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Commentary

No "back to normal" after COVID-19 for our failed drug policies

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ABSTRACT

Before COVID-19 pandemic, advocates had long urged drug policy reforms based on health, security, civil rights, racial justice, fiscal stewardship, and other considerations. In the United States, such calls went largely unanswered. In response to COVID-19, public health and occupational safety concerns have rapidly transformed some drug policies, along with their enforcement. Almost contemporaneously, nationwide protests against violence and racism by militarized police have highlighted the enduring legacy of the Drug War in fueling carceral systems. Disruption from these historical events provides a once-in-a-century opportunity to reconsider the legal architecture of drug policy and policing–both in the U.S. and elsewhere. Rather than returning to a fundamentally broken and inequitable *status quo*, we urge envisioning a new drug policy in service to life, liberty, and the pursuit of happiness.

Introduction: Before the pandemic

Before COVID-19 hit, North America and other parts of the world were already two decades into a an overdose crisis of historic magnitude (Ciccarone, 2019). The trajectory of this crisis was a resounding indictment of a failed system of global and domestic drug control. In the U.S., the rapid and sustained growth of fatalities involving prescription analgesics to heroin and on to illicitly-manufactured fentanyl had claimed over half a million lives. Although this decades-long crisis had complex causes, the federal Controlled Substances Act (CSA)—the landmark federal legislation and a model for analogues the world over—was one of the key elements contributing to this tragedy. As a regulatory instrument that was intended to prevent diversion and non-medical use of certain drugs, the CSA proved impotent in regulating the pharmaceutical market for opioids and other psychoactive medications. On the other hand, the wide availability, low price, and ever-increasing purity of illicit opioids clearly illustrated the status quo's impotence in controlling clandestine drug supply chains.

Compounding the fallout of these failures, the use of agonist medications to treat OUD was gaining ground (Abraham, Andrews, Harris & Friedmann, 2020), but not fast enough to deliver their lifesaving benefits to thousands of needless overdose victims (Tsai et al., 2019; Wakeman & Rich, 2018). The Drug Enforcement Administration mismanaged their regulation, based on unfounded or exaggerated fears about their diversion and misuse. These fears yielded a web of regulations that deter physicians from prescribing the medicines (Andraka-Christou & Capone, 2018; Wakeman & Barnett, 2018), perpetuate stigma against their use, and leave countless people with OUD deprived of access to lifesaving treatment (Carroll, Rich & Green, 2018).

The failure of this legal architecture had been on display long before the overdose crisis. The CSA and its progeny of highly-punitive drug laws were characterized by over-policing, mass incarceration, and all of their enduring collateral consequences (Dumont, Brockmann, Dickman, Alexander & Rich, 2012). These policies rely on arrest and incarceration, disproportionately impacting disadvantaged and minority groups (Alexander, 2012). Codified stigma against drug use and criminal legal involvement forecloses future economic opportunities, convictions can disenfranchise people from the political process, and incarceration without effective addiction treatment leaves individuals more susceptible to fatal overdose upon reentry (Green et al., 2018). These consequences spread as labor markets are disrupted and families are fractured, resulting in communities where diminished civil liberties and life prospects are one of their defining features.

A myopic focus on interdiction and the perverse financial incentives created by asset forfeiture spurred the militarization of policing under the banner of the War on Drugs (Radil, Dezzani & McAden, 2017). Investments in drug enforcement consumed resources that could have been dedicated to systems care and support. These resource allocations crowded out proven measures to address the spread of HIV, problematic substance use, and other serious public health harms. Media and popular portrayals of drug use that emphasized the crack cocaine epidemic in Black communities helped expand and metastasize the footprint of

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the nation's carceral systems. It bred a paradigm powered by overzealous prosecution (Stuntz, 2011) with profoundly unjust consequences that plague the U.S. along racial lines to this day (Alexander, 2012; Forman Jr., 2017). Civil liberties and the civic life of entire communities were eroded through mass surveillance, excessive searches, over-policing, and other forms of coercive governance (Friedman, 2017) in the quest for a "Drug Free World."

Even before COVID-19, this decades-old regime showed signs of strain. Regulation of cannabis was undergoing rapid transformation, including the expungement of prior convictions for its possession and sale (Ahrens, 2020). After decades of stonewalling, scientific research into the medical uses of psychedelics was gaining momentum ("Data justify further research on potential of psychedelics in treating psychiatric disorders,", 2020). Increased attention to the continued social and health harms of tobacco and alcohol has highlighted the paradox of their arbitrary exclusion from the controlled substances regulatory regime and their parallel but separate regulatory and research tracks. More broadly, with increasing calls to abandon a culture of mass incarceration in favor of a "public health approach" to addiction and substance use, an opportunity to re-envision drug policy had never seem more urgent. Yet, the pace of change was painfully slow.

COVID-19: Crisis as opportunity

The COVID-19 pandemic quickly transformed life around the globe. In the United States, this included both the content and enforcement of drug policy. As calls mounted for the rapid depopulation of prisons, jails (Akiyama, Spaulding & Rich, 2020; del Pozo, 2020), and other detention settings (Irvine et al., 2020) in response to the pandemic, frontline personnel in a growing number of jurisdictions were instructed to limit drug arrests and other encounters with the public (Mock, 2020). Advocates including the Black Lives Matter movement had long urged formal drug policy reforms and shrinking the footprint of both policing and the criminal legal system based on public health, civil rights, racial justice, fiscal stewardship, and harm reduction considerations. Beyond a few notable exceptions, however, calls for change had failed to gain real traction. In the age of COVID-19, public health and occupational safety concerns began quickly reordering this landscape as a matter of necessity. It will prove difficult to measure the effects of this reordering because the pandemic is a particularly challenging research environment (Becker & Fiellin, 2020). Nonetheless, it will be critical to assess which changes are worth keeping, perhaps using the methods of legal epidemiology, before political and cultural forces yield a return to the status quo (del Pozo, Beletsky & Rich, 2020).

On the policy side, responses to the COVID-19 pandemic led to relaxed rules for treating addiction. Traveling to access medications for opioid use disorder (MOUD) could not only be burdensome but pose a public health risk. Restrictions on prescribing both buprenorphine and methadone were considerably relaxed, the former quite substantially, while telemedicine became an option for prescriber contact (Substance Abuse & Mental Health Services Administration, 2020). While some saw this as a way to reduce risk and save lives and sent patients home with unprecedented quantities of these medicines (Prudente, 2020), the longstanding fear that physicians who are seen as facilitating diversion can face censure persists.

Other countries made even more decisive steps to shift policy during the pandemic. In the context of rapid spikes in overdose deaths, the movement for full decriminalization and broader drug law reform gathered momentum in Canada. The relaxation of prescribing guidelines there went quite a bit further, invoking the tenets of the "Safe Supply" movement to vastly expand the scope of medications considered for maintenance (Bellrichard, 2020). At least at the onset of the pandemic, drug law enforcement in many U.S. jurisdictions also changed, nearly overnight. Two features of the pandemic led to a dramatic reduction in the number of people arrested for drug possession and sale. One was the need to keep jail and prison populations low, since their congregate living environments are especially conducive to the spread of disease (Blakinger & Schwartzapfl, 2020). This resulted in guidance in many jurisdictions to avoid making low-level arrests that would crowd detention facilities (Brennan Center for Justice, 2020). This concern was compounded by the inherent infection hazards that occur whenever a person is arrested and processed at a police facility, since police work by its nature is not conducive to social distancing (Elinson & Chapman, 2020). As a result, people convicted of drug crimes were released from prisons around the nation (Prison Policy Initative, 2020), and drug arrests in major cities plummeted: in Chicago they decreased by over 40% (Coyne, 2020), and in Philadelphia there was a period where hardly any were being made at all, down from hundreds a week (Palmer &, Newall). While this constitutes a shift that could alleviate mass incarceration if sustained over time, evidence suggests that significant structural changes should accompany decriminalization if we are striving for population-level improvements in health, and not simply superficial measures. In Mexico, decriminalization of drug possession in favor of treatment ultimately had little effect on interactions with the police, or reducing the risk behaviors such as syringe sharing among people who use drugs (Beletsky et al., 2016). More recently in New Zealand, what was viewed as a watershed effort to decriminalize drugs by giving police the discretion to divert people to treatment in lieu of arrest resulted in very little change in overall arrest rates for drug-related offenses (Cheng, 2020).

One of the most striking aspects of the changes in agonist prescribing and drug enforcement is that they were not made for the benefit of people with opioid use disorder *per se*, but rather to protect health care facilities and care providers from being infected and becoming vectors (del Pozo et al., 2020). Prior to this, onerous regulations surrounding treatment for OUD had little basis in science, and continued to deter health care providers from treating patients with OUD, with deadly consequences (Beetham, Saloner, Wakeman, Gaye & Barnett, 2019). Overall, these changes were marginal, unevenly implemented, and their impact difficult to evaluate.

Another significant aspect of the pandemic is that despite marginal reductions in drug-related arrests and the temporary loosening of regulations surrounding MOUDs, there is every indication that overdoses have increased throughout North America (Wan & Long, 2020). Research may begin to elucidate the circumstances that produced these outcomes, but continuities of treatment and access to services have been disrupted in several health care and public health sectors, and people's vulnerabilities have been amplified by the pandemic's effects of social isolation, increased unemployment, and lack of access to reliable, established drug supply chains (Katz, Goodnough & Sanger-Katz, 2020). So while the pandemic has forced us to reconsider our values and priorities in a way that makes the CSA seem more obsolete than ever, the pathbreaking legal and policy responses have not been part of a larger, coordinated effort to address the nation's overdose crisis.

No going back: a vision for 21st century drug policy

Despite these limitations, we cannot afford to go back to our pre-pandemic ways of thinking and acting about drugs. It is clear that COVID-19 has afforded an opportunity to parse essential and effective legal measures from the theatrics that have long dominated drug policy. But whatever positive momentum has resulted from COVID-19, sustaining it is far from guaranteed. In many jurisdictions, both policies and practices of the criminal legal system have exhibited a stubborn resistance to reform (Barberi & Taxman, 2019). These failures to adapt to a new reality have impeded pandemic response, while putting frontline staff at risk of infection. In addition, COVID-19—just like the overdose crisis and other public health challenges—sets the stage for a possible criminal legal system net-widening, rather than shrinking.

It is clear that the CSA serves as a faulty foundation for both U.S. drug policy and its global analogues. Disruption caused by the COVID-19 pandemic provides a once-in-a-century opportunity to reconsider the

legal architecture of drug policy and policing–both in the U.S. and elsewhere. Rather than returning to a fundamentally ineffective and harmful status quo, we urge a revisionary drug policy in service to life, liberty, and the pursuit of happiness (Beletsky, 2020; Gillespie, 2020).

Life

A post-COVID-19 blueprint for reform would place public safety within the framework of population health, with the goal of honoring the sanctity of life. The ostensible purpose of the nation's drug policy is to protect life by reducing the harmful consequences of substance use such as overdose and the spread of infectious diseases, but in practice it has had the opposite effect. The post-COVID-19 world provides an opportunity to dramatically recast this approach and to improve the health of PWUD through continued de-regulation of agonist MOUD treatment, eliminating X-waiver training requirements to be able to prescribe buprenorphine (Fiscella, Wakeman & Beletsky, 2019; Frank, Wakeman & Gordon, 2018), and the serious consideration of interventions that are presently unlawful but that have been proven to reduce deaths or preserve health, such as overdose prevention sites (Marshall, Milloy, Wood, Montaner & Kerr, 2011; Roth et al., 2019) and the safe supply of opioids to people with OUD (Ivsins, Boyd, Beletsky & McNeil, 2020). As another example, some jurisdictions have decided to decriminalize the possession of diverted buprenorphine as a public health intervention, in recognition of its lifesaving effects (del Pozo, Krasner & George, 2020).

Liberty

The consequences and failures of the punitive approach to regulating controlled substances are compelling reasons to take a parsimonious approach to drug enforcement and use. As a condition of justice, every citizen should be entitled to a maximized scheme of liberties provided that their exercise does not unnecessarily infringe on the liberties of others (Rawls, 1999). We have not seen a posture that approaches this outlook in any meaningful way prior to the de facto reforms brought on by the pandemic. The decreased level of drug enforcement resulting from it should be made permanent, conceptually enshrined by Harmon's (2016) position that requires the state to justify its compelling interest in effecting arrests rather than simply relying on its legal authority as a sufficient reason to make one.

In advancing liberty interests, no half-measures will do. As the experiences of New Zealand, Mexico, and elsewhere demonstrate, poorly-conceived reform results in too little street-level change. In many jurisdictions, such reforms yielded marginal declines in categories of certain drug arrests, while spurring compensatory arrests for other crimes. The decriminalization of marijuana in many U.S. states, for example, has made racial disparities in arrests and the targeting of minorities for enforcement more pronounced (American Civil Liberties Union, 2020). Decriminalization and depenalization have also failed to advance vital liberty interests in the realms of carceral reprieve and expungement; children welfare and family law; employment law; immigsration law; and many other legal domains permeated by the War on Drugs. Thus, decriminalization may be necessary, but is insufficient to transform the status quo.

Policy interventions must instead be designed to change the structural environment of drug use, including by reordering the systems and incentives that currently aggravate health risk. This structural perspective also implies the need to shrink the overall footprint of policing and other carceral institutions in favor of harm reduction, effective and respectful treatment, and social supports. These interventions should be spearheaded by people who use drugs. This would be a critical step in restoring and protecting the liberty of countless Americans.

The pursuit of happiness

One of the cornerstones of a liberal democracy is a commitment to pluralism, the idea that there are many ways to live a satisfying life, and that none of these conceptions is inherently better or more valuable than the others (Rawls, 1993). Some of them may involve substance use and other presently stigmatized behavior that generates pleasure and euphoria. Reconciling drug enforcement with pluralism and the pursuit of happiness would require taking an evidence-based approach to regulating substances based on their actual risks, while balancing them against the timeless practice of consuming drugs for their positive spiritual, mental and physical health effects. These should be considered positive outcomes and be included in the calculus.

Policies not only codify norms but help shape and perpetuate them. Perhaps the most important shortcoming of US drug policy is its failure to acknowledge the extent to which substance use stems from the need for people to recreate, and to feel pleasure, sometimes as one of the simplest and most reliable options open to them under especially difficult or stressful circumstances. Despair and isolation are conditions that are universal during the pandemic's periods of social distancing and quarantine. Prior to the pandemic, they were brought on and compounded by economic distress and structural inequalities in the determinants of health that consistently fall along the lines of class and race (Dasgupta, Beletsky & Ciccarone, 2018). These are factors that are likely to add more strain to people's lives, increasing their likelihood of substance use as either a recreational reprieve or an attempt to self-medicate: data suggest that economic recessions and rising unemployment are associated with increases in the use of illicit drugs (Nagelhout et al., 2017). The COVID-19 pandemic has ushered in not only the highest levels of unemployment in decades, but it also portends a sustained global recession (Goodman, 2020). Pre-pandemic incentives to seek solace and pleasure in substance use stand to be magnified by its exceptionally challenging and disruptive circumstances, with enduring consequences. A blueprint for drug policy reform must be operationalized in a way that signals the abandonment of an untenable “drug free” mantra, acknowledging instead the normative acceptability of certain kinds of recreational, pleasure-generating substance use, as well as the need for profound changes to the basic structures of society that make it an appealing option as people pursue happiness in the face of adversity.

Operationalizing reforms

Implementing this vision would include the revision of the legal and regulatory instruments that embody it, as well as rebuilding institutional architecture to implement policies. This would be a complex process that would go beyond the CSA, entailing a range of reforms on both the national and international level. They should include revamping the scheduling system, using risk-based principles and increased flexibility to classify substances according to empirically-documented health benefits and harms. We must also consider substantially minimizing and/or eliminating individual-level criminal penalties for drug-related crimes. Around the world, we must rapidly deregulate and liberate opioid agonist therapy, removing access barriers and encouraging decentralization in supplying these lifesaving medications.

To promote the pursuit of happiness, reforms should also include integrating alcohol, tobacco, nicotine, psychedelics, and other recreational drugs under a new consumer protection, taxation, and corporate regulatory framework intended to promote the public's interest and alleviate the effects of past oppression. Taking these reforms seriously and following them to their logical conclusions would also mean significantly restructuring regulatory institutions such as the DEA, and redistributing many of their reduced and revised functions to other agencies. Such restructuring in conjunction with scrapping a wide range of drug-related criminal provisions would help shrink the fiscal

and social footprint of drug law enforcement both in the U.S. and internationally.

Ultimately, a revisioning of the CSA and its analogues around the world should be accompanied by a congruent reformulation of the Single Convention on Narcotic Drugs (David & Rick, 2018). This would allow national and international reform efforts to move in tandem, and for the early ones to gather the momentum necessary to spur change elsewhere through an emerging international consensus. The result, in the case of the United States, would be local and state laws in alignment with federal ones, all of them centered around significantly reduced criminal penalties for drug possession, use, and sale, and these regimes aligning with a revised, more humane international standard for the regulation of psychoactive substances.

Conclusion

Prior to the COVID-19 pandemic, drug policy reform had progressed slowly despite vigorous efforts to bring about change. In response to the failures and atrocities of the War on Drugs, the drug policy reform movement has mounted a decades-long challenge to the CSA and its prohibitionist progeny. But the push for drug decriminalization and legalization advanced by this movement glosses over the reality that most of the substances regulated by the CSA are already legal. In other words, an abolitionist approach to CSA reform does not capture the ways in which the Act empowers the regulation of lawful pharmaceuticals, as well as its silence on the regulation of alcohol and nicotine products. The ongoing overdose crisis—and the emerging COVID-19 pandemic with its isolating and disorienting effects on PWUD—bring the urgency for a holistic vision of drug policy reform into sharp relief, and the dire circumstances the U.S. finds itself in both in terms of public health and public policy may hopefully give reform efforts much-needed momentum.

Declaration of Competing Interests

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