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Beyond Decriminalization: Ending the War on Drugs Requires Recasting Police Discretion through the Lens of a Public Health Ethic

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A BOLD PLAN

Earp, Lewis, and Hart (2021) argue the pursuit of racial justice requires a summary end to the war on drugs. In surveying the racially disparate harms of an enforcement-oriented, punitive, and ultimately failed approach to regulating psychoactive substances, they make a compelling case. They add their voice to calls for decriminalizing drug possession and use, expunging convictions for nonviolent drug-related crimes, releasing prisoners currently serving time for such convictions, and ultimately moderating drug use through regulatory, rather than criminal legal apparatus.

While we agree with this long-term vision (del Pozo and Beletsky 2020), we believe that more immediate street-level change requires deploying additional tools. From the state-level legalization of cannabis to the pathbreaking decriminalization of controlled substances in Oregon, there are promising signs that the nation's thinking on drugs is evolving. Change at the national level will be slower in coming, however; even the full-speed implementation of comprehensive reforms will take years. In the meantime, harmful, racially unjust police interventions will continue.

To complicate matters, the policing of people who use drugs is frequently unresponsive to legal reforms. Evidence suggests that formal policy change may be necessary but insufficient to substantially shift law enforcement practices. Evaluation of cannabis reforms demonstrates that racial disparities in drug-related arrests actually increase post-legalization.

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Reforms like syringe legalization and 911 Good Samaritan laws demonstrate that police discretion often blocks the translation of policies to the street level. These data shine a light on the key role of police discretion as a major mediator between formal policy and their health impact, especially among over-policed, vulnerable and racialized groups (Friedman et al. 2020).

The implication is that when it comes to maximizing the public health benefits of drug policy reforms, police discretion is a critical point of intervention. The broad latitude police exercise when implementing formal policies is shaped by supervisory directives, police culture, fiscal considerations, and other factors. We submit it is possible to reshape police discretion with an orientation toward public health, a concept we call the "public health ethic of police discretion." Even after a reform plan is fully realized, it is unclear to what extent it will abate the entrenched social and economic determinants underlying drug use and its consequences (Dasgupta, Beletsky, and Ciccarone 2018). Police encounters with people who use drugs will continue and a public health ethic of discretion could shape them with the same values that motivated the overarching reforms.

POLICE DISCRETION AS A PROBLEM-SOLVING PREROGATIVE

Police officers not only have broad latitude in how they enforce the misdemeanors and nonviolent felonies that regulate drugs, but also in addressing outcomes associated with addictive behavior such as theft, domestic disputes, and public disorder. At a higher level, police agencies have the discretion to prioritize addressing some conditions over others and to decline to enforce certain laws (such as police and prosecutors *de facto* decriminalizing the possession of unprescribed buprenorphine, the partial agonist medication that effectively treats opioid addiction (del Pozo, Krasner, and George 2020)). This discretion empowers police leaders to allocate staff and resources as they deem necessary and allows officers to tailor their responses. Nothing prevents them from choosing treatment over arrest, referring people to harm reduction resources, and seeking the help of professionals trained to intervene in ways that solve rather than exacerbate behavioral health problems.

But the use of professional discretion requires a guiding ethic. Discretion is not a private decision-making power, but a positional prerogative—an entitlement to use professional judgment about how to act. It is a societally-granted permission and those who possess it in their professional roles should appeal to the normative goals of those roles to determine how best or most appropriately to make their decisions. In other words, discretion is a bounded prerogative that police can exercise to solve the problems society tasks them with addressing. Earp, Lewis, and Hart (2021) assert that drug enforcement in principle "aims to protect people from harm and promote public health," but has spectacularly failed to do so. If we accept these aims as legitimate ends of police work, then the use of discretion by police should be guided by an ethic of public health.

A VISION FOR A PUBLIC HEALTH ETHICS FOR POLICE

Police discretion guided by a public health ethic takes the profession's putative role of protecting life and delivering public safety and operationalizes it with decisions that

equitably improve health outcomes. With people who use drugs, it would incorporate public health's goals and values at all levels, from strategic plans and resource allocations to individual field encounters. Preliminarily, it would require:

- An ethical response to drug use and overdose that "must include providing a strong social support system, breaking down stigma and discrimination, improving access to addiction treatment, and promoting harm reduction interventions" (Tyndall and Dodd 2020).
- Striving for and measuring the true endpoints of reduced morbidity, mortality, and improved health and resiliency, rather than surrogate endpoints that often diverge from these outcomes. Arrests, tickets issued, drugs seized, and the crime rate often indicates little more than police productivity.
- Measuring and reducing the "iatrogenesis" of police interventions. Police should consider their work a series of interventions measured not only by their proximate outcomes but the collateral harms of enforcement, arrest, and the disruptions they can cause (Goulka, del Pozo, and Beletsky In press).
- Acknowledging when other entities are better trained and positioned to intervene, ceding responsibilities to them when feasible, and advocating for the funding necessary for these entities to respond effectively.

OPERATIONALIZING AN ETHIC

Implementing such an ethic calls for both top-down and bottom-up strategies. Top-down strategies are tied to funding sources and strategic leadership. Civic leaders hire and retain chiefs of police and approve their budgets. Doing so entitles them to set the ethical norms of their police departments. Requiring chiefs of police to align their drug-related strategies with the jurisdiction's public health goals is reasonable and discrete. Insisting on these methods and metrics will align a police department's guiding values with the rest of the city's agencies.

Training is a bottom-up strategy. A public health ethic of policing can be conveyed to police as enhancing their own wellness and safety. SHIELD, a police training program we administer in several states, presents evidence that referrals to effective addiction treatment lead to crime reduction, public naloxone distribution prevents onerous overdose calls, and these measures reduce police exposure to infectious disease and the emotional trauma of constantly responding to the consequences addiction. Taking both top-down and bottom-up strategies would be optimal.

AFTER THE WAR: LESSONS LEARNED FROM PROHIBITION

A hundred years ago this January, the United States declared war on alcohol by launching Prohibition. Its enforcement created an illicit market that predominantly criminalized poor and working-class Blacks, whites, and immigrants. It greatly expanded the role for the federal government in criminal law enforcement, gave police the power to intrude into people's lives over what was essentially a private act, built a vast penal apparatus, and

laid the conceptual groundwork for the wars on crime, terror, and drugs (McGirr 2015). Prohibition was a shift from seeing alcohol misuse as a problem of regulating businesses and public behavior to regulating people's liberties in their own homes and bodies, and decades later our approach to drugs followed suit (Thacher 2020).

Ending the war on alcohol significantly reduced police responses to alcohol misuse, but did not end them. Legalization ended policing of an illicit market, but the dangers of impaired driving, the disruptive and sometimes violent results of intoxication, and the consequences of alcohol use disorder continue to require emergency interventions. Ending the war on drugs will be no different. The extent to which misuse produces emergencies that cannot be diverted to other responders is the extent to which police will continue to contend with the effects of drug use.

In addition, legalization will not eradicate disparities in policing these emergencies. Sobriety checkpoints have perniciously targeted minority neighborhoods (Caputo 2015), and Blacks and Hispanics suffer greater consequences than whites when arrested for alcohol-related offenses (Camplain et al. 2020). Ending the war on drugs will leave us with similar challenges. Civil processes can still impose significant harms, and a criminal law without drug statutes will still afford police the opportunity to take enforcement action for a slew of related offenses. Moving the regulation of all psychoactive substances from the criminal to the civil law will not fully achieve racial justice unless the ethics that guide the discretionary decisions of police put health and welfare first and do so in a fair and equitable way.

CONCLUSION

Properly ending the War on Drugs is critical but will take time; creating and implementing a public health ethic for police discretion can start now, and justice demands both. To whatever extent Earp, Lewis, and Hart (2021) vision is ultimately realized, police will still have a role in responding to drug-related emergencies, and police leaders and officers will always have the power of discretion to determine their ultimate enforcement. Implementing public health goals effectively, and doing so equitably, will require police embody a public health ethic of discretion.

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