Persistent Criminalization and Structural Racism in US Drug Policy: The Case of Overdose Good Samaritan Laws

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The US overdose crisis continues to worsen and is disproportionately harming Black and Hispanic/Latino people. Although the "War on Drugs" continues to shape drug policy—at the disproportionate expense of Black and Hispanic/Latino people—states have taken some steps to reduce War on Drugs–related harms and adopt a public health–centered approach. However, the rhetoric regarding these changes has, in many cases, outstripped reality.

Using overdose Good Samaritan Laws (GSLs) as a case study, we argue that public health–oriented policy changes made in some states are undercut by the broader enduring environment of a structurally racist drug criminalization agenda that continues to permeate and constrict most attempts at change.

Drawing from our collective experiences in public health research and practice, we describe 3 key barriers to GSL effectiveness: the narrow parameters within which they apply, the fact that they are subject to police discretion, and the passage of competing laws that further criminalize people who use illicit drugs. All reveal a persisting climate of drug criminalization that may reduce policy effectiveness and explain why current reforms may be destined for failure and further disadvantage Black and Hispanic/Latino people who use drugs. (*Am J Public Health*. 2023;113(S1):S43–S48. https://doi.org/10.2105/AJPH.2022.307037)

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The overdose crisis has resulted in over 1 000 000 deaths in the United States since 1999.[1] There were nearly 108 000 overdose fatalities in 2021, more than in any year prior.[1] Overdose death rates are currently increasing faster among Black people than any other group, and Hispanic/Latino people are experiencing particularly sharp increases in mortality from some prevalent drug combinations such as opioids and stimulants.[2]

For decades, the primary policy approach to drug use in the United States has been to arrest, prosecute, and incarcerate as many people as possible for as long as possible.[3] This approach has been ineffective in reducing drug use[4,5] and is associated with increased drug-related harms, including nonfatal and fatal overdoses, injection-related endocarditis, and HIV and hepatitis C incidence.[6–8] Strategies like mandatory minimum sentencing and disparate sentencing for crack versus powder cocaine have unjustly and disproportionately penalized Black and Hispanic/Latino people, making this set of policies a hallmark example of structural racism in the United States.

In response to the first wave of the current overdose crisis, which was characterized by record fatalities among White people and driven primarily by prescription opioids,[9] advocates urged policymakers to adopt a more public health–centered approach to reduce drug-related harms. Their successes include expanding access to the overdose reversal agent naloxone,[10] increasing availability of evidence-based treatment of substance use disorder, and enacting overdose Good Samaritan Laws (GSLs).[11] Overdose GSLs aim to encourage overdose

witnesses to seek help by providing limited legal protections from certain criminal offenses, typically including possession of controlled substances and drug paraphernalia. As of June 2021, 47 states and Washington, DC had enacted a GSL.[12] However, the nature and scope of GSL protections vary widely across states, and research on their impacts has produced mixed results.[13–16] Although 2 studies found reductions in fatal opioid overdose following GSL enactment, neither association was statistically significant at the $P < .05$ level[13,14]; a third study found that only GSLs that provide protections from arrest are significantly associated with reductions in fatal opioid overdose.[15]

Using GSLs as a case study, we argue that these public health–oriented policy changes adopted to counter the ongoing overdose crisis are undercut by persistent structural racism and criminalization of people who use drugs, which work against that goal. We highlight 3 overarching barriers to GSL effectiveness: (1) provision of very limited protections, (2) implementation being subject to police discretion, and (3) presence of competing laws that further criminalize people who use illicit drugs. Each is a manifestation of persistent structural racism in drug policy and illustrates why GSLs and related legal changes may fail to reduce drug-related harms, particularly among Black and Hispanic/Latino Americans.

LEGAL PROTECTIONS AS THE EXCEPTION, NOT THE RULE

GSLs were developed to address fear of drug-related criminal consequences, a fundamental barrier to help-seeking among individuals witnessing an overdose.[17] They provide a mechanism for help-seekers to avoid those consequences and are often considered an example of prioritizing harm reduction over criminalizing people who use drugs. However, instead of decriminalizing drug possession and use outright—the most straightforward way to ensure that fear of criminalization does not deter help-seeking—these laws merely provide exceptions through which select individuals can find relief from select criminal–legal consequences. The following examples demonstrate how the limited nature of these exceptions ultimately maintains the status quo of structurally racist drug criminalization.

Lack of Protections Under Community Supervision

As of June 2021, 22 of the 48 jurisdictions with active GSLs did not provide protections for violation of probation or parole.[12] This means that individuals under community supervision may face incarceration if they call for help at an overdose, because being in the presence of illicit drugs or being arrested (even if not formally charged) for any reason can constitute a violation. Given the high rate of prior criminal–legal system involvement among people who use drugs,[18] this disproportionately affects many whom GSLs are ostensibly intended to benefit. This is a particularly glaring example of enduring structural racism within GSLs, as Black and Hispanic/Latino people, independent of their drug use, are more likely to have prior criminal–legal interactions than White people.[3] Failing to provide protection from probation or parole violations is therefore likely to amplify racial inequities in criminal–legal involvement, overdose, and broader adverse health outcomes related to substance use and incarceration.

Lack of Protections From Arrest

Only 27 states and Washington, DC provide protection from arrest for the offenses covered by the GSL.[12] In the remaining 20 states, help-seekers (and, typically, the overdose victims) can still be arrested and detained for covered offenses, even though the GSL protects them from subsequent charge or prosecution.[12] A national survey of patrol officers revealed that more than one third of those who had responded to an overdose in the prior 6 months reported making an arrest on scene.[19] Preserving the ability to arrest and detain help-seeking individuals is unlikely to sufficiently dismantle fear of police as a barrier to medical help-seeking and has numerous downstream risks, even if charges are not pursued.[20,21] Detainment, even for a short time, can have potentially life-altering consequences for employment (e.g., missed shifts) and dependent care responsibilities, and can subject people dependent on opioids to forced withdrawal. Moreover, it increases the potential for stigma, harassment, and violence associated with police interactions and detainment,[20,21] which disproportionately affects Black and Hispanic/Latino Americans, illustrating another structurally racist characteristic of many GSLs.[3] Given the adverse consequences of arrest itself, it is unsurprising that a recent study found evidence of reductions in fatal overdose only in states where GSLs specifically included arrest protections.[15]

More broadly, there is considerable confusion among the public about which protections GSLs provide.[22,23] Colloquially, the term "arrest" is often used interchangeably to mean arrest, charge, and prosecution. This may

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contribute to distrust that law enforcement officials are abiding by the laws, which studies have suggested is a considerable barrier to their effectiveness.[24] Individuals who believe that the law protects from arrest and are subsequently arrested when seeking help for an overdose may interpret this as law enforcement failing to comply with the law, even if they are ultimately released without charge.

This confusion may be further exacerbated by insufficient or inaccurate information regarding these laws. Many state Web sites do not provide information about the state's GSL protections, and those that do may mischaracterize them. For example, a Fact Sheet produced by the New York Department of Health erroneously states that, under certain circumstances, "The New York State 911 Good Samaritan Law allows people to call 911 without fear of *arrest*" [emphasis added] for possession of drug paraphernalia or "under 8 ounces" of a controlled substance.[25] However, the law only provides protection from charge and prosecution for those crimes; a related law provides protection from arrest for possession of controlled substances, but of much smaller amounts. This difference is not merely semantic: it reflects the distinction between being forcibly detained by law enforcement or not.

In some states, such as Iowa, South Dakota, and Tennessee, GSLs only offer protection a single time,[26] subjecting the bystander and the police to a bizarre decision tree that entails knowledge of the overdose history of those at the scene. The lack of clarity, consistency, and comprehensiveness of GSLs poses a clear obstacle to ensuring that police and bystanders understand these laws' protections. It further complicates help-seeking decisions during a critical window of time and does so in a way that may disproportionately reduce GSL effectiveness among Black and Hispanic/Latino Americans.

RELIANCE ON POLICE DISCRETION AND TRUST IN POLICING

Another barrier to GSL effectiveness is the fact that equitable implementation depends on police discretion. Police discretion is a critical determinant of whether policy-level reforms translate into the changes in street-level practice necessary for improvement in downstream health outcomes.[27] Individuals who are structurally disadvantaged under the status quo are most vulnerable to this discretion.[28] Even where more sweeping reforms are adopted, as with cannabis liberalization, evidence demonstrates ongoing structural racism illustrated by persistent or amplified racial disparities in arrest.[29] In the case of even the most comprehensive current GSLs, police retain latitude in whether and how to physically interact with individuals at an overdose scene, including decisions about interrogation, searches, confiscation of drugs or paraphernalia, and whether to charge individuals with adjacent low-level offenses (often referred to as crimes of poverty, such as loitering).[27] GSL effectiveness may therefore rely on how entrenched a culture of racist policing is,[3] and on the community's perceptions of whether that culture has shifted. Despite reforms, recent data show that drug-related arrests have not decreased,[30] and concerns about police conduct and arrest have been shown to persist in settings for years after GSL enactment,[31] particularly among people of color.[22]

COMPETING POLICIES REINFORCE DRUG CRIMINALIZATION

An additional barrier to GSL effectiveness is the persistence of laws firmly rooted in drug criminalization, as well as the introduction of new ones. Even if comprehensive GSLs that provide immunity from a much broader range of crimes than current laws are successfully enacted, myriad legal consequences may await individuals seeking help.[24] Drug-induced homicide laws, which authorize the prosecution of drug-related deaths as criminal killings, offer a clear illustration of this contradictory environment. These laws assign criminal liability for a drug-related death to the individual who supplies the drug. In many cases, this person is a family member or friend who sold a small amount of drug to someone they knew, or shared or used the drug with the deceased. As of January 2019, 23 states and Washington, DC had a drug-induced homicide law (all but 2 also have a GSL).[32] Drug-induced homicide laws may make individuals present at the scene of an overdose more reluctant to call 911.[33] In a recent study, 87% of people who used drugs in Maryland were familiar with the state's drug-induced homicide law, compared with just 53% aware of the GSL.[22] Furthermore, hearing of someone else being charged under the state's drug-induced homicide law was strongly associated with greater perceived vulnerability of overdose-related arrest; these concerns were disproportionately reported by non-White respondents.[22]

The increased popularity of drug-induced homicide laws, as well as the recent proliferation of laws that create harsher penalties for the sale or possession of fentanyl and other synthetic

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opioids, signal a doubling-down on failed Drug War rhetoric and actions.[4] It further sends a stark message to potential help-seekers about the government's priorities regarding prevention of fatal overdose. In states with both a GSL and a drug-induced homicide law, individuals in possession of drugs who seek help at an overdose scene may be protected from the legal consequences of drug possession—but if the overdose becomes fatal, they may find themselves facing felony charges ranging from "delivery or distribution resulting in death" to "murder in the first degree."[32] Although GSLs are intended to motivate help-seeking, concomitant drug-induced homicide laws—along with laws that prohibit trespassing, loitering, possession with intent to distribute, and numerous other offenses of which people who use illicit drugs are frequently accused—do the opposite. Here again, structural racism is at play: early data suggest drug-induced homicide charges are being deployed at disproportionately high rates among Black and Hispanic/Latino individuals.[3,34,35]

CONCLUSIONS

Amid the current overdose crisis, rhetoric has proclaimed that "we can't arrest our way out of the problem."[36] However, this rhetoric has largely failed to translate into reality. Instead, the persistence of a broader, structurally racist environment of criminalization that is maintained by policymakers and law enforcement continues to threaten health and racial equity outcomes. The case of GSLs clearly illustrates this dichotomy. The combination of laws designed to provide protections only in limited circumstances, actions and decisions that erode trust in the policies and the officials enforcing them, and contradictory laws that further reinforce drug criminalization, signal continued structural racism that undercuts public health policies and their potential impacts on racial justice moving forward.

Analogous barriers undermine other harm reduction policies; for example, efforts to expand access to naloxone (which is often in injectable form) and safe injection equipment among people who use illicit drugs are compromised by criminalization of syringe possession in many states.[37] This status quo of structurally racist criminalization and enforcement will continue to disproportionately limit the effectiveness of public health–oriented drug policies for Black and Hispanic/Latino people who use illicit drugs, and entrench racial inequities in corresponding health and social outcomes.

A number of steps would allow for more robust impacts of GSLs amid escalating overdose mortality. First, improvement can and should be made to GSLs to ensure that protections are the rule rather than the exception. This includes comprehensive protections from arrest for a broad range of crimes and violations of probation or parole, without limitation on the number of times the immunity is provided.[15] Second, interventions are needed to establish a harm reduction– and public health–oriented environment more broadly. Several North American settings have abandoned routine police attendance to drug overdose calls in favor of a well-resourced behavioral health response system.[38] This may help bypass issues of distrust in law enforcement, although empirical evidence from these settings is needed. In addition, the recent adoption of overdose prevention centers in New York City and Rhode Island may serve as an example of structural interventions to promote the safety of people at risk for overdose in health-promoting, rather than criminalizing, environments.[39] However, efforts need to be taken to ensure equitable access to these sites by Black and Hispanic/Latino people, and research is necessary to determine whether additional steps, such as prohibiting police from targeting participants, are needed. Finally, a more direct and comprehensive approach to reducing drug-related harm that focuses on the health, rights, and dignity of people who use drugs is needed. Rather than narrow provisions of immunity, decriminalizing or legalizing illicit substances could more directly remove drug use from the purview of the criminal legal system, offering an opportunity to usher it into the public health arena. Internationally, countries are increasingly decriminalizing drug possession, actions endorsed by public health and racial justice advocates.[40–42] Although there is limited experience of this strategy domestically, in 2021, Oregon's Ballot Measure 110 went into effect, decriminalizing personal possession of drugs in the state while increasing access to health assessments and substance use disorder treatment and recovery services. Evaluations of this change, informed by and with the direct involvement of people who use drugs, will be critical to understanding its potential for effectively reducing drug harms in a racially equitable way and its feasibility for adoption in other states.[43]

Progressive policies rooted in a true harm reduction framework have produced considerable enthusiasm and are the product of decades of organizing efforts to shift societal views and approaches to drug use. However, even these well-meaning policies will continue to perpetuate structural

racism and fail to mitigate overdose deaths if the broader policy environment does not abandon the criminalization of drug use in earnest. Until then, Black and Hispanic/Latino communities will continue to be disproportionately targeted by the War on Drugs. AJPH

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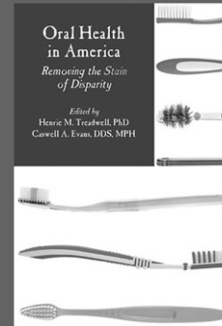

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Edited by Henrie M. Treadwell, PhD and Caswell A. Evans, DDS, MPH

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