



BREAKING FREE FROM THE “WAR ON DRUGS”: Examples From Three Leader States

Corey Davis and Amy Judd Lieberman

Abstract:


This paper summarizes key shifts in judicial decisions relating to public health powers during the pandemic and the implications of those decisions for public health practice. Then, it gives a preview and call for partnership in developing a legal framework for authority that guides public health to better activities, processes, and accountability in service of the public’s health.

The “War on Drugs” Increases Drug-related Harm

The crisis of overdose and other drug-related harm continues to impact communities across the United States. According to the most recent provisional data, the 12-month period ending June 2023 was one of the deadliest on record, with approximately 110,000 lives lost in the U.S. due to drug-related overdoses.¹ Both non-fatal overdoses and injection-related infections are at or near all-time highs as well.²

Since the 1970s, the United States has resolutely pursued a “War on Drugs” that directs the power of the state not toward reducing drug-related harm but to the criminalization and stigmatization of people who use certain drugs. Under this “War,” the number of incarcerated people has risen steadily; the U.S. now incarcerates its citizens at a higher rate than nearly every other country. More arrests are made for drug offenses than any other category of crime — nearly 1.3 million for simple possession in 2019 alone — and nearly 1 in 5 incarcerated people are imprisoned for a drug offense.³ The “War” has perpetuated and in many cases exacerbated racial disparities in arrest and incarceration; while Black and White people use drugs at a similar rate, Black people make up a quarter of those incarcerated for drug crimes despite comprising only 14% of the population.⁴

The “War” has not, however, reduced either illicit drug use or drug-related harm. The percentage of 12th graders who reported using any illicit drug in the prior year has hovered around 40% since the mid-1990s, and fatal overdose rates have continued to grow at an exponential rate since the late 1970s.⁵ This dichotomy is



not surprising; indeed, extensive evidence demonstrates that punitive drug laws and drug law enforcement do not deter drug use or initiation but rather increase harm to individuals and communities.⁶

Simply having been arrested for a drug crime is a risk factor for overdose death, and that risk increases with the number of arrests an individual experiences.⁷ Police activity reduces the number of people who access syringe service programs and low-barrier buprenorphine.⁸ Black individuals who are arrested in young adulthood experience significantly increased odds of later drug use and substance use disorder, and formerly incarcerated people are at extremely high risk for overdose.⁹ Researchers have suggested that punitive drug laws encouraged illicit drug suppliers to shift production from heroin to the more potent and more easily transportable fentanyl, helping to drive the current crisis of fentanyl-related overdose.¹⁰

Federal Commitment to the War


In 2011, then Director of the Office of National Drug Control Policy (ONDCP) Gil Kerlikowske stated, “As someone who has spent their entire career in law enforcement, I know we cannot arrest our way out of the drug problem.”¹¹ This realization has not led to any meaningful changes in drug arrests. Over 1.5 million such arrests were made in the U.S. in 2019, nearly 80,000 more than when Director Kerlikowske noted the futility of prioritizing them.¹² Approximately one in three people with opioid use disorder in the U.S. are arrested every year, and overdose incidents often result in arrest and incarceration.¹³

While most arrests are made for alleged violations of state law, states and localities often take direction from the federal government. The Biden administration has increasingly adopted the rhetoric of a more public health-focused approach to illicit drug use, but in practice it remains committed to a system that criminalizes and stigmatizes people who use drugs. Among many other examples, the federal Department of Justice has been battling for years to stop an overdose prevention center — a facility where people can use pre-obtained drugs in a controlled setting — from operating in Philadelphia, despite evidence that such facilities reduce fatal overdose without increasing crime.¹⁴

When a conservative publication claimed that the Biden administration was going to “fund crack pipe distribution,” the administration responded not by voicing support for the evidence-informed practice of providing safer smoking equipment but by announcing that federal funds were not to be used for it.¹⁵ Indeed, such instruments are illegal in most states because the Drug Enforcement Administration created a model paraphernalia law and urged states to adopt it. Despite overwhelming evidence that paraphernalia laws increase harm without reducing drug use, the administration has done nothing to encourage states to repeal them.¹⁶

States Can Lead the Way Forward

While some states have passed laws that double down on “War on Drugs” approaches such as increasing the penalties for fentanyl-related crimes, most have also adopted at least some evidence-based, human-focused policies designed to reduce drug-related



harm. For example, almost all states now have some form of overdose Good Samaritan laws, and, in just the past few years, most have eliminated penalties for the possession and distribution of fentanyl test strips.¹⁷ A few states have made even more sweeping efforts to change the legal environment to one that benefits, rather than harms, individuals and communities.

Perhaps the most far-reaching of these state changes occurred in Oregon. There, advocates built support for decriminalization of simple drug possession by pairing that change with increased funding for prevention, treatment, and recovery.

The result, ballot measure 110, was approved by nearly 60% of voters. Measure 110, which went into effect in early 2021, reduced personal drug possession from a crime to a non-criminal violation that results only in a \$100 fine, which is waived if the individual completes a health screening.¹⁸ Initial evidence from this change shows that drug arrests have declined dramatically, with no impact on violent crime or overdose deaths.¹⁹ Disappointingly but not surprisingly, proposals are already underway to roll back many of the changes made by Measure 110, despite generally positive initial results and increasing recognition globally of the necessity of decriminalization.²⁰

Despite the federal government's continued opposition to OPCs, Rhode Island passed legislation in July 2021 that legalized the facilities in the state.²¹ State officials have carefully crafted a regulatory framework to support and protect OPC workers and participants in ways that are responsive to the needs of the community, and the first licensed facility is expected to open soon.²² Meanwhile, unauthorized but officially-supported OPCs in New York City have intervened in over 1,000 overdoses in their first year of operation, potentially saving many lives.²³

Minnesota has also been a leader in drug policy reform. As noted above, one of the most absurdly harmful prohibitionist policies is the criminalization of drug use equipment, or "paraphernalia." In 2022, Minnesota passed a sweeping law that decriminalized the possession, use, and free distribution of drug paraphernalia in the state.²⁴ The bill also decriminalized residual amounts of controlled substances in and on drug paraphernalia and allowed for the unlimited sale of syringes by pharmacists.

Conclusion

Over five decades on, the "War on Drugs" — rightly recognized by the Secretary of the Department of Health and Human Services as a "war on people" — continues to have a devastating impact on individuals and communities.²⁵ In light of continuing failure by the federal government to stop fighting this war on its own people, some states — pushed by reform advocates — have shown bold leadership in adopting evidence-based, human-centered drug policy reforms.

Overdose death and other drug-related harm is preventable. Removing paraphernalia laws, decriminalizing drug possession, and authorizing OPCs are

common sense ways to prevent that harm. In light of continuing federal inaction, states should work with advocates and people with lived and living experience to make the changes necessary to save lives.

References

1. *Vital Statistics Rapid Release: Provisional Drug Overdose Death Counts*, National Center for Health Statistics, available at <<https://www.cdc.gov/nchs/nvss/vsrr/drug-overdose-data.htm>> (last visited November 1, 2023).
2. J.A. Barocas et al., “Long-Term Infective Endocarditis Mortality Associated with Injection Opioid Use in the United States: A Modeling Study,” *Clinical Infectious Diseases* 73 (2021); A.J. Schranz, A. J. et al., “Trends in Drug Use-Associated Infective Endocarditis and Heart Valve Surgery, 2007 to 2017: A Study of Statewide Discharge Data,” *Annals of Internal Medicine* 170 (2018), 31–40; D. Ciccarone et al., “Nationwide Increase in Hospitalizations for Heroin-Related Soft Tissue Infections: Associations with Structural Market Conditions,” *Drug and Alcohol Dependence* 163 (2016), 126–33; *DOSE Dashboard: Nonfatal Overdose Syndromic Surveillance Data*, Centers for Disease Control and Prevention, available at <<https://www.cdc.gov/drugoverdose/nonfatal/dose/surveillance/dashboard/index.html>> (last visited November 15, 2023).
3. *Mass Incarceration: The Whole Pie 2023*, Prison Policy Institute, available at <<https://www.prisonpolicy.org/reports/pie2023.html>> (last visited November 21, 2023); *States of Incarceration: The Global Context 2021*, Prison Policy Institute, available at <<https://www.prisonpolicy.org/global/2021.html>> (last visited November 22, 2023); *Drug Arrests Stayed High Even As Imprisonment Fell From 2009 to 2019* (February 2022), Pew Charitable Trusts, available at <<https://www.pewtrusts.org/-/media/assets/2022/02/drug-arrests-stayed-high-even-as-imprisonment-fell-from-2009-to-2019.pdf>> (last visited February 19, 2024); *Crime in the United States, 2019* (Fall 2020), Federal Bureau of Investigation (FBI), available at <<https://ucr.fbi.gov/crime-in-the-u.s/2019/crime-in-the-u.s.-2019/topic-pages/persons-arrested.pdf>> (last visited February 19, 2024).
4. *Racial Disparities Persist in Many U.S. Jails* (May 16, 2023), Pew Charitable Trusts, available at <<https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2023/05/racialdisparities-persist-in-many-us-jails>> (last visited February 19, 2024).
5. W. M. Compton et al., “Exponential Increases in Drug Overdose: Implications for Epidemiology and Research,” *International Journal of Drug Policy* 104 (2022); *Monitoring the Future: 2021 Overview* (January 2022), NIDA, available at <<https://deepblue.lib.umich.edu/bitstream/handle/2027.42/171751/mtf-overview2021.pdf>> (last visited February 19, 2024).
6. S. R. Friedman et al., “Drug Arrests and Injection Drug Deterrence,” *American Journal of Public Health* 101, no. 2 (2011), 344–9.
7. N. Krawczyk et al., “Opioid Overdose Death Following Criminal Justice Involvement: Linking Statewide Corrections and Hospital Databases to Detect Individuals at Highest Risk,” *Drug and Alcohol Dependence* 213 (2020).
8. J. N. Park et al., “Police Violence Among People Who Inject Drugs in Baltimore, Maryland,” *International Journal of Drug Policy* 64 (2019), 54–61; K. Weisenthal et al., “Effect of Police Action on Low-Barrier Substance Use Disorder Service Utilization,” *Harm Reduction Journal* 19, no. 1 (2022), 86.
9. I. A. Binswanger et al., “Release from Prison—a High Risk of Death for Former Inmates,” *New England Journal of Medicine* 356, no. 2 (2007); 157–65; E. E. Doherty et al., “Examining the Consequences of the “Prevalent Life Events” of Arrest and Incarceration among an Urban African-American Cohort,” *Justice Quarterly* 33, no. 6 (2016), 970–99.
10. L. Beletsky and C.S. Davis, “Today’s Fentanyl Crisis: Prohibition’s Iron Law, Revisited,” *International Journal of Drug Policy* 46 (2017), 156–59.
11. G. Kerlikowske, *Statement from White House Drug Policy Director Kerlikowske on the Results of the 2010 National Survey on Drug Use and Health* (September 8, 2011), The White House, available at <<https://obamawhitehouse.archives.gov/ondcp/news-releases-remarks/statement-on-the-results-of-the-2010-national-survey-on-drug-use-and-health>> (last visited February 19, 2024).
12. FBI, *supra* note 3.
13. K. Fiscella et al., “Implementing Opioid Agonist Treatment in Correctional Facilities,” *JAMA Internal Medicine* 178, no. 9 (2018), 1153–54; N. J. Richardson et al., “National Survey Findings on Law Enforcement Agency Drug Response Practices, Overdose Victim Outcomes, and Good Samaritan Laws,” *Drug and Alcohol Dependence* 248 (2023).
14. S. Burris et al., “Toward Healthy Drug Policy in the United States — the Case of Safehouse,” *New England Journal of Medicine* 382, no. 1 (2020): 4–5.

15. P. Hauf, *Biden Admin To Fund Crack Pipe Distribution To Advance 'Racial Equity'* (February 7, 2022), Washington Free Beacon, available at <<https://freebeacon.com/biden-administration/biden-admin-to-fund-crack-pipe-distribution-to-advance-racial-equity/>> (last visited February 19, 2024); X. Becerra, and R. Gupta, *Statement by HHS Secretary Xavier Becerra and ONDCP Director Rahul Gupta* (February 9, 2022), Department of Health and Human Services, available at <<https://www.hhs.gov/about/news/2022/02/09/statementhhs-secretary-xavier-becerra-and-oncpc-director-rahul-gupta.html>> (last visited February 19, 2024).
16. C.S. Davis and D. H. Carr, "Repealing State Drug-Paraphernalia Laws — the Need for Federal Leadership," *New England Journal of Medicine* 387, no. 15 (2022), 1344–46.
17. *Legality of Drug Checking Equipment in the United States* (August 2023), Network for Public Health Law, available at <<https://www.networkforphl.org/wp-content/uploads/2023/11/50-State-DCE-Fact-Sheet-2023-2.pdf>> (last visited February 19, 2024); *Legal Interventions to Reduce Overdose Mortality: Overdose Good Samaritan Laws* (July 2023), Network for Public Health Law, available at <<https://www.networkforphl.org/wp-content/uploads/2023/07/Legal-Interventions-to-Reduce-Overdose-Mortality-Overdose-Good-Samaritan-Laws-2.pdf>> (last visited February 19, 2024).
18. *Measure 110*, Oregon Judicial Department, available at <<https://www.courts.oregon.gov/about/Documents/BM110Statistics.pdf>> (last visited Nov. 2, 2023).
19. C. S. Davis et al., "Changes in arrests following decriminalization of low-level drug possession in Oregon and Washington," *International Journal of Drug Policy*, Vol. 119 (2023); S. Joshi et al., "One-Year Association of Drug Possession Law Change with Fatal Drug Overdose in Oregon and Washington," *JAMA* (2023).
20. L. Dake, *Effort underway to recriminalize drugs again, supporters include Oregon's richest businessmen* (Sept. 18, 2023), OPB, available at <<https://www.opb.org/article/2023/09/18/oregon-drug-measure-110-recriminalize-decriminalize-addiction-recovery-drugs/>> (last visited February 19, 2024); *The Lancet*, "Drug decriminalisation: grounding policy in evidence," *Lancet* 402 (2023).
21. 23 R.I. Gen. Laws Ann. § 23-12.10-1, et seq., eff. March 1, 2022.
22. 216-40-10 R.I. Code R. § 25.
23. E. Soto, *OnPoint NYC, Operator of the Nation's First Supervised Consumption Centers, Announces That it Has Intervened in Over 1,000 Overdoses* (August 8, 2023), OnPoint NYC, l <<https://onpointnyc.org/intervened-in-over-1000-overdoses/>> (last visited February 19, 2024).
24. 2023 Minn. Sess. Law Serv. Ch. 52 (S.F. 2909), eff. August 1, 2023.
25. X. Becerra, *Secretary Becerra Delivers Remarks During Joint HHS-ONDCP Press Call on Biden-Harris Administration Harm Reduction Investments* (December 8, 2021), Department of Health and Human Services, available at <<https://www.hhs.gov/about/news/2021/12/08/secretary-becerradelivers-remarks-during-joint-hhs-oncpc-press-call-onbiden-harris-administration-harm-reduction-investments.html>> (last visited February 18, 2024).

Corey Davis, J.D., M.S.P.H., is Director of the Harm Reduction Legal Project at the Network for Public Health Law. Amy Judd Lieberman, J.D., is Senior Attorney at the Harm Reduction Legal Project at the Network for Public Health Law, both in Los Angeles, CA.

The image shows the cover of the journal 'THE JOURNAL OF LAW, MEDICINE & ETHICS' for Spring 2024. The cover features a photograph of a city street scene with people walking. The title 'THE JOURNAL OF LAW, MEDICINE & ETHICS' is at the top. Below it, the text reads 'SYMPOSIUM 2023 Public Health Law Conference: People. Policy. Progress.' and 'GUEST EDITED BY Vinita Gupta'. A list of articles is provided, including 'Opportunities in Public Health: Leveraging Science and Practice' by Alan Borenstein, 'Barriers and Opportunities for Tribal Access to Public Health Services' by Lynn Fick, and 'Responsible and Law of Justice' by Johnathan J. Hagan. The Cambridge University Press logo is at the bottom.

This article was originally published in the [Spring 2024 Symposium issue of the Journal of Law, Medicine & Ethics](#), which examines some of the critical topics that were discussed at the October 2023 National Public Health Law Conference: People. Policy. Progress, in Minneapolis, Minnesota. The conference was organized by the Network for Public Health Law with generous support from the Robert Wood Johnson Foundation, Health Forward Foundation, M Health Fairview, and Amazon Web Services