERVS., HHS Acting Secretary Declares Public Health Emergency to Address National Opioid Crisis (Oct. 26, 2017), <https://www.hhs.gov/about/news/2017/10/26/hhs-acting-secretary-declares-public-health-emergency-address-national-opioid-crisis.html>.

2. *Data Brief 329: Drug Overdose Deaths in the United States, 1999-2017*, CTRS. FOR DISEASE CONTROL AND PREVENTION: NAT'L CTR. FOR HEALTH STATISTICS, [https://www.cdc.gov/nchs/data/databriefs/db329\\_tables-508.pdf#1](https://www.cdc.gov/nchs/data/databriefs/db329_tables-508.pdf#1) (last visited Mar. 24, 2019).

3. *Id.* Opioids as a whole caused 47,600 drug overdose deaths in 2017, of which synthetic opioids other than methadone were responsible in 59.8% of instances. *See also Opioid Overdose: Commonly Used Terms*, CTRS. FOR DISEASE CONTROL AND PREVENTION (last updated Aug. 28, 2017), <https://www.cdc.gov/drugoverdose/opioids/terms.html> (The CDC defines opioids as “natural or synthetic chemicals that interact with opioid receptors on nerve cells in the body and brain, and reduce the intensity of pain signals and feelings of pain.” The category of opioids “include[s] the illegal drug heroin, synthetic opioids such as fentanyl, and pain medications available legally by prescription, such as oxycodone, hydrocodone, codeine, morphine, and many others.”).

4. *Id.* *Data Brief 329: Drug Overdose Deaths in the United States*, *supra* note 2.

5. *Opioid Overdose: What is fentanyl?*, CTRS. FOR DISEASE CONTROL AND PREVENTION (last updated Dec. 19, 2018), <https://www.cdc.gov/drugoverdose/opioids/fentanyl.html>.

6. 21 U.S.C. § 802 (32)(A)(i)-(iii) (2012).

7. *Id.*

animals such as elephants, is up to 10,000 times more potent than morphine.<sup>8</sup>

While some pharmaceutical fentanyl may be diverted for illicit use, the fentanyl at the source of the opioid epidemic is illicitly manufactured fentanyl and its analogues, such as carfentanil (“IMF”).<sup>9</sup> The use of IMF is extremely profitable for illicit drug traffickers.<sup>10</sup> The DEA estimates that a single kilogram of pure fentanyl – purchased from China for an amount between \$3,300 to \$5,000 – can yield an output of 16 to 24 kilograms of sale-ready product, once manufactured, worth \$80,000 per kilogram on an open U.S. market.<sup>11</sup> This product generates a total \$1.28 million to \$1.92 million in revenue—all from the initial kilogram of raw fentanyl.<sup>12</sup> Compare this revenue with that of heroin, for which an initial kilogram purchased from Colombia would cost between \$5,000 to \$7,000 and only yield one kilogram of street-ready product (as opposed to 16 to 24 kilograms) generating a mere \$80,000 in revenue.<sup>13</sup>

IMF threatens not only direct users of these substances, but also law enforcement and first responders coming into close contact with the substance itself through routine, on-the-job tasks. In recent times, several law enforcement personnel and first responders have needed emergency medical treatment after responding to someone experiencing a fentanyl-related drug overdose.<sup>14</sup> In one example, several hours after an Ohio police officer made a drug bust, the officer “brushed fentanyl residue off his uniform.”<sup>15</sup> Minutes later, the officer described the feeling of his body shutting down.<sup>16</sup> Paramedics administered Narcan and took him to the hospital, where he ultimately recovered.<sup>17</sup>

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8. *2017 National Drug Threat Assessment: October 2017*, U.S. DEPT OF JUST.: DRUG ENFT ADMIN. 63, [https://www.dea.gov/sites/default/files/2018-07/DIR-040-17\\_2017-NDTA.pdf](https://www.dea.gov/sites/default/files/2018-07/DIR-040-17_2017-NDTA.pdf) (last visited Mar. 24, 2019).

9. *Id.* at 57.

10. *Id.* at 54-55.

11. *Id.* at 62.

12. *Id.*

13. *Id.*

14. See Chris Boyette & Amanda Watts, *Deputy, EMTs exposed to opioids get medical treatment*, CNN (May 25, 2017, 8:33 AM), <http://www.cnn.com/2017/05/24/health/maryland-deputy-emts-treated-for-heroin-overdose/index.html>; DEA Public Affairs, *DEA Issues Carfentanil Warning to Police and Public*, U.S. DEPT OF JUST., DRUG ENFT ADMIN. (Sept. 22, 2016), <https://www.dea.gov/divisions/hq/2016/hq092216.shtml> (sharing the stories of two detectives in Atlantic County, NJ, who faced sudden health effects after exposure to small amounts of fentanyl).

15. Artemis Moshtaghian, *Police Officer Overdoses After Brushing Fentanyl Powder off His Uniform*, CNN (May 16, 2017, 12:49 PM), <http://www.cnn.com/2017/05/16/health/police-fentanyl-overdose-trnd/>.

16. *Id.*

17. *Id.*

The potency of fentanyl has also been employed in larger scale situations beyond the parameters of the U.S. opioid epidemic. In October 2002, Chechen extremists held approximately 800 people hostage in a theatre in Moscow, Russia.<sup>18</sup> After more than two days without a resolution, Russian forces deployed a fentanyl-derivative gas through the vents of the theatre, incapacitating the captors and permitting an intervention.<sup>19</sup> However, more than 100 of the hostages were killed.<sup>20</sup> Several days later, after pressure from foreign nations to reveal the contents of the gas, Russian Health Minister Yuri Shevchenko revealed that the gas was “based on derivatives of fentanyl.”<sup>21</sup>

The use of fentanyl in the Moscow hostage crisis has captured the concern of national security experts. For example, former Acting CIA Director Michael Morell discussed the Moscow hostage crisis when making an argument that fentanyl and its derivatives are “weapon[s] of mass destruction,” and, therefore, should be considered not only in the context of the opioid epidemic, but also in the context of national security.<sup>22</sup> In discussing carfentanil, Morell noted that the substance “is readily available in large quantities . . . . [A] single terrorist attack using carfentanil could kill thousands of Americans.”<sup>23</sup> Today in America, large quantities of IMF are indeed readily available. In New Jersey, during two related arrests on June 28 and 29, 2017, law enforcement seized 45 kilograms, or nearly 100 pounds, of fentanyl from two men—a quantity of fentanyl that could have yielded over 18 million doses, enough to kill the entire population of New Jersey and New York City, combined.<sup>24</sup>

In sum, the potency of fentanyl—in its capacity to kill direct users of drugs, injure first responders in a potentially fatal way, and be deployed in a capacity that could yield mass casualties in minutes—provides a challenge unprecedented in the world of drug prevention. One may question: Is fentanyl a drug, or is it a chemical toxin? It is, of course, the former; but is it also the latter? And if it is the latter, are existing enforcement strategies, brought through the federal Controlled Substances Act and related state laws, sufficient? In this commentary, I will propose a new theory and make a legal argument for prosecuting

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18. *Russia names Moscow siege gas*, CNN.COM: WORLD (Oct. 30, 2002, 9:11 PM), <http://www.edition.cnn.com/2002/WORLD/europe/10/30/moscow.gas/>.

19. *Id.*

20. *Id.*

21. *Id.*

22. Michael J. Morell, *The Opioid Crisis Becomes a National Security Threat*, THE CIPHER BRIEF (Sept. 3, 2017), [http://www.thecipherbrief.com/column\\_article/opioid-crisis-becomes-national-security-threat](http://www.thecipherbrief.com/column_article/opioid-crisis-becomes-national-security-threat).

23. *Id.* (Simply put, Morell stated: “[C]arfentanil is the perfect terrorist weapon.”).

24. Press Release, State of New Jersey Office of the Attorney General, Two Men Sentenced to Prison in Connection with Largest Seizure of Super-Potent Opioid Fentanyl in New Jersey History (Jan. 26, 2018), <http://nj.gov/oag/newsreleases18/pr20180126c.html>.

those entities manufacturing and distributing IMF under statutes that ban most uses of chemical weapons. With this new theory, prosecutors will be equipped with additional tools to deter IMF trafficking, hold high-level traffickers of IMF accountable for the tremendous level of danger their actions create, and promote public safety regarding both the opioid epidemic and natural security.

In Part II of this commentary, I will discuss what constitutes a toxic chemical weapon under federal and state law; in Part III, I analyze how IMF traffickers could be prosecuted under federal and state statutes banning chemical weapons; and in Part IV, I propose additional considerations worth exploring when implementing this theory.

## II. CLASSIFYING IMF AS A TOXIC CHEMICAL WEAPON

In 1997, the United States ratified the Chemical Weapons Convention,<sup>25</sup> a multilateral international treaty that required nations to destroy their chemical weapons and related facilities, and subjected nations' citizens and businesses to comply as well.<sup>26</sup> The following year, Congress implemented its provisions under the legislation known as the Chemical Weapons Convention Implementation Act [hereinafter "CWCIA"].<sup>27</sup> The CWCIA states that, with the exception of certain military and law enforcement functions, "it shall be unlawful for any person knowingly to develop, produce, otherwise acquire, transfer directly or indirectly, receive, stockpile, retain, own, possess, or use, or threaten to use, any chemical weapon."<sup>28</sup> Barring several exemptions, the CWCIA broadly characterizes a "chemical weapon" as "a toxic chemical and its precursors."<sup>29</sup> The term "toxic chemical" is defined even more broadly, as:

[A]ny chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals. The term includes all such chemicals, regardless of

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25. Barry Kellman, *The Advent of International Chemical Regulation: The Chemical Weapons Convention Implementation Act*, 25 J. LEGIS. 117 (1999) (citing S. Res. 17, 105th Cong. (1997) (enacted)).

26. Message from the President of the United States Transmitting the Convention on the Prohibition of Development, Production, Stockpiling, and Use of Chemical Weapons and on Their Destruction [hereinafter *Chemical Weapons Convention*], Opened for Signature and Signed by the United States at Paris on January 13, 1993, 1993 U.S.T. LEXIS 107.

27. Kellman, *supra* note 25, at 117 (citing Pub. L. No. 105-277, 112 Stat. 2681 (1998)).

28. 18 U.S.C. § 229(a)(1) (2012). The statute carves out exemptions for specific military or law enforcement functions or other emergencies. § 229(b).

29. *Id.* § 229F(1)(A). The use of toxic chemicals not prohibited under the CWCIA includes peaceful, protective, unrelated military, and law enforcement purposes. § 229F(7)(A)-(D).

their origin or of their method of production, and regardless of whether they are produced in facilities, in munitions or elsewhere.<sup>30</sup>

The CDC currently classifies fentanyl as an “incapacitating agent” and assigns it a Chemical Abstracts Service (“CAS”) registry number in its Emergency Response Safety and Health Database.<sup>31</sup> Furthermore, fentanyl and its analogues have long been considered in the context of the Chemical Weapons Convention. The Russians’ deadly use of fentanyl in the Moscow theatre hostage crisis of 2002 generated disagreement among experts about whether law enforcement should be able to use fentanyl as a riot control agent under exceptions granted by the Chemical Weapons Convention.<sup>32</sup> More recently, various countries that ratified the Chemical Weapons Convention put pressure on fellow state party China to ban carfentanil, which had been both legal and a source of exports to countries like the United States, where it is illegal.<sup>33</sup> These countries emphasized that such chemicals are “banned from the battlefield” under the treaty.<sup>34</sup> China ultimately followed through and banned the drug in 2017.<sup>35</sup>

Thus, in the United States, it may appear rather simple to classify IMF as toxic chemicals, and thus, chemical weapons, under the CWCIA’s provisions and penal statutes. However, the U.S. Supreme Court ruling in *Bond v. United States* raises questions about whether such a theory would be constitutionally permissible in practice.

In *Bond*, when microbiologist Carol Anne Bond found out that her husband impregnated her best friend, she pursued revenge against her friend.<sup>36</sup> She stole an arsenic-based chemical compound from her workplace and ordered additional chemicals from Amazon.com.<sup>37</sup> Bond then applied these chemicals on her friend’s “car door, mailbox, and door knob.”<sup>38</sup> Although the chemicals were “toxic to humans and, in high

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30. *Id.* § 229F(8)(A).

31. *FENTANYL: Incapacitating Agent*, CTRS. FOR DISEASE CONTROL AND PREVENTION; NAT’L INST. FOR OCCUPATIONAL SAFETY AND HEALTH (last updated Nov. 9, 2017), [https://www.cdc.gov/niosh/ershdb/emergencyresponsecard\\_29750022.html](https://www.cdc.gov/niosh/ershdb/emergencyresponsecard_29750022.html).

32. See David P. Fidler, *The Meaning of Moscow: “Non-lethal” Weapons and International Law in the Early 21st Century*, 87 INT’L REV. RED CROSS 525, 532-535 (2005). See also Russia names Moscow siege gas, *supra* note 18.

33. Erika Kinetz & Desmond Butler, *Chemical Weapons For Sale: China’s Unregulated Narcotic*, ASSOCIATED PRESS (Oct. 8, 2016), <https://apnews.com/3e3c2b624edc46f8a57e78d236091798/chemical-weapon-sale-chinas-unregulated-narcotic>. See also *supra* notes 8-13 and accompanying text.

34. Kinetz & Butler, *supra* note 33.

35. Erika Kinetz, *China Carfentanil Ban a ‘Game-Changer’ for Opioid Epidemic*, ASSOCIATED PRESS (Feb. 16, 2017), <https://www.apnews.com/733cfd073951495aa608df549b79a9f8>.

36. *Bond v. United States (Bond)*, 134 S. Ct. 2077, 2085 (2014).

37. *Id.*

38. *Id.*

enough doses, potentially lethal,”<sup>39</sup> the Court acknowledged that Bond had no intent to kill her former friend, but only hoped that she “would touch the chemicals and develop an uncomfortable rash.”<sup>40</sup> Bond’s former friend received a minor chemical burn from coming into contact with the chemicals on one occasion.<sup>41</sup> She also saw powder on her mailbox, which ultimately led postal inspectors to investigate and discover that Bond stole the chemicals at issue from her workplace.<sup>42</sup>

Bond was charged with two federal counts of possessing and using a chemical weapon under the CWCIA.<sup>43</sup> She entered a conditional guilty plea, and subsequently challenged the conviction under the argument that the CWCIA was unconstitutionally vague and overbroad, an argument struck down by the courts.<sup>44</sup> Bond had more success challenging the reach of the CWCIA under the Tenth Amendment, arguing that her actions were “‘localized’ offenses,” and that “bring[ing] citizens into the federal criminal area for conduct not properly the subject of federal prosecutors” would “significantly restrike[] the delicate balance between the federal and state governments.”<sup>45</sup> The prosecution argued that it had federal jurisdiction because the CWCIA was invoked under the Necessary and Proper Clause of the Constitution<sup>46</sup> as a means of implementing the Chemical Weapons Convention, a treaty.<sup>47</sup>

The Supreme Court agreed with Bond, stating, “In sum, the global need to prevent chemical warfare does not require the Federal Government to reach into the kitchen cupboard, or to treat a local assault with a chemical irritant as the deployment of a chemical weapon.”<sup>48</sup> The Court’s majority emphasized a “fair reading” (rather than a textual reading) of the CWCIA, which requires “recognizing that ‘Congress legislates against the backdrop’ of certain unexpressed presumptions” and tasks the federal courts with “‘be[ing] certain of Congress’ intent before finding that the federal law overrides’ the ‘usual and constitutional balance of federal and state powers.’”<sup>49</sup>

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39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.* at 2085-86; *United States v. Bond (Bond I)*, 581 F.3d 128, 138 (3d Cir. 2009).

45. *Bond I*, 581 F.3d at 134.

46. The Necessary and Proper Clause of the Constitution provides Congress with the power “[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.” U.S. CONST. art. I, § 8, cl. 18.

47. *Bond I*, 581 F.3d at 133.

48. *Bond*, 134 S. Ct. at 2093.

49. *Id.* at 2088-89 (internal citations omitted).

The Court referred to “ambiguity” in the statute, and found it appropriate to use federalism principles to address the ambiguity.<sup>50</sup> The statute’s ambiguity centers on the “improbably broad reach”<sup>51</sup> of the term “chemical weapon.”<sup>52</sup> Further, the Court examined the way that an ordinary person would conceive of Bond’s actions, and believed that “the chemicals in this case are not of the sort that an ordinary person would associate with instruments of chemical warfare.”<sup>53</sup> The Court reasoned that “[s]aying that a person ‘used a chemical weapon’ conveys a very different idea than saying the person ‘used a chemical in a way that caused some harm.’”<sup>54</sup>

The Court acknowledged that “[t]he natural meaning of ‘chemical weapon’ takes account of both the particular chemicals that the defendant used and the circumstances in which she used them.”<sup>55</sup> The Court indicated that if Bond had used these same chemicals to “poison a city’s water supply,” the chemicals “might be chemical weapons” in that context.<sup>56</sup> However, the Court characterized Bond’s circumstances as something “worlds apart from such hypotheticals”—as “an act of revenge born of romantic jealousy, meant to cause discomfort, that produced nothing more than a minor thumb burn.”<sup>57</sup> The Court concluded that Congress could not have intended its statute to reach into “traditionally local criminal conduct,” and explained that the states had “sufficient” laws to prosecute this “assault.”<sup>58</sup> Ultimately, Bond’s federal convictions under the CWCIA were expunged.<sup>59</sup> This outcome in *Bond* created questions as to whether manufacturers and distributors of IMF could be successfully prosecuted under the federal CWCIA.

Meanwhile, several states have enacted laws that closely, if not identically, mirror the definition of “chemical weapon” under the CWCIA.<sup>60</sup> Examining these states’ statutes may provide prosecutors with

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50. *Id.* at 2090.

51. *Id.*

52. *Id.*

53. *Id.* *But see Bond*, 134 S. Ct. at 2096 (Scalia, J., concurring) (“[T]he ordinary meaning of the term being defined is irrelevant, because the statute’s own definition [of ‘chemical weapon’] – however expansive – is utterly clear . . . When a statute includes an explicit definition, we must follow that definition, *even if it varies from that term’s ordinary meaning.*”).

54. *Id.*

55. *Id.*

56. *Id.* at 2091.

57. *Id.*

58. *Id.* at 2091-92.

59. *United States v. Bond (Bond II)*, No. 07-528, 2015 U.S. Dist. LEXIS 1135, at \*1 (E.D. Pa. Jan. 6, 2015).

60. For state statutes that define “chemical weapon” and “toxic chemical” as the CWCIA does to regulate chemical weapons, see IDAHO CODE § 18-3324 (2018); KAN. STAT.

the same tools that the CWCIA offers, without having to balance the federalism questions that surfaced in *Bond*.

New Jersey, for example, has codified almost exact language from the CWCIA into statute.<sup>61</sup> According to New Jersey's Criminal Code:

A person who, purposely or knowingly, unlawfully develops, produces, otherwise acquires, transfers, receives, stockpiles, retains, owns, possesses or uses, or threatens to use, any chemical weapon, biological agent, toxin, vector or delivery system for use as a weapon, or nuclear or radiological device commits a crime of the first degree . . . .<sup>62</sup>

The New Jersey definition is nearly identical to that in the CWCIA,<sup>63</sup> but adds the attendant circumstance “for use as a weapon,”<sup>64</sup> which it defines as, “[A]ll situations in which the circumstances indicate that a person intended to employ an item's ready capacity of lethal use or of inflicting serious bodily injury.”<sup>65</sup>

The New Jersey statute was passed in 2002 as part of the September 11th, 2001 Anti-Terrorism Act, following the September 11th attacks on the World Trade Center, which took place in close proximity to New Jersey.<sup>66</sup> There is presently no case law that has applied the New Jersey chemical weapons statute (or other states' related statutes). In cases pertaining to other matters, the New Jersey Supreme Court has provided guidance on how state statutes must be interpreted.<sup>67</sup> Should prosecutors seek to charge a trafficker of IMF under this statute, an understanding of a state court's approach to statutory interpretation will be necessary.

### III. PROSECUTING IMF TRAFFICKERS UNDER CHEMICAL WEAPONS STATUTES

Despite the holding in *Bond*, the federal government could still prosecute manufacturers and distributors [hereinafter: *traffickers*] of IMF under the CWCIA. Additionally, state laws could be applied to

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ANN. 21-5422 (2018); N.J. REV. STAT. § 2C:38-3 (2016); N.Y. CLS PENAL § 490.05 (LexisNexis 2018); OHIO REV. CODE ANN. § 2909.21 (LexisNexis 2018).

61. N.J. REV. STAT. § 2C:38-3.

62. *Id.* § 2C:38-3(a).

63. “Chemical weapon’ means a toxic chemical and its precursors, except where intended for a lawful purpose as long as the type and quantity is consistent with such a purpose.” N.J. REV. STAT. § 2C:38-3(c)(1)(a) (2016). The definition continues, “Chemical weapon’ shall include, but not be limited to . . . incapacitating agents . . . .” § 2C:38-3(c)(1)(v). For comparison to the CWCIA, see definition of “chemical weapon” in the CWCIA, *supra* notes 29-30 and accompanying text.

64. *Id.* § 2C:38-3(c)(7).

65. *Id.*

66. 2001 Anti-Terrorism Act, N.J. STAT. ANN. §2C:38-1 (West 2019).

67. See *infra* notes 87–92 and accompanying text.

prosecute these individuals and organizations. To demonstrate via a hypothetical, consider how both federal and New Jersey laws could have been used to prosecute the two individuals that were arrested and sentenced in New Jersey for possessing 45 kilograms of fentanyl with intent to distribute [hereinafter *New Jersey Case*].<sup>68</sup>

A. *Federal Law: Applying the CWCIA to IMF, Post-Bond*

Federal prosecutors seeking to try alleged traffickers of IMF under the CWCIA could distinguish the case from *Bond* on several grounds sufficient enough to convince courts that the trafficking of IMF was the kind of behavior that Congress sought to regulate when it passed the CWCIA. As with the toxic chemicals in *Bond*, there is no issue in establishing that IMF meets the textual definition of a toxic chemical under the statute.<sup>69</sup> Mainly, the prosecution must show that, unlike the chemicals in *Bond*, IMF is a chemical “of the sort that an ordinary person would associate with the instruments of chemical warfare,” and that it meets the “natural meaning” of chemical weapon, accounting for “both the particular chemicals that the defendant used and the circumstances in which [he or] she used them.”<sup>70</sup>

IMF is much more deadly than the substances in question in the *Bond* case. In *Bond*, the victim only suffered a minor thumb burn.<sup>71</sup> But there is no ambiguity as to how lethal fentanyl is, based on both its potency<sup>72</sup> and its role in the deaths of nearly 30,000 people in the United States in 2017.<sup>73</sup>

In *Bond*, the prosecution provided no evidence that the particular substance in question had been the subject of any international discussion in the context of the Chemical Weapons Convention. Fentanyl and its analogues, however, have been frequently discussed in such a context. National security experts have debated the connection between IMF and possible terrorist attacks yielding mass casualties.<sup>74</sup> Fentanyl has already been deployed with deadly force—resulting in mass

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68. See Press Release: State of New Jersey Office of the Attorney General, *supra* note 24. The defendants in the case were prosecuted under New Jersey state law.

69. It was undisputed in *Bond* that the chemicals in question textually met the definition of “toxic chemical.” *Bond v. United States (Bond)*, 134 S. Ct. 2077, 2094 (2014) (Scalia, J., concurring). IMF and its analogues would easily meet this definition as well. However, for the majority in *Bond*, this was not the end of the inquiry. See *also Bond*, 134 S. Ct. at 2090.

70. *Bond*, 134 S. Ct. at 2090.

71. *Id.* at 2091.

72. See *supra* notes 5–8 and accompanying text.

73. See *supra* notes 2–3 and accompanying text.

74. See Morell, *supra* note 22.

killings.<sup>75</sup> The analogue carfentanil, banned under the Chemical Weapons Convention, was the subject of recent international negotiations between China and several other nations that ratified the Chemical Weapons Convention.<sup>76</sup> None of this broad international attention applied to the arsenic-based compound stolen from work and the additional chemicals purchased from Amazon.com central to the *Bond* case.<sup>77</sup>

The tremendous scope of potential injury in the New Jersey Case presents another opportunity to distinguish it from *Bond*. The U.S. Supreme Court referred to *Bond* as “traditionally local criminal conduct” between two individuals.<sup>78</sup> The Court cautioned against the federal government “reach[ing] into the kitchen cupboard” to enforce every possible toxic chemical under the CWCIA.<sup>79</sup> It said that the analysis might be different if the chemicals were used to “poison a city’s water supply,” for example.<sup>80</sup> The trafficking of 18 million lethal doses of fentanyl in the New Jersey Case is analogous to the poisoning of a city’s water supply, which itself would be a public health crisis. In the New Jersey Case, the defendants were trafficking the same toxic chemicals that have already achieved an unprecedented public health crisis that killed nearly 30,000 people nationally in 2017.<sup>81</sup> The defendants were trafficking a quantity of these toxic chemicals that likely would have led to hundreds if not thousands, of deaths in New Jersey and other areas. This destruction would not only have had adverse impacts on the direct users of the substances themselves, but also potentially on first responders and law enforcement—and would have compromised the well-being of countless families and community members who have been affected by the tragedies that have resulted. Finally, as national security experts argue, there is no limit as to who could have ended up with these toxic chemicals—including parties who may wish to commit acts of terrorism yielding mass casualties.<sup>82</sup>

None of these outcomes would have constituted “traditionally local criminal conduct”<sup>83</sup> between two individuals, one acting out of betrayal and revenge, as in *Bond*. Instead, any outcomes that would have resulted from this trafficking of IMF would have threatened the welfare and

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75. See Russia names Moscow siege gas, *supra* note 18; see also Fidler, *supra* note 32.

76. See Kinetz & Butler, *supra* note 33.

77. *Bond*, 134 S. Ct. at 2085.

78. *Id.* at 2091.

79. *Id.* at 2093.

80. *Id.* at 2091.

81. See Press Release: State of New Jersey Office of the Attorney General, *supra* note 24.

82. See Morell, *supra* note 22.

83. *Bond*, 134 S. Ct. at 2091.

safety of communities across a wide geographic range. Not only does this speak to the “particular chemicals that the defendant used” as required in considering the “natural meaning” of a chemical weapon, but it also speaks to the “circumstances in which [he or] she used them.”<sup>84</sup> The ordinary person would believe that individuals trafficking 18 million lethal doses of IMF are not doing so benignly. The ordinary person, exposed to knowledge of the unprecedented opioid epidemic that is the subject of regular news coverage and public discussion, would believe that under these circumstances, the IMF would ultimately cause additional pain and death in significant quantities. Furthermore, the ordinary person, upon being informed of basic information from national security experts on the potential for mass casualties with fentanyl, could well associate these chemicals “with instruments of chemical warfare.”<sup>85</sup>

Toxic chemicals that have demonstrated the ability to produce mass casualties are indeed the kinds of chemicals that Congress sought to regulate under the CWCIA. Prosecutors seeking to charge those manufacturing and distributing IMF—such as the defendants in the New Jersey Case—under the CWCIA’s provisions could overcome the Tenth Amendment constraints imposed in the *Bond* case to be successful in achieving a conviction.<sup>86</sup>

*B. State Law: Prosecuting Under New Jersey’s Chemical Weapons Statute*

State-level prosecutors seeking to apply state laws that are similar, if not identical, to the CWCIA’s language have many of the same advantages federal prosecutors have in applying the CWCIA to traffickers of IMF, without having to address the Tenth Amendment federalism questions presented in *Bond*. In the New Jersey Case, state prosecutors could apply New Jersey’s statutory version of the CWCIA by demonstrating that the trafficking of IMF falls within the court’s rules regarding statutory interpretation and meets the criteria of the statute.

In applying the New Jersey Supreme Court’s rules on statutory interpretation, one must first look to “the plain language of the statute to which we accord the ordinary meaning of the words used by the Legislature.”<sup>87</sup> Given that the language in the New Jersey statute is nearly identical to the CWCIA, the analysis provided in the previous section applies. Under the ordinary meaning of the words used, IMF

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84. *Id.* at 2090.

85. *Id.*

86. Under the CWCIA, prosecutors would also have to prove that defendants “knowingly” trafficked these toxic chemicals. 18 U.S.C. § 229(a) (2012).

87. *Shelton v. Restaurant.com, Inc.*, 214 N.J. 419, 428-29 (2013) (citations omitted).

meets the definition of a toxic chemical.<sup>88</sup> The court's rule then states, "If the Legislature's intent is clear from the statutory language and its context with related provisions, we apply the law as written."<sup>89</sup> A textualist legal perspective, depicted in Justice Scalia's concurrence in *Bond*,<sup>90</sup> would end the inquiry here and instantly find that the Legislature clearly intended for IMF to be included in the statute.<sup>91</sup>

Other legal perspectives on breadth or narrowness of statutory interpretation may require additional evidence to satisfy the rule. In its rule, the court adds, "We turn to extrinsic tools to discern legislative intent, however, only when the statute is ambiguous, the plain language leads to a result inconsistent with any legitimate public policy objective, or it is at odds with a general statutory scheme."<sup>92</sup>

Defendants may raise questions as to whether the application of IMF to the plain language of New Jersey's chemical weapons statute "leads to a result inconsistent with any legitimate public policy objective."<sup>93</sup> Here, prosecution may argue that the court does not state the need for a *specific* legitimate public policy objective, but rather, the need for *any* legitimate public policy perspective. In the New Jersey Case, laws that could adequately provide enforcement and punishment against those trafficking 18 million lethal doses of fentanyl certainly serve legitimate public policy perspectives, particularly amidst a public health crisis that has attracted the widespread interest of lawmakers.<sup>94</sup>

In terms of whether "the statute is ambiguous,"<sup>95</sup> it is not unconstitutionally vague or overbroad, based on the determination in *Bond*.<sup>96</sup> However, defendants may argue, as was done in *Bond*, that applying IMF to a chemical weapons statute would render the statute "ambiguous," giving the statute an "improbably broad reach" that would regulate chemicals "not of the sort that an ordinary person would associate with instruments of chemical warfare."<sup>97</sup> Specifically,

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88. See *supra* notes 9, 46, 62 and accompanying text.

89. *Shelton*, 214 N.J. at 429.

90. See *Bond*, 134 S. Ct. at 2094-97 (Scalia, J., concurring).

91. *Id.*

92. *Shelton*, 214 N.J. at 429.

93. *Id.*

94. See Steve Janoski, *He Had Enough Fentanyl to Kill Millions of People, but He'll Be Out of Prison in 6 Years*, NORTHJERSEY.COM (Apr. 22, 2018, 5:19 PM), <https://www.northjersey.com/story/news/bergen/2018/04/20/fentanyl-trafficking-penalties-weaker-heroin-despite-lethality/530244002/>; David Chang & Cydney Long, *NJ Sen. Bob Menendez Cracks Down on China in Fight Against Fentanyl*, NBC PHILADELPHIA (Apr. 8, 2019, 6:59 PM), <https://www.nbcphiladelphia.com/news/health/New-Jersey-Senator-Bob-Menendez-Opioid-Fentanyl-Federal-Sanctions-China-United-States-Epidemic-Drug-Trade-508281741.html>.

95. *Shelton*, 214 N.J. at 429.

96. *Bond I*, 581 F.3d at 138.

97. *Bond*, 134 S. Ct. at 2090.

defendants in the New Jersey Case may argue that the legislative intent of the September 11th, 2001 Anti-Terrorism Act was to respond to the tragic events of the September 11th Twin Tower terrorist attacks that greatly impacted citizens of the State of New Jersey, not to regulate the activity of drug traffickers.<sup>98</sup>

In response, prosecutors in the New Jersey Case must argue that the trafficking of 18 million lethal doses of fentanyl was the kind of behavior the Legislature sought to regulate under the September 11th, 2001 Anti-Terrorism Act. In the weeks and months following the September 11th attack, during which time the bill was circulating through the Legislature, the toxic chemical anthrax was of great concern in New Jersey.<sup>99</sup> There were great fears about an individual being able to touch the toxic chemical anthrax and suffer serious bodily injury or death, following deadly anthrax-laced mail being sent out of a Hamilton, N.J. post office and contaminating the post office in the process, injuring five postal employees and an accountant.<sup>100</sup> The anthrax scare mirrors the present fears about innocent bystanders and first responders being injured, potentially fatally, after coming into contact with fentanyl, following the injury and hospitalization of various law enforcement officers in Southern New Jersey who came into contact with fentanyl during their job duties.<sup>101</sup> Stopping the trafficking of millions of lethal doses of fentanyl, a substance which can cause injury or death by absorption, inhalation or ingestion,<sup>102</sup> at a quantity which could kill every citizen of New Jersey, twice over, was certainly within the scope of what New Jersey state legislators sought to regulate when passing the September 11, 2001 Anti-Terrorism Act. This argument is only strengthened by the use of fentanyl in the Moscow hostage crisis,<sup>103</sup> and the concerns of national security experts regarding the opportunity for fentanyl use in acts of terrorism.<sup>104</sup> Prosecutors could confidently argue that the defendants in the New Jersey case were trafficking large quantities of illicitly manufactured, toxic chemicals in a manner that would inevitably cause fatalities, and which could potentially wind up in

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98. See *supra* note 66 and accompanying text.

99. Erin Duffy, *A Decade on, Legacy of Anthrax Lingers in Mercer County and Beyond*, NJ.COM (Oct. 9, 2011), [http://www.nj.com/mercer/index.ssf/2011/10/after\\_a\\_decade\\_the\\_legacy\\_of\\_t.html](http://www.nj.com/mercer/index.ssf/2011/10/after_a_decade_the_legacy_of_t.html).

100. *Id.*

101. Kim Mulford, *Fentanyl Danger Has SJ First Responders on Edge*, COURIER POST (June 22, 2017, 12:08 PM), <https://www.courierpostonline.com/story/news/local/2017/06/22/first-responders-taking-extra-measures-against-accidental-exposure/392138001/>; see also DEA Issues Carfentanil Warning to Police and Public, *supra* note 14.

102. See DEA Issues Carfentanil Warning to Police and Public, *supra* note 14.

103. See Russia names Moscow siege gas, *supra* note 18.

104. See Morell, *supra* note 22.

the hands of terrorists seeking to use fentanyl as a weapon of mass destruction.

Additionally, the prosecution in the New Jersey Case must show that those trafficking IMF intended to do so “[f]or use as a weapon.”<sup>105</sup> The New Jersey legislature provides a very broad definition of this term, referring to “*all situations* [that] indicate that the person intended to employ an item’s ready capacity of lethal use or of inflicting serious bodily injury.”<sup>106</sup> Again, the rules of statutory interpretation—“the plain language of the statute”<sup>107</sup> and the “ordinary meaning of the words”<sup>108</sup> used—show that the Legislature clearly intended to regulate *all situations* in which a person would “purposely or knowingly”<sup>109</sup> employ the chemical weapon’s capacity for lethal use or to inflict serious bodily injury. Knowledge, an easier standard to meet, is defined as the following:

A person acts knowingly with respect to the nature of his conduct or the attendant circumstances if he is aware that his conduct is of that nature, or that such circumstances exist, or he is aware of a high probability of their existence. A person acts knowingly with respect to a result of his conduct if he is aware that it is practically certain that his conduct will cause such a result.<sup>110</sup>

While proving that the defendants acted knowingly, prosecutors could demonstrate that the defendants were aware of the deadly nature of a quantity of 18 million lethal doses of fentanyl. The “capacity of lethal use”<sup>111</sup> of IMF is common knowledge, and must be so to a likely experienced drug trafficker, who must have the knowledge that these substances in the illicit marketplace will inevitably result in death or “serious bodily injury”<sup>112</sup> to others with whom their products come into contact.

Although proving knowledge is sufficient, prosecutors may even be able to prove a standard of acting “purposely”—that the defendant acted “with respect to attendant circumstances if he is aware of the existence of such circumstances or believes or hopes that they exist.”<sup>113</sup> Defendants may argue that their intent was merely to sell drugs to willing customers in a business transaction, not to inflict death on anyone. In response, prosecutors must demonstrate the direct connection between the IMF’s

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105. N.J. STAT. ANN. § 2C:38-3(c)(7).

106. *Id.* (emphasis added).

107. *Shelton*, 214 N.J. at 429.

108. *Id.*

109. *Id.* § 2C:38-3(a).

110. *Id.* § 2C:2-2(b)(2).

111. *Id.* § 2C:38-3(c)(7).

112. *Id.*

113. *Id.* § 2C:2-2(b)(1).

“ready capacity of lethal use or of inflicting serious bodily injury”<sup>114</sup> and the drug traffickers’ business model and consumer demand. There is evidence that within circles of drug use, when a particular dealer is known to be distributing a substance of high potency, greater demand from users emerges.<sup>115</sup> Specifically, when someone dies, some users interpret the death as a sign that the substance is of high potency, and in pursuing that strong high, the users seek out the dealer of that especially potent substance for purchase.<sup>116</sup> In these instances, the substance’s “ready capacity for lethal use” is a specific element of generating market demand, helping the drug dealer to increase his or her profits. Thus, the prosecution may argue that traffickers of IMF, seeking profit, “believe[] or hope[]” that IMF’s capacity for lethal use “exist[s],”<sup>117</sup> with the insight that these lethal substances maximize their business interests.

Prosecutors could apply the plain language of the law to convict traffickers of IMF under state chemical weapons statutes; if extrinsic evidence is required, prosecutors have strong arguments that could overcome possible defenses. Therefore, in the handful of states that have chemical weapons statutes similar to the CWCIA, these statutes could be useful tools for prosecutors pursuing traffickers of IMF.

#### IV. CONCLUSION

As the United States faces a significant public health emergency, one in which synthetic opioids have claimed the lives of nearly 30,000 individuals annually, communities are looking for ways to stem the spread of these substances. And in the background, national security experts caution that these substances can be deployed in ways that cause mass casualties. This commentary demonstrates that a legal basis exists for prosecuting manufacturers and distributors of illicitly manufactured fentanyl and its analogues under state and federal statutes prohibiting the use of chemical weapons. However, further consideration is needed to compare the severity of criminal punishment this legal route provides versus other routes (and the associated merits and concerns), to explore any civil remedies that may be available through this legal route, and to determine whether this legal route would have a policy impact on slowing

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114. *Id.* § 2C:38-3(c)(7).

115. *See Research on the Use and Misuse of Fentanyl and Other Synthetic Opioids*, NAT’L INST. ON DRUG ABUSE (June 30, 2017), <https://www.drugabuse.gov/about-nida/legislative-activities/testimony-to-congress/2017/research-use-misuse-fentanyl-other-synthetic-opioids> (“The researchers reported, ‘Some may seek out a certain dealer or product when they hear about overdoses because they think that it must be good stuff.’”).

116. *Id.*

117. N.J. STAT. ANN. § 2C:2-2(b)(1).

the tide of the opioid epidemic and protecting national security (and at what cost). Additionally, it is essential to recognize that while this commentary seeks to impose responses that may result in harsher criminal sentences on high-level traffickers of IMF, in no way does this piece seek to resuscitate the War on Drugs or advocate for expanded criminalization of those facing drug addiction, who are deserving of quality, compassionate care and treatment. What can be known is that in the midst of such a public health crisis, it is valuable that all potential tools for promoting public health and public safety should be explored, analyzed, and implemented as appropriate. This commentary offers new tools, based on presently existing statutes, for consideration and implementation.