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Critical Public Health Law and Policy Issues in 2021: The Year in Review

1:00 – 2:30 p.m. ET | December 15, 2021

Co-sponsored by:

The Network for Public Health Law

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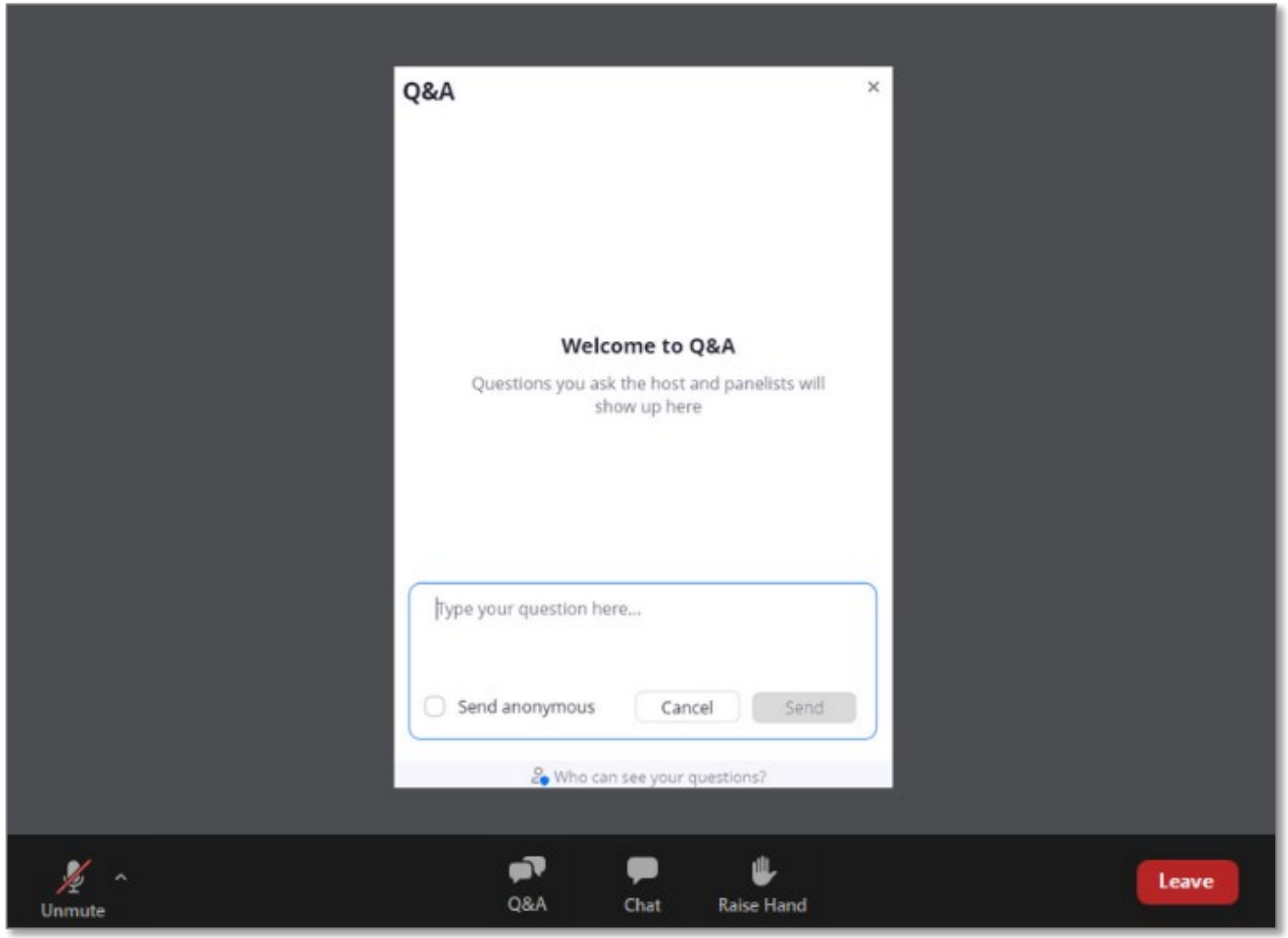
Zoom Q&A

1. Open the Q&A panel
2. Type your question
3. Click “Send”



Moderator

Brianne Schell, J.D., M.A., Staff Attorney, Network for Public Health Law—Eastern Region Office

Presenter

Dawn Hunter, J.D., M.P.H., Region Director, Network for Public Health Law—Southeastern Region Office

Presenter

Corey Davis, J.D., M.S.P.H., Deputy Director, Network for Public Health Law—Southeastern Region Office

Presenter

Jill Krueger, J.D., Region Director, Network for Public Health Law—Northern Region Office

Presenter

Brooke Torton, J.D., Senior Staff Attorney, Network for Public Health Law—Eastern Region Office

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Racism as a Public Health Issue – Developments and Trends

Presented by Dawn Hunter

RACISM IS A PUBLIC HEALTH CRISIS

Twitter: @alexbhill

More than 230 declarations issued across the U.S.

» **April 2020 → 9**

» **November 2020 → 207**

» **28 so far in 2021**

2022 – all about implementation

Network Racial Equity Assessment*

83.4% agree or strongly agree that addressing racial equity is a **high priority** of their organization.

68.6% agree or strongly agree that their organization **takes meaningful action** to address racial equity.

42% agree or strongly agree that their organization **allocates sufficient resources** for racial equity initiatives.

*Preliminary Findings

Network Racial Equity Assessment*

38.5% of respondents said the workforce **reflects the demographics of the community** served

55.2% of respondents said their organization has **an internal structure** to address racial equity

31.2% said their organization **allocates sufficient resources** for engagement and outreach in communities of color

*Preliminary Findings

What barriers to addressing racial equity exist within your organization?

Network for Public Health Law, preliminary data, Fall 2021

Using racial equity tools "has directly influenced changes to internal governmental policies and practices, which ultimately needs to happen before sustainable changes in law and policies can be adopted."

"Governmental Use of Racial Equity Tools to Address Systemic Racism and the Social Determinants of Health," Institute for Healing Justice & Equity and the Center for Health Law Studies, November 2021.

Governmental Use of Racial Equity Tools to Address Systemic Racism and the Social Determinants of Health

Figure 8. Cycle of Racial Equity Tool Use Model, 2021

Note. This model was produced by Charysse Gibson, Crystal N. Lewis, and Ruqaiijah Yearby in 2021, illustrating the cycle of racial equity tool use in government organizations to address systemic racism and the social determinants of health, which includes stages of strategic planning, implementation, change, evaluation, workplace change, and law and policy change. Copyright 2021 by Charysse Gibson, Crystal N. Lewis, & Ruqaiijah Yearby.

Salud America! #SaludTues Tweetchat – December 7, 2021

- Drivers of health inequities
- What it means to declare racism a public health crisis
- Examples of local policies and practices to promote racial healing and advance health equity
- What makes a strong commitment
- Resources and tools
- Overcoming resistance

Salud America! Action Pack

Where can your community or organization start?

Network for Public Health Law and 3 others liked

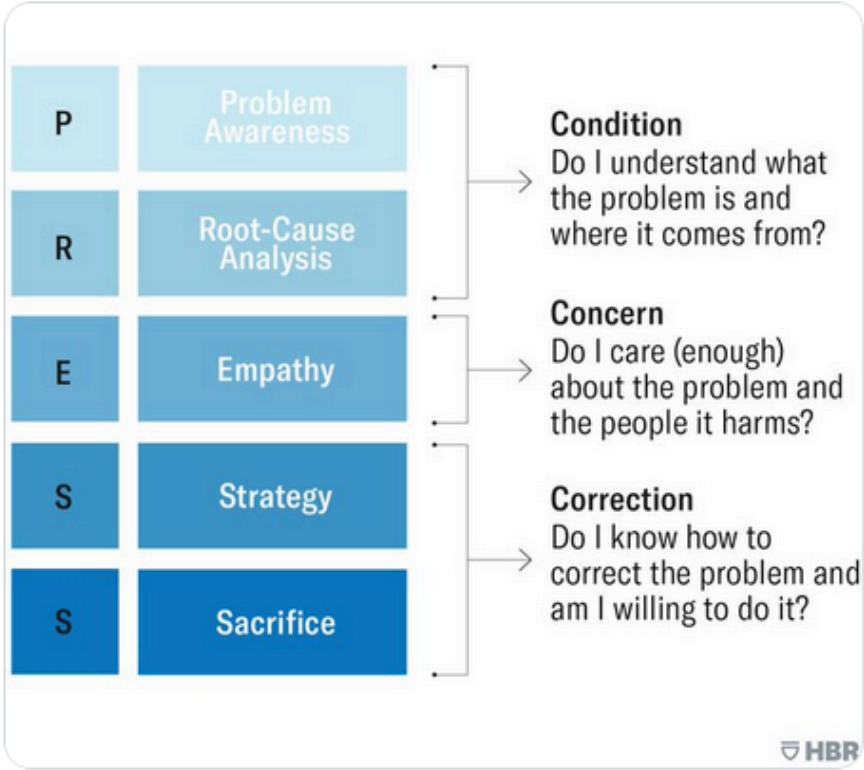
PublicHealthMaps @PublicHealthMap · 1h

A7: Address the impact of #racism by:

1 Building consensus that it is a problem

2 Increase empathy by sharing accounts of the negative impact that racism has on people's lives

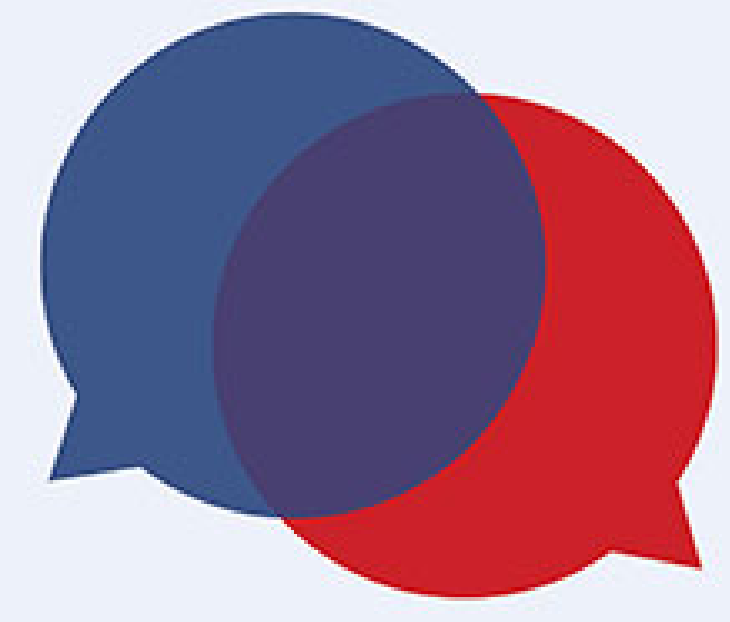
3 Take actions to address personal attitudes, informal cultural norms & formal policies #SaludTues



APHA and 9 others

6 10

Healing Through Policy: Creating Pathways to Racial Justice



APHA
deBeaumont Foundation
National Collaborative for Health Equity

Five Policy and Practice Briefs:

- **Narrative Change**
- **Racial Healing and Relationship Building**
- **Separation**
- **Law**
- **Economy**

Future plans to provide technical assistance on implementation

You Issued a Declaration – Now What?

- Normalize conversations about race and health.
- Develop a racial equity action plan with clear goals and timelines.
- Establish the organizational infrastructure & build capacity to engage advance health and racial equity.
- Engage communities in the policymaking process and invest in community-led priorities.
- Systematize the use of racial equity tools in your organization.
- Establish equitable standards for the collection and use of data.
- Fund specific programs or initiatives and engage in cross-sector collaborations to leverage funding.

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Operationalizing

Establishing policies and procedures to support community leaders, seek community expertise, and incorporate community priorities in planning and budget decisions

Establishing an enterprise-wide equity framework

Building workforce capacity through training and professional development in health and racial equity, anti-racism, trauma-informed and culturally-appropriate services, etc.

Reviewing, revising, and enacting laws and policies that address specific health and racial equity issues

Directing agencies to collect, analyze, and publish racial equity data

Establish or support existing commissions, offices, working groups, and positions dedicated to advancing health and racial equity

Requiring legislative racial equity impact assessments

Specific interventions to address the social determinants of health

Aligning with Other Efforts

- State-level COVID-19 Health Equity Task Forces
- White House Health Equity Task Force
- Bipartisan Policy Commission, Public Health Forward: Modernizing the U.S. Public Health System
- National Network of Public Health Institutes, Challenges and Opportunities for Strengthening the US Public Health Infrastructure

> 76: The Federal Government should evaluate the impact of the many structural and economic policy changes that were made during the pandemic, including those involving housing, criminal justice, and Medicaid.
>
> ~ White House Health Equity Task Force Recommendations

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Questions?

Dawn Hunter

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Twitter @dawnmariehunter

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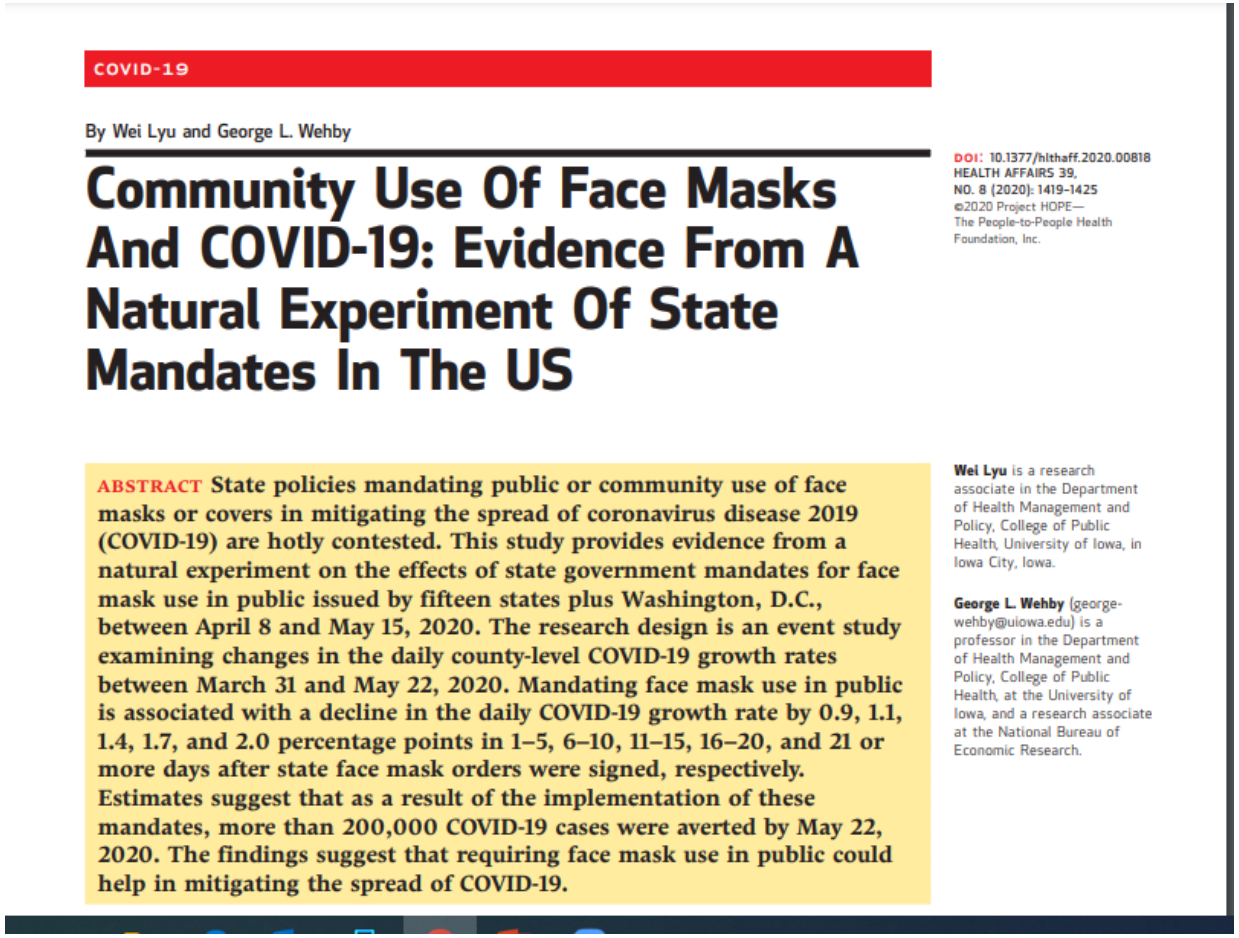
2021 Year in Review: Legislative Threats to Public Health Authority

Presented by Jill Krueger

Effectiveness of Laws to Implement Community Mitigation and Address Economic Impact



COVID-19

By Wei Lyu and George L. Wehby

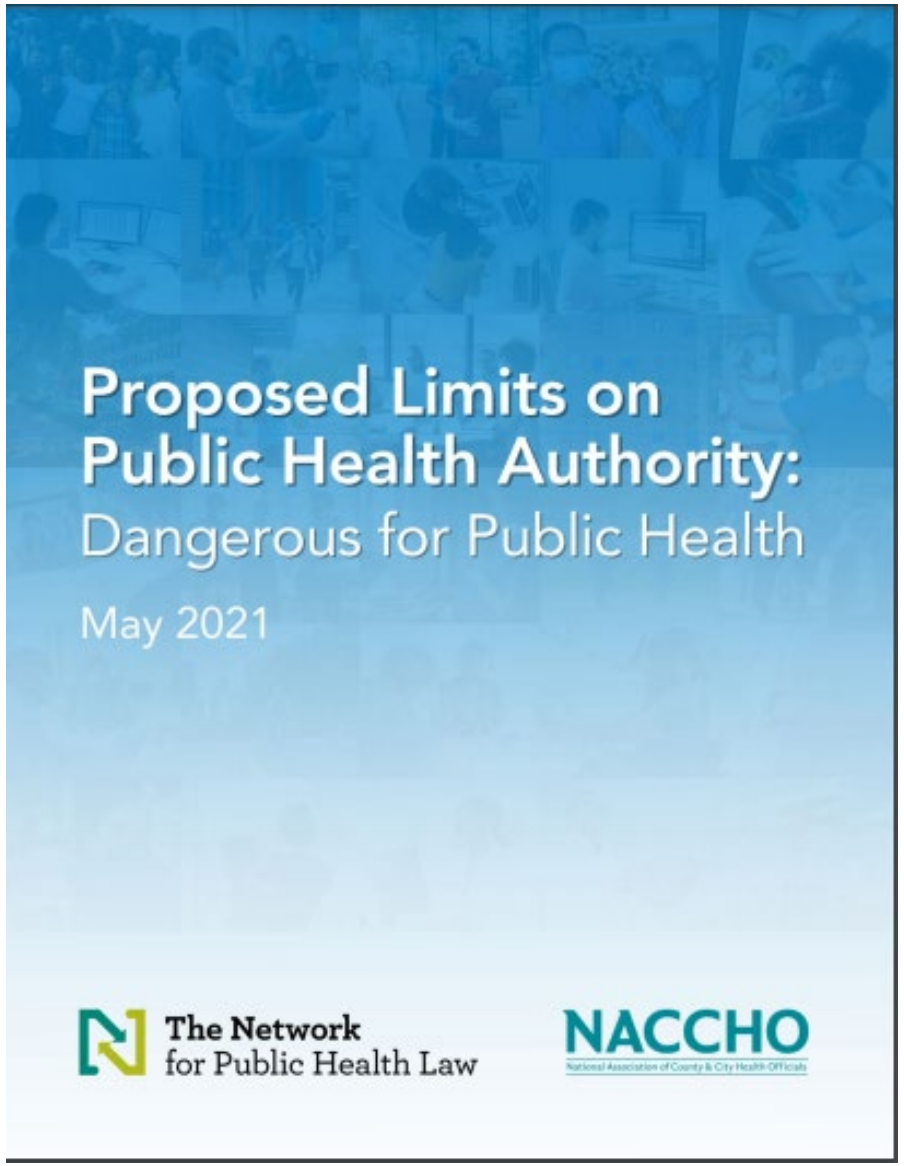
Community Use Of Face Masks And COVID-19: Evidence From A Natural Experiment Of State Mandates In The US

DOI: 10.1377/hlthaff.2020.00818
HEALTH AFFAIRS 39,
NO. 8 (2020): 1419–1425

ABSTRACT State policies mandating public or community use of face masks or covers in mitigating the spread of coronavirus disease 2019 (COVID-19) are hotly contested. This study provides evidence from a natural experiment on the effects of state government mandates for face mask use in public issued by fifteen states plus Washington, D.C., between April 8 and May 15, 2020. The research design is an event study examining changes in the daily county-level COVID-19 growth rates between March 31 and May 22, 2020. Mandating face mask use in public is associated with a decline in the daily COVID-19 growth rate by 0.9, 1.1, 1.4, 1.7, and 2.0 percentage points in 1–5, 6–10, 11–15, 16–20, and 21 or more days after state face mask orders were signed, respectively. Estimates suggest that as a result of the implementation of these mandates, more than 200,000 COVID-19 cases were averted by May 22, 2020. The findings suggest that requiring face mask use in public could help in mitigating the spread of COVID-19.

Wei Lyu is a research associate in the Department of Health Management and Policy, College of Public Health, University of Iowa, in Iowa City, Iowa.

George L. Wehby (george-wehby@uiowa.edu) is a professor in the Department of Health Management and Policy, College of Public Health, at the University of Iowa, and a research associate at the National Bureau of Economic Research.



Proposed Limits on Public Health Authority: Dangerous for Public Health, A Report by the Network for Public Health Law and the National Association of County and City Health Officials (May, 2021). Available at https://www.networkforphl.org/resources/proposed-limits-on-public-health-authority-dangerous-for-public-health/

A Sample of Laws Analyzed

- **Florida SB 2006**

  Local emergency orders expire automatically at 7 days unless local governing body votes to extend up to total 42 days

- **Indiana SB 5**

  No local emergency disease prevention measures more stringent than state-wide measures from governor

- **Montana HB 121**

  Policy-making authority and authority to appoint local health officer transferred from board of health to local governing board

Legislative Trends in the First Half of 2021

Shift of General or Emergency Public Health Authority

- Local Public Health Agency to Another Local Entity
- Local Public Health Agency to State Public Health Agency or State Legislature
- State Public Health Agency to Governor or State Legislature
- State Executive to State Legislature
- Prohibition of Certain Types of State or Local Public Health Orders

Conclusions from Limits on PH Authority Report

- Legislation to block reasonable public health measures poses an immediate threat to life and health.
- Legislation to stop expert public health agencies from leading the response to health emergencies creates unforeseen, serious risks to life and health.
- Legislation that strips authority from public health agencies and the executive branch and transfers it to the Legislature violates the constitutional separation of powers and undermines effective government response.
- If adopted, these bills would make it harder to advance health equity during a pandemic that has disproportionately sickened and killed Black, Hispanic and Latino, and Indigenous Americans.

All four living former Idaho Governors support Gov. Little's veto of emergency powers bills

Friday April 16, 2021 Boise, Idaho – Governor Brad Little announced today he will veto House Bill 135 and Senate Bill 1136, the "emergency powers bills" that threaten the safety of Idahoans and the Idaho economy during future emergencies.

Former Governors C.L. "Butch" Otter, Jim Risch, Dirk Kempthorne, and Phil Batt all provided statements of support for Governor Little's vetoes.

Governor Little will veto the bills because they are overly restrictive and handcuff the state's ability to take timely and necessary action to help Idahoans in future emergencies. The bills unnecessarily politicize the state's emergency response efforts and jeopardize critical funding for local governments. The bills violate the separation of powers doctrine and are unconstitutional.

https://gov.idaho.gov/pressrelease/all-four-living-former-idaho-governors-support-gov-littles-veto-of-emergency-powers-bills/

Strategies for a Changing Legal Environment

Reduced Isolation and Quarantine Authority	• Work with local school districts to explain and inform exercise of exclusion authority
State law restricting school district mask requirements	• School district adopts masks as part of the dress code
State law limits public health authority, retains public health duties	• Create tools to support dialogue between local public health and local government bodies (Montana Public Health Institute)
Local government or school district ineligible for re-grant of federal funds under state law	• Federal government makes grant directly to local government or school district
Limits on local public health authority	• City or county issues report on COVID response, highlighting successes and challenges, including legal challenges (for example, Nashville)

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Laws to Strengthen Public Health Authority and Effectiveness

Funding, Resources, and TA for Shared Services	Task Forces and Commissions	Increased Transparency and Accountability
• Massachusetts • Oklahoma • Washington	• New Mexico • Indiana	• Colorado • Florida

For additional information, see https://www.networkforphl.org/wp-content/uploads/2021/06/2021-Strengthening-Public-Health-Authority-to-Contain-and-Prevent-Communicable-Disease.pdf

Emerging Federal Response

- **Use of conditional spending requirements (e.g. CMS rule re healthcare employer vaccination requirements);**
- **OSHA rule re large employer vaccination requirements**
- **Americans with Disabilities Act**
- **Federal Preemption (PREP Act)**
- Hodge JG, Piatt JL, Barraza L, *Legal interventions to counter COVID-19 denialism,* Journal of Law, Medicine & Ethics (Forthcoming, currently available on SSRN)

And the Backlash

- **Legal challenges to federal vaccine requirements imposed by OSHA and CMS**
- **States enacting laws to provide access to unemployment benefits for persons who lost their jobs for failure or refusal to get vaccinated**
- **Government entities declining American Rescue Plan Act funds**
- **State governments imposing conditions upon receipt of American Rescue Plan Act funds by local governments which may be inconsistent with other federal requirements, such as CMS vaccination requirements**

Trends in the Second Half of 2021

- **Regular and Special Legislative Sessions**

  Example—Tennessee HB 9076 and COVID Omnibus (SB 9014)
- **Mask Requirements**
- **Blocking Mask Requirements**
- **Vaccine and Testing Requirements (especially by Health Care Providers, Employers, and Schools)**
- **Efforts to Block Vaccine and Testing Requirements**
- **Unemployment Benefits for those who Fail or Refuse to Obtain Required Vaccines**
- **More Laws to Strengthen Public Health**
- **More Commissions—i.e. Indiana Executive Order**
- **Continued Litigation about All of the Above**

Coordinating Efforts in 2022

- Collaborative of Public Health Law Partners, Public Health Associations, and Advocacy Organizations
- Track and Monitor Judicial Opinions and Cases
- Coordinate Amicus Briefs and Conduct Legal Research
- Track, Monitor and Analyze Legislative Efforts
- Provide Legal Technical Assistance
- Develop Resources for Public Health Lawyers, Practitioners and Advocates
- Organize Convenings on Public Health Authority to Inform and Coordinate Efforts
- Develop Strategic, Coordinated Communications

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Summit on Public Health Authority: Strengthening Protections for Community Health

- April 25-27, 2022 in Baltimore, Maryland
- Topics to include:
  - Preemption
  - Legal Challenges to Public Health Measures
  - Legislative Efforts to Limit Public Health Ability to Protect the Public's Health
  - Threats to, and Protections for, Public Health Officials
  - Public Health Messaging
  - Building Legal Capacity in Public Health Agencies
  - Understanding the De-Regulatory Landscape

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Cell 612-532-2813

Network resources on public health authority,
https://www.networkforphl.org/resources/topics/public-health-authority/
And additional resources on public health authority,
https://www.networkforphl.org/resources/links-to-additional-public-health-authority-resources/

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Public Health Official Safety: Existing State Protections

Presented by Brooke Torton

Overview

- **Legal Landscape: Criminal Offenses Against Public Health Officials**
  - ***Threats and Interfering with Government Operations/Employees***
    - 4 Protective Statutes
      - Summaries
      - Model Statutes
  - ***Doxing***
  - ***Technology and Harassment***
- **Utilizing State Statutes**
- **Discussion**

Legal Landscape: *Threats and Interfering with Government Operations/Employees*

1. **Obstructing Government Operations/Public Administration**
2. **Threatening, Harassing, or Intimidating Public Officials/Public servants**
3. **Disturbing, Disrupting, or Interfering with Public Officials/Public Servants and/or the Conduct of Public Business/Discharge of Duties**
4. **Obstructing Person Enforcing Health Law/ Health Officer in Performance of Duty**

Legal Landscape: *Threats and Interfering with Government Operations/Employees*

35 states and D.C. have a criminal statute:

- **Alabama, Arizona, Arkansas, California, Colorado, D.C., Delaware, Hawaii, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Dakota, Texas, Utah, Washington, West Virginia**
- **Of these, all but 2 (Louisiana and Oklahoma) apply to state *and* local officials**

15 do not:

- **Alaska, Connecticut, Florida, Georgia, Illinois, Maryland, Massachusetts, North Carolina, Rhode Island, South Carolina, Tennessee, Vermont, Virginia, Wisconsin, Wyoming**

Threats & Interfering with Government Operations/Employees: Terminology

"Government" means any state, county, municipality, or other political subdivision, branch, department, agency, or subdivision of any of the foregoing, and any corporation or other entity established by law to carry out any governmental function.

"Governmental function" means any activity which a public servant is legally authorized to undertake on behalf of a government.

"Public servant" or **"public official"** means any officer or employee of government, whether elected or appointed, performing a government function.

Obstructing Government Operations/Public Administration: Summary

Summary: A person must obstruct, impair, impede, or hinder a public official/public servant's official duties by means of intimidation, physical force, or attempted, threatened, or actual violence

Criminal Actions: Intimidation, physical force, or attempted, threatened, or actual violence

Criminal Impact: Obstructed, impaired, impeded, or hindered a public official/public servant/public employee's official duties

States: Alabama, Arizona, Arkansas, Colorado, Hawaii, Iowa, Kentucky, Maine, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, North Dakota, Oregon, Pennsylvania, South Dakota, Utah (20)

Obstructing Government Operations/Public Administration: Statute

A person commits the crime of obstructing governmental operations if, by means of intimidation, obstacle, violence or threatening to use violence or physical force, or by any other independently unlawful act, he/she:

(1) Intentionally obstructs, impairs or hinders the administration of law or other governmental function; or

(2) Intentionally prevents a public servant/public official from performing a governmental function.

Obstructing Government Operations/Public Administration: Enforcement

Incarceration:

30 days-2 years (most common penalty- 1 year)

Fines:

$50-$6,000 (most common penalty- $1,000)

Threatening, Harassing, or Intimidating Public Officials/Public servants: Summary

Summary: A person threatens, harasses, or intimidates a public official/public servant/public employee because of his/her employment OR with the purpose of influencing his/her position

Criminal Actions: Threatening, harassing, or intimidating

Criminal Impact: Need not influence a public official/ public servant decision

States: California, D.C., Delaware, Louisiana, Minnesota, Indiana, Washington, Ohio, Idaho

Threatening, Harassing, or Intimidating Public Officials/Public servants: Statute

A person is guilty of a misdemeanor when he/she knowingly and willingly harasses, intimidates, threatens the life of or serious bodily harm to, a public official/public servant because of his/her employment and/or with the purpose of influencing his/her performance of a government function.

Threatening, Harassing, or Intimidating Public Officials/Public Servants: Enforcement

Incarceration:

6 months- 10 years (most common penalty- 1 year)

Fines:

$1,000-$10,000 (most common penalty- $5,000)

Disturbing, Disrupting, or Interfering with Public Officials/Public Servants and/or the Conduct of Public Business/Discharge of Duties: Summary

Summary: A person interferes, disturbs, or disrupts government administration at or in a government owned building or property

Criminal Actions and Impact: Restricting freedom of movement to/from government owned premises, impeding performance of duties or proceedings, refusing or failing to leave premises

States: Kansas, New Mexico, Oklahoma

Disturbing, Disrupting, or Interfering with Public Officials/Public Servants and/or the Conduct of Public Business/Discharge of Duties: Statute

Disturbance, disruption, or interference with public officials/public servants or the conduct of public business is:

(1) Conduct at or in any public building owned, operated or controlled by the government, so as to knowingly deny to any public official/public servant or any invitee on such premises, the lawful rights to enter, use, or leave the facilities;

(2) knowingly impeding any public official/public servant in performance of a government function through the use of abduction, coercion, threats, intimidation, violence or threat of violence, or physical force; or

(3) knowingly refusing or failing to leave any such public building upon being requested to do so by a lawful custodian or designee, if the person is committing, threatens to commit or incites others to commit any act which would disrupt, impair, interfere with or obstruct the lawful mission, processes, procedures or functions of the property, building or facility.

Disturbing, Disrupting, or Interfering with Public Officials/Public Servants and/or the Conduct of Public Business/Discharge of Duties: Enforcement

Incarceration:

6 months- 1 year

Fines:

$500-$2,500

Obstructing Person Enforcing Health Law/ Health Officer in Performance of Duty: Summary

Summary: A person obstructs or interferes with a health officer/person enforcing health laws/measures.

Criminal Actions: Targeted at health officer/person charged with enforcement of health laws/measures

Criminal Impact: Obstructed or interfered with the person enforcing the health laws/measures

States: Michigan, New York, Texas, West Virginia

Obstructing Person Enforcing Health Law/ Health Officer in Performance of Duty: Statute

A person shall not willfully oppose, obstruct, interrupt, disrupt, impede, or otherwise interfere with a health department representative/designee, health officer, or other person charged with the enforcement of a health law in the performance of that person's legal duty.

Obstructing Person Enforcing Health Law/ Health Officer in Performance of Duty: Enforcement

Incarceration:

90 days- 1 year

Fines:

$200-$2,000

Doxing: Statutory Summary

Electronically publishing personal information about another to reveal their identity with the intent to harass, alarm, frighten, abuse, or intimidate that person.

Legal Landscape: Doxing

Only 13 states have a doxing statute:

- **Arizona, California, Colorado, Connecticut, Florida, Kentucky, Minnesota, Missouri, Nevada, Oklahoma, Oregon, Utah, Virginia**

- **Of these, all but one (Minnesota) apply to public health officials. In Minnesota, the statute applies exclusively to law enforcement officials.**
- **In Kentucky, the statute permits a civil cause of action in addition to criminal penalties.**
- **In Nevada and Oregon, the statute only permits a civil cause of action.**

Doxing: Terminology

"All Persons, Peace Officers, Public Officials, Law Enforcement, Protected Persons" means……

"Personal Identifying Information" means information that would allow the identified person to be located, contacted or harassed including, but not limited to: home address, work address, phone number, email address, directions to home address, state-issued identification, mother's maiden name, date of birth, biometric, health, or medical data, photographs of home or vehicle.

"Electronic Communication" means a social media post, wire line, cable, wireless or cellular telephone call, hyperlink, text message, instant message or electronic mail.

Doxing: Enforcement

Incarceration:

15 days- 1 year (most common penalty 1 year)

Fines:

$500-$2,500 (most common penalty $1,000)

Legal Landscape: Technology and Harassment

Telephone Misuse: Using a telephone to harass, torment, embarrass, or annoy an individual (without legal/legitimate purpose).

Electronic Devices Misuse: Using an electronic communication device to harass, torment, embarrass, or annoy an individual (without legal/legitimate purpose).

Harassment: A course of conduct which annoys, threatens, intimidates, alarms, or puts a person in fear of their safety.

Stalking: A course of conduct directed at a person involving surveillance with no legitimate purpose, and which alarms, annoys, intimidates, or harasses that person.

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Fact Sheet Sample

State Fact Sheet

Statute Text and Citation

Relevant Definitions

Penalties

Summary

Template Response to Violators

Template Response

Maine Criminal Code, Title 17-A, § 751**, prohibits [insert crime—for example: interference with a public official by force, violence, or intimidation.]* [**insert here a description of the conduct with a date--for example: On August 28, 2021, you sent an email to Dr. X, the Secretary of Health for Maine, threatening to come to her home and show your opposition to the State's mask requirement.**] ***This may constitute a violation of §751. If convicted, you face a fine of up to $2,000 and imprisonment up to 1 year.

If the conduct is extreme, add: ***We have notified the [insert proper law enforcement agency] of this conduct.***

If the conduct does not rise to the level of reporting, add: ***Should you continue with this conduct, we may report the matter to [insert law enforcement agency].***

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Drug-Related Harm

Presented by Corey Davis

12 THE NEW YORK TIMES, SUNDAY, FEBRUARY 8, 1914.

NEGRO COCAINE "FIENDS" ARE A NEW SOUTHERN MENACE

Murder and Insanity Increasing Among Lower Class Blacks Because They Have Taken to "Sniffing" Since Deprived of Whisky by Prohibition.

By Edward Huntington Williams, M. D.

FOR some years there have been rumors about the increase in drug taking in the South—vague, but always insistent rumors that the addiction to such drugs as morphine and cocaine was becoming a veritable curse to the colored races in certain regions. Some of these reports of alleged conditions read like the wildest flights of a sensational

stagger the man. And a second shot that pierced the arm and entered the

eventually, and was so thoroughly "doped" that he squandered his

so Georgia, North Carolina, South Carolina, Mississippi, Tennessee, and West Virginia passed laws intended to abolish the saloon and keep whisky and the negro separated.

These laws do not, and were not intended to, prevent the white man or the well-to-do negro getting his accustomed beverages through legitimate channels. They obliged him to forego the pleasures of leaning against a bar and "taking his drink perpen-

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PROCEEDINGS

OF THE

AMERICAN

PHARMACEUTICAL ASSOCIATION

AT THE

FIFTIETH ANNUAL MEETING

HELD AT

PHILADELPHIA, PA., SEPTEMBER, 1902.

First, this Section and this Association should direct their best efforts towards the absolute suppression of the incoming of opium for smoking. If the Chinaman cannot get along without his "dope," we can get along without him. The great increase in the quantity of this special kind of opium proves one of two things, or both: Either our exclusion laws are being violated, or the smoking of opium is largely practised by others than

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INTERNATIONAL OPIUM COMMISSION

Held at Shanghai, February 1 to February 26, 1909.

REPORT ON THE INTERNATIONAL OPIUM COMMISSION AND ON THE OPIUM PROBLEM AS SEEN WITHIN THE UNITED STATES AND ITS POSSESSIONS.

By HAMILTON WRIGHT.

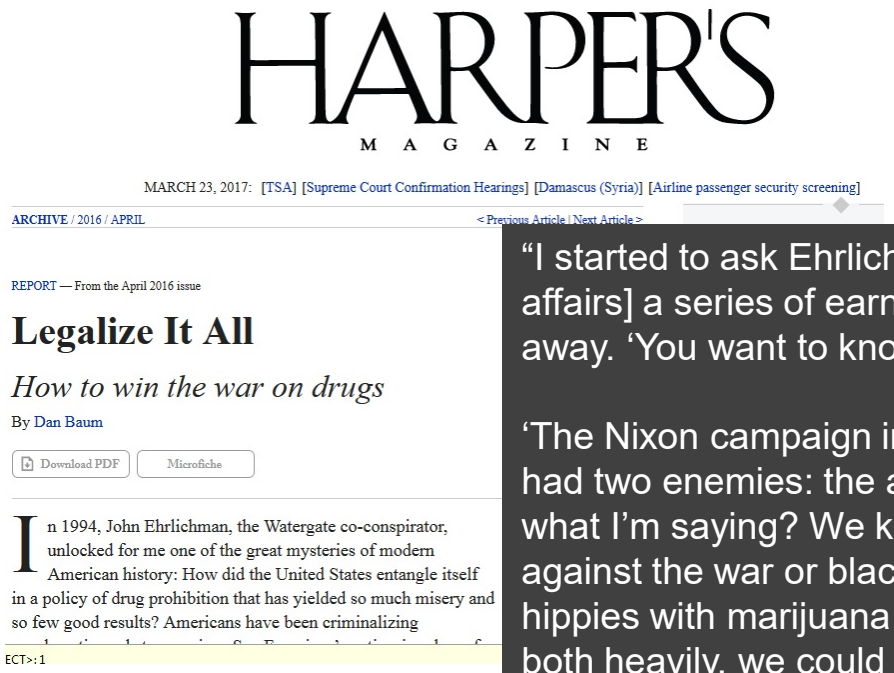
AMERICAN DELEGATES TO THE INTERNATIONAL OPIUM COMMISSION:

CHARLES H. BRENT. HAMILTON WRIGHT. CHARLES D. TENNEY.

have been partially successful, but they can not be made really effective until there is interstate control of the traffic. It has been authoritatively stated that cocaine is often the direct incentive to the crime of rape by the negroes of the South and other sections of the country.

Apart from the outlaw population, the use of cocaine threatens

The modern "War on Drugs"



HARPER'S MAGAZINE

MARCH 23, 2017: [TSA] [Supreme Court Confirmation Hearings] [Damascus (Syria)] [Airline passenger security screening]

ARCHIVE / 2016 / APRIL

< Previous Article | Next Article >

REPORT — From the April 2016 issue

Legalize It All

How to win the war on drugs

By Dan Baum

Download PDF | Microfiche

In 1994, John Ehrlichman, the Watergate co-conspirator, unlocked for me one of the great mysteries of modern American history: How did the United States entangle itself in a policy of drug prohibition that has yielded so much misery and so few good results? Americans have been criminalizing

ECT>:1

"I started to ask Ehrlichman [President Nixon's assistant for domestic affairs] a series of earnest, wonky questions that he impatiently waved away. 'You want to know what this was really all about?' he asked ….'

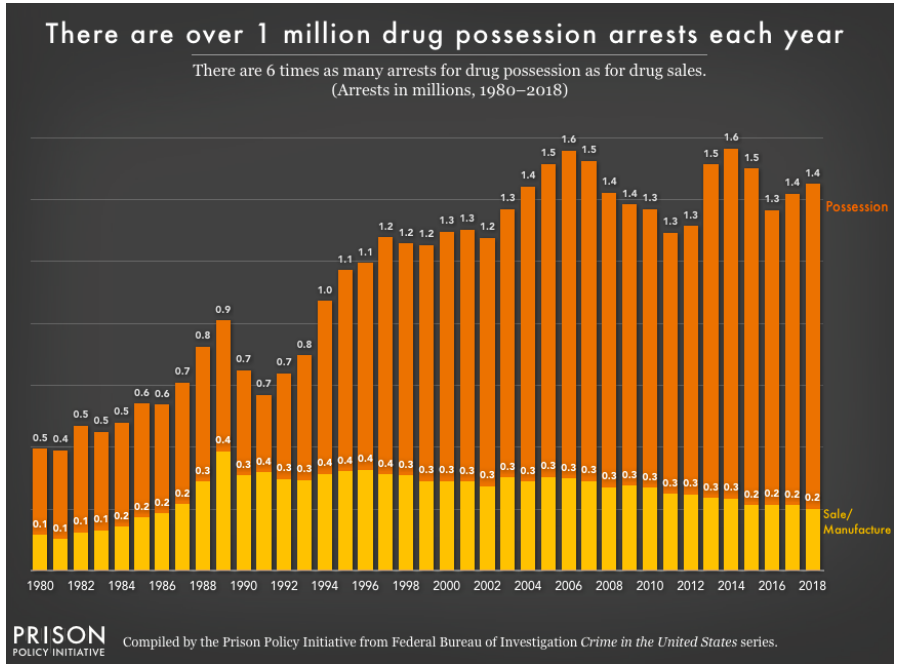
'The Nixon campaign in 1968, and the Nixon White House after that, had two enemies: the antiwar left and black people. You understand what I'm saying? We knew we couldn't make it illegal to be either against the war or black, but by getting the public to associate the hippies with marijuana and blacks with heroin, and then criminalizing both heavily, we could disrupt those communities. We could arrest their leaders, raid their homes, break up their meetings, and vilify them night after night on the evening news. **Did we know we were lying about the drugs? Of course we did**.'

Is it working?

It depends on what you mean by "working" – and for whom

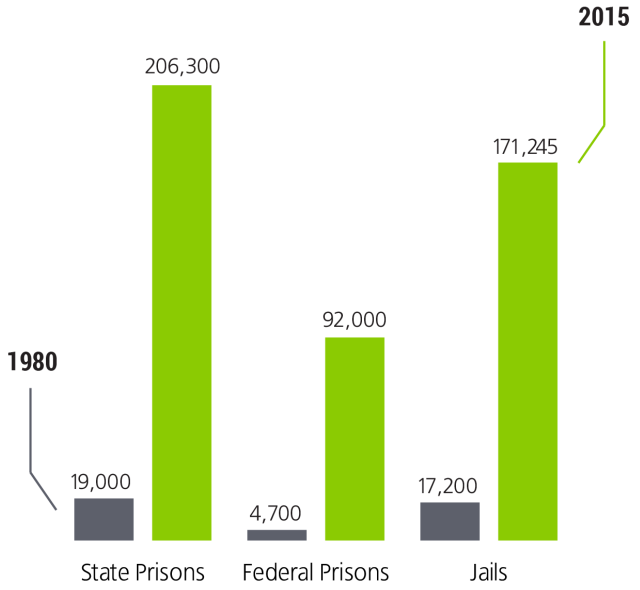
- 20-25% of everyone locked up in the US is in on a drug crime
- Massive inequities by race and class
- Huge opportunity costs on numerous margins

Drug use has not gone down, and the sometimes kinder-seeming rhetoric of the past five years has not resulted in fewer drug arrests

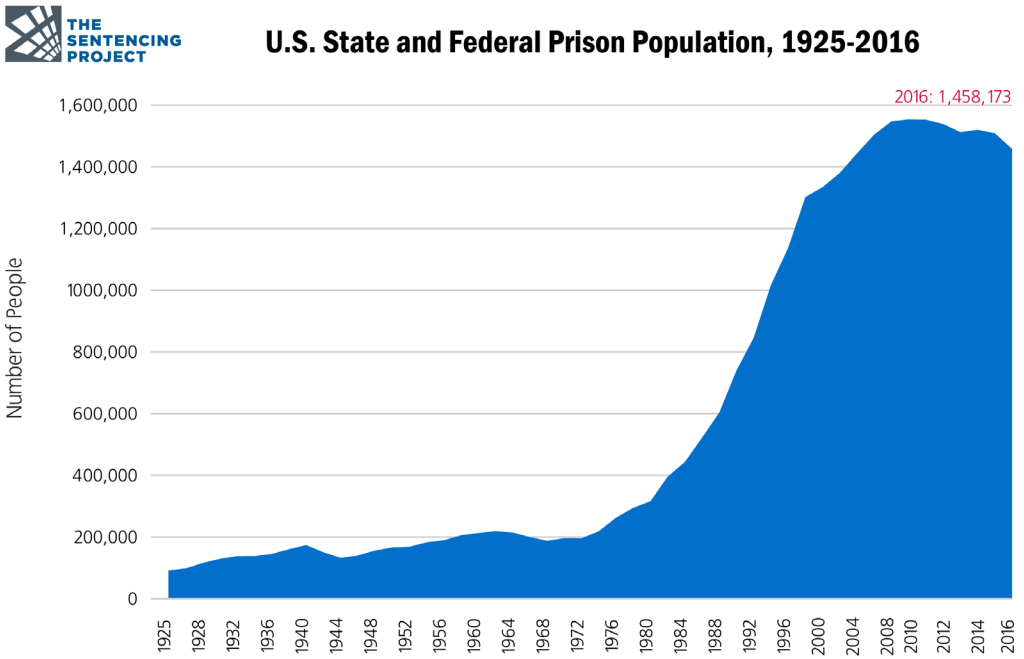


Is it working?

Number of People in Prisons and Jails for Drug Offenses, 1980 and 2015



Sources: Carson, E.A. and Anderson, E. (2016). *Prisoners in 2015*. Washington, DC:
James, D.J. (2004). *Profile of Jail Inmates, 2002*. Washington, DC: Bureau of Justic
(2007). *A 25-Year Quagmire: The War on Drugs and its Impact on American Society*. W
Project; Minton, T.D. and Zeng, Z. (2016). Jail Inmates in 2015. Washington, DC: B



Is it working?

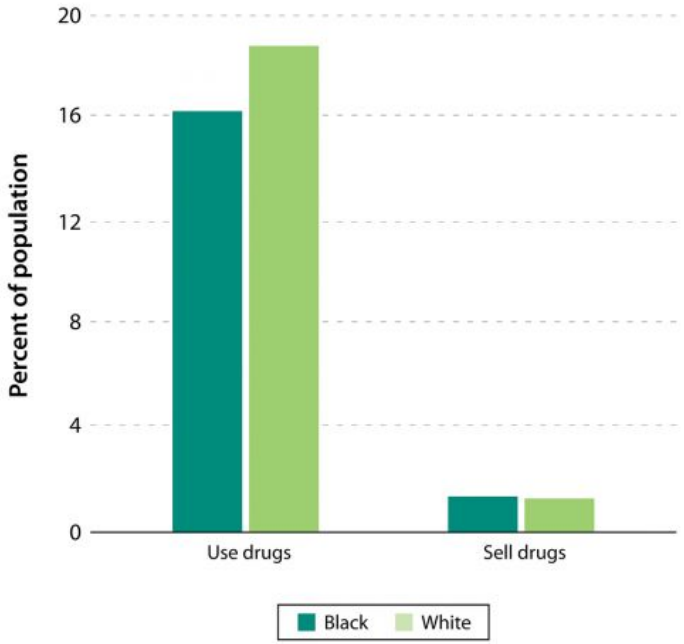
FIGURE 6A.

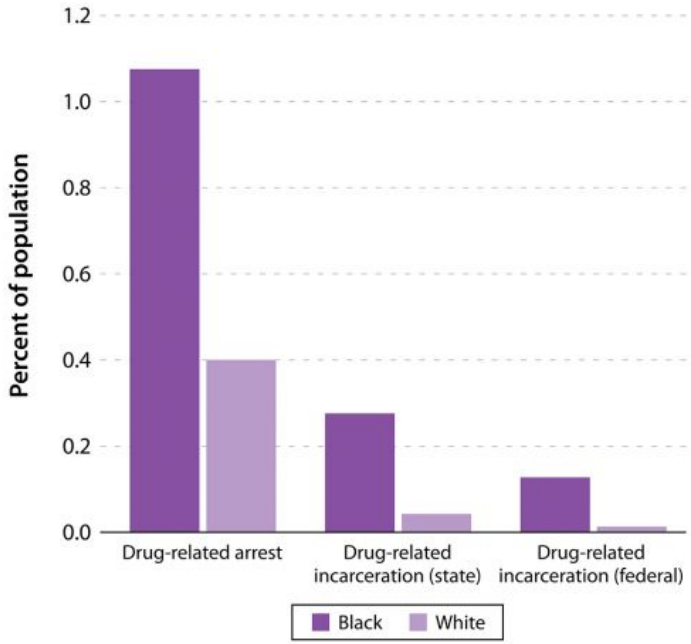
Rates of Drug Use and Sales, by Race

FIGURE 6B.

Rates of Drug-Related Criminal Justice Measures, by Race

At the state level, blacks are about 6.5 times as likely as whites to be incarcerated for drug-related crimes.





Source: BLS n.d.c; Carson 2015; Census Bureau n.d.; FBI 2015; authors' calculations.

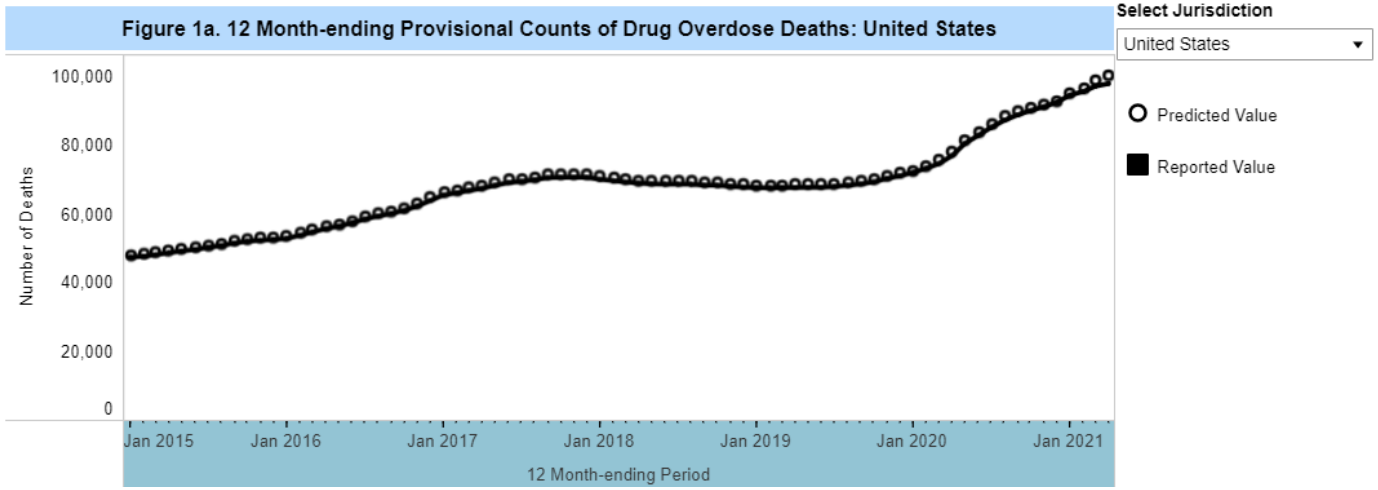
THE HAMILTON PROJECT
BROOKINGS

Is it working?

Overdose deaths now at highest rate ever – over 100,000 people in the US in the last year

12 Month-ending Provisional Number of Drug Overdose Deaths

Based on data available for analysis on: 11/7/2021



Dual epidemics magnify disparities

» People with OUD are at a significantly increased risk of COVID-19, and COVID-19 patients w/OUD have significantly worse outcomes than those without

-This risk is more pronounced in non-white people

Risk for COVID-19 Infection, Hospitalization, and Death By Race/Ethnicity

Updated Sept. 9, 2021 Print

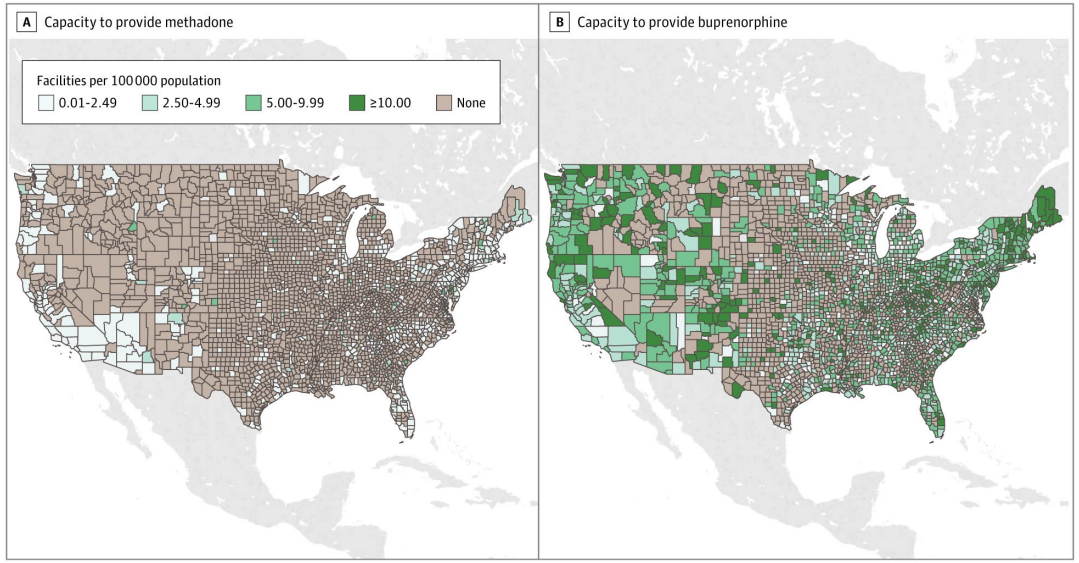
Rate ratios compared to White, Non-Hispanic persons	American Indian or Alaska Native, Non-Hispanic persons	Asian, Non-Hispanic persons	Black or African American, Non-Hispanic persons	Hispanic or Latino persons
Cases[1]	1.7x	0.7x	1.1x	1.9x
Hospitalization[2]	3.5x	1.0x	2.8x	2.8x
Death[3]	2.4x	1.0x	2.0x	2.3x

The Role of Law and Policy

- The federal government has made some changes, particularly to increase access to treatment
- But they steadfastly refuse to challenge the primacy of profit over people (as in moving naloxone OTC) or criminalization over public health
- States have also changed policy in a number of ways – some good, some not so good
- Let's talk through a few quickly

Positive federal government changes

- Feds have increased access to methadone and buprenorphine for the duration of the COVID-19 emergency (and beyond, for methadone)
- Have also (finally!) released rules that permit some methadone clinics (OTPs) to operate mobile sites



But many barriers persist

- **Buprenorphine**
  - Most providers need to obtain a federal "waiver" to prescribe buprenorphine for OUD to >30 patients
  - Caps on number of patients waivered providers can treat
  - Ryan Haight Act generally requires an initial in-person consultation before issuing controlled substance prescription, including for the treatment of OUD
    - ~25 million people lack broadband access – concentrated among low income people, people of color, and people in rural areas

- **Methadone**
  - Only federally certified Opioid Treatment Programs (OTPs) can dispense methadone for OAT
  - Only patients w/ certain characteristics are eligible
  - Prospective patients must have an initial in-person visit
  - Initial doses are limited
  - Periodic urinalysis is required
  - Patients required to come to the OTP daily initially; take-homes per federal schedule, not provider expertise or patient characteristics

Example: Paraphernalia laws

- Injection drug use is NOT a risk factor for HIV, hepatitis C, and other bloodborne disease
- Lack of access to new syringes is the risk factor
- Synthetic opioid-related overdoses increased more than 12-fold from 2010 to 2018 – mostly related to fentanyls
- Fentanyl is increasingly prevalent in illicit stimulants in some areas as well

- However, due to paraphernalia laws, in many states the legal status of drug checking is unclear, and in most syringe access is highly constrained

This is really low hanging fruit!

- People who use drugs are less likely to utilize syringe services programs and more likely to engage in risky drug use behavior if they are fearful of police and prosecution (Cloud et al., 2018; Kerr et al., 2005; Burris et al., 2004; Cooper et al., 2005, Beletsky et al., 2014).

- Most state paraphernalia laws are based on a model law developed by the DEA in the late 1970's
- These laws define nearly every object used with illegal drugs to be "drug paraphernalia" and prohibit the possession and distribution of that paraphernalia
- Penalties for simple possession range from nothing to a $50 civil fine in NM to 5 years in ND and 20 years in AR

MODEL DRUG PARAPHERNALIA ACT

ARTICLE I

(Definitions)

SECTION (insert designation of definitional section) of the Controlled Substances Act of this State is amended by adding the following after paragraph (insert designation of last definition in section):

"( ) The term 'Drug Paraphernalia' means all equipment, products and materials of any kind which are used, intended for use, or designed for use, in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, concealing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance in violation of this Act (meaning the Controlled Substances Act of this State). It includes, but is not limited to:

(1) Kits used, intended for use, or designed for use in planting, propagating, cultivating, growing or harvesting of any species or plant which is a controlled substance or from which a controlled substance can be derived;

(2) Kits used, intended for use, or designed for use in manufacturing, compounding, converting, producing, processing, or preparing controlled substances:

(3) Isomerization devices used, intended for use, or designed for use in increasing the potency of any species of plant which is a controlled substance;

(4) Testing equipment used, intended for use, or designed for use in identifying, or in analyzing the strength, effectiveness or purity of controlled substances;

This can be changed!

- If the goal is to waste money, decrease health, and kill some people who use drugs, the status quo is working well
- ..but if the goal is to reduce expenditures, preventable death, and disability, it's pretty crummy

- Federal government has commissioned a "model syringe services program act" – which is better than most existing syringe access laws, but still assumes that paraphernalia should be illegal
- Has not repudiated the 1979 model law or even suggested that states repeal their paraphernalia laws

How do we get there?

Flip the paradigm from *discouraging* to *encouraging* syringe access

OK, but how do we do that?

- **Repeal paraphernalia laws**
- **Forbid municipalities from interfering w/ syringe access**
- **Remove restrictions on pharmacy sales**
- **Encourage and fund SSPs**

Is paraphernalia decriminalization a pipe dream?

No - it's the reality in a number of states

- **Alaska has no paraphernalia laws at all**
- **Michigan, Massachusetts, Nevada, Oregon, South Carolina, Vermont don't criminalize the possession or free delivery of syringes**
- **DC fully decriminalized paraphernalia possession last year, and permits CBOs to deliver it for personal use**
- **Many states have carved out drug checking equipment (and federal government has clarified that some federal funds can be used to purchase FTS)**

Why decriminalize paraphernalia?

Criminalization serves no criminal-legal purpose that can't be achieved through other means

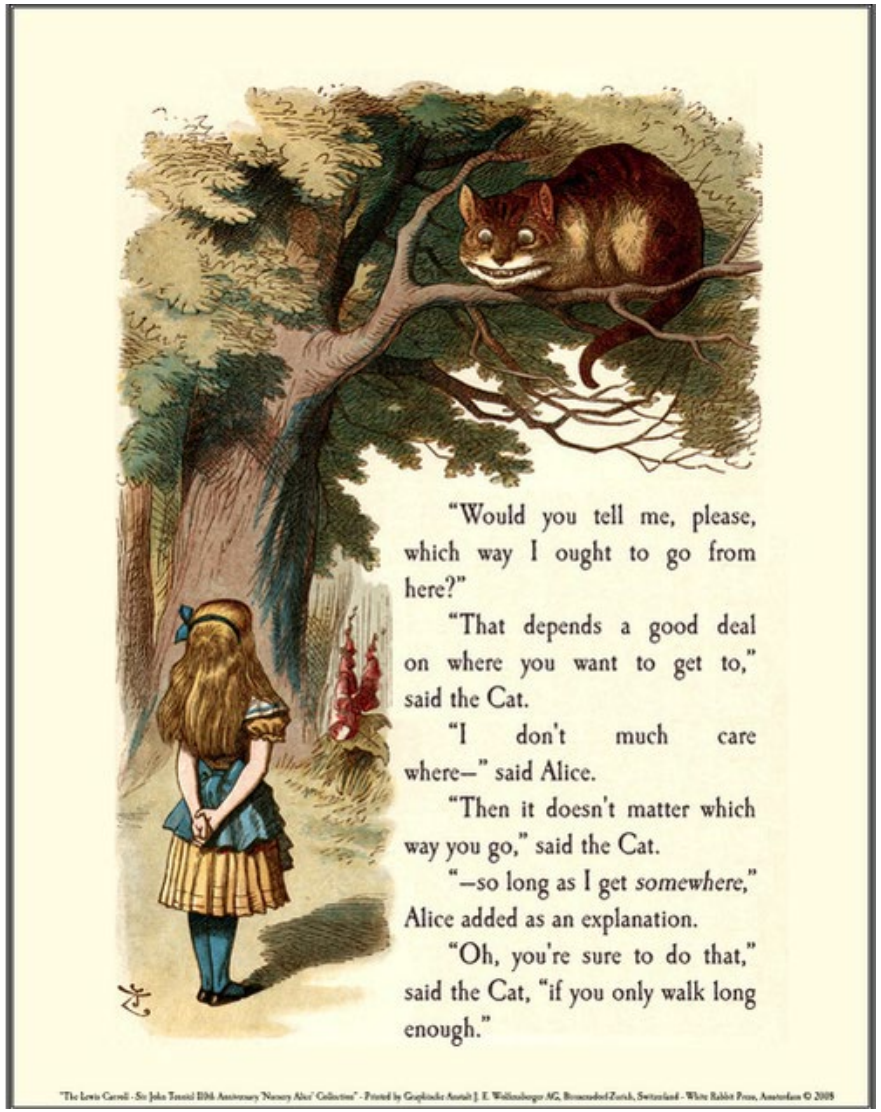
» If it's important to arrest people for having drugs (protip: this is also bad) you can still do that

Criminalization increases risks to people who inject drugs and everyone else in the community, including LEOs

Criminalization costs money

Laws that cost money and make people less healthy are bad

Alice


"Would you tell me, please, which way I ought to go from here?"
"That depends a good deal on where you want to get to," said the Cat.
"I don't much care where—" said Alice.
"Then it doesn't matter which way you go," said the Cat.
"—so long as I get *somewhere*," Alice added as an explanation.
"Oh, you're sure to do that," said the Cat, "if you only walk long enough."

So.. Where do we want to go?

- We can choose to double-down on the status quo, passing drug-induced homicide laws, increasing fentanyl penalties, and so on
- We can choose to make incremental changes that, while beneficial, are clearly insufficient to address the crisis
- Or, we can recognize that criminalizing (some) people who (use) some drugs is a failed policy, and decide to change it

- It really is a choice.

Final thoughts

- The overdose epidemic is a public health emergency
- It requires an epidemic-appropriate, person-centered, equity-forward public health response
- It also requires attention to root causes of misuse and addiction

- If a law isn't designed to address one or more of those things, it's probably not going to achieve it
- Until we decide that reduction of drug-related harm is the goal, and work towards it, things are unlikely to get better
- And likely to get worse

The Network for Public Health Law
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Questions?

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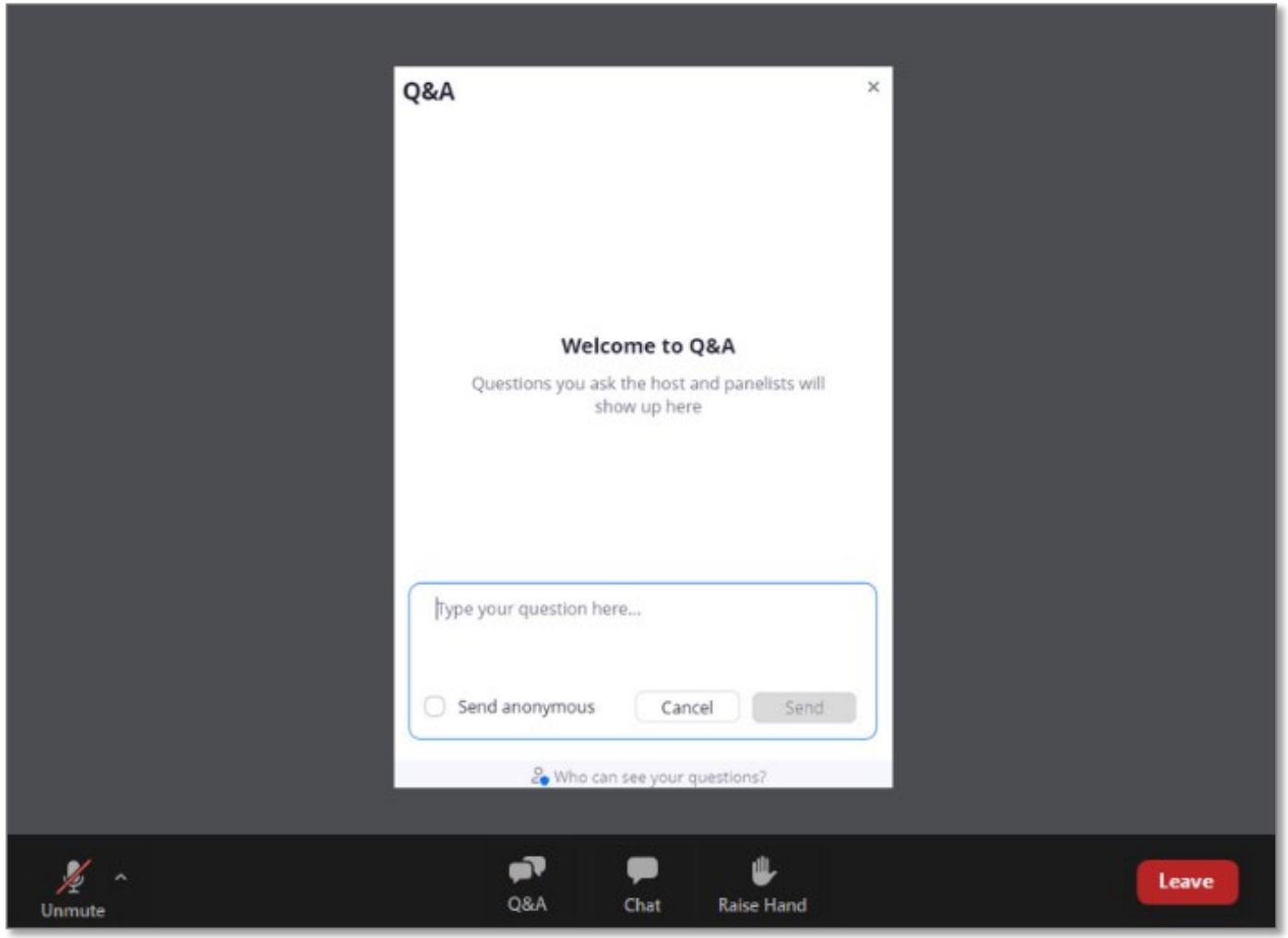
Zoom Q&A

1. Open the Q&A panel
2. Type your question
3. Click “Send”



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2022 Public Health Law Summit:
Strengthening Protections for Community Health
April 25 – 27 | Baltimore, MD | networkforphl.org/summit

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