

# DEPENALIZING AND DECRIMINALIZING DRUG POSSESSION IN THE US:

## EMERGING MODELS & RECOMMENDATIONS FOR POLICY DESIGN AND IMPLEMENTATION

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# EXECUTIVE SUMMARY

Amid calls to address substance use as a public health issue, jurisdictions nationwide are rethinking the paradigm of criminalization for possession of drugs other than cannabis. While decriminalization of all drugs through official legislation (*de jure*) has only been enacted in Oregon, many localities are leveraging prosecutorial discretion to *de facto* decriminalize simple drug possession. However, the different policy provisions and implementation experiences of *de facto* strategies have not yet been systematically captured. Through key informant interviews (N=22), we describe and contrast emerging models of *de facto* drug decriminalization (specifically, the use of prosecutorial discretion to depenalize and/or decriminalize the possession of drugs other than cannabis) in 14 jurisdictions nationally. Systematic thematic analysis revealed four distinct implementation models of *de facto* drug decriminalization: expanded diversion, substance-specific declination, case-by-case declination, and unconditional declination. Challenges and opportunities for implementation of *de facto* decriminalization included data availability and quality, addressing past and non-drug charges, and stakeholder and public engagement. Key recommendations include tailoring policies to the local context, seeking multisectoral collaboration early in implementation, establishing research and evaluation partnerships, and explicitly adopting measures to improve outcomes for racial/ethnic minority and low-income communities disproportionately affected by drug enforcement. The use of these strategies can help reduce exposure to and disparities in the carceral system, even in the absence of formal legislation.

# BACKGROUND

## **The United States remains in the midst of an escalating overdose crisis**

with nearly 107,000 overdose deaths in 2021(1). Exposure to the criminal legal system, from police contact to incarceration, has been shown to amplify the risk of overdose and other drug-related harms (2-5).

Moreover, laws criminalizing drug possession and use are disproportionately enforced in low-income and racial/ethnic minority communities, driving disparities in policing harassment, incarceration, and socio-economic outcomes such as employment and housing access.

## **To combat this crisis, jurisdictions across the US are decriminalizing drug possession.**

In 2020, Oregon voters endorsed a ballot measure decriminalizing non-commercial drug possession of any drugs below defined thresholds (8). While this is the only example of legislative or *de jure* decriminalization of all drugs in the United States to date, several jurisdictions have implemented *de facto* measures, using prosecutorial discretionary action (“declination”) to decline to pursue criminal penalties for drug possession. The use of the *de facto* approach expanded during the COVID-19 pandemic as a means for jurisdictions to limit disease transmission in jails and prisons and mitigate system-wide backlogs on processing new offenses (9). *De facto* decriminalization approaches may also allow jurisdictions to concentrate resources on more serious offenses, reduce jail populations, and work towards achieving racial justice objectives.

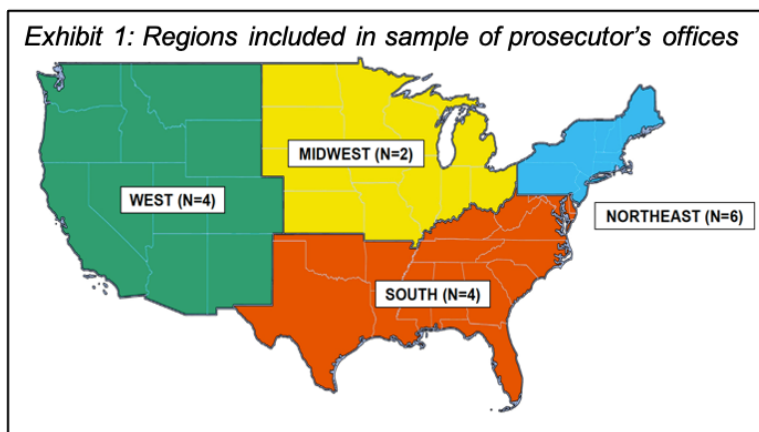
## **There is little information about how emerging *de facto* decriminalization policies are designed and implemented.**

This study addresses this gap by: i) characterizing and comparing different *de facto* approaches to drug policy reform; ii) exploring distinct policy features; iii) identifying barriers and facilitators to implementation. Understanding these processes is crucial for designing appropriate evaluation metrics to measure downstream impacts on health and racial equity.

## STUDY METHODS

We conducted 22 semi-structured in-depth interviews with policy informants across the US (Exhibit 1). Sixteen respondents represented prosecutorial offices in 14 jurisdictions (i.e. District/States Attorneys, Policy Directors, Assistant District Attorneys, Unit Chiefs or Policy Staff) and

6 represented advocacy organizations involved in drug policy or criminal justice reform. Interviews focused on 1) drug policy characteristics, 2) facilitators and barriers to implementation, and 3) perceived policy impact and evaluation considerations. Interviews were analyzed using a structured, hybrid inductive-deductive framework analysis approach (10).



## STUDY FINDINGS

**1. *De facto* decriminalization varied widely and fell into four distinct models: expanded diversion, substance-specific declination, case-by-case declination, and unconditional declination** (Exhibit 2).

Through our analysis, we found that jurisdictions' approaches to *de facto* drug decriminalization represented four distinct models:

In the "expanded diversion model," jurisdictions expanded the options or eligibility for diversion programs rather than instituting overt declination policies. One approach was to establish more pre-arrest, pre-charge, and pre-plea off-ramps, meaning participants did not need to pursue expungement—a process that can be financially and logistically onerous—to avoid a criminal record. Other tactics included expanding diversion eligibility to special populations (e.g., young men engaged in

the cannabis trade) or relaxing diversion requirements—e.g., shifting from completion of drug treatment to engagement with a case worker.

The three remaining models were predicated upon prosecutors declining to prosecute drug possession without the condition of any form of diversion. In the “substance-specific declination” model, jurisdictions declined to prosecute possession of specific substances, such as those used as pharmacotherapy for opioid use disorder (e.g., buprenorphine), because those drugs could protect against overdose. By contrast, several settings adopted a broader approach by declining to prosecute possession of any drug. Among these, several used “case-by-case declination” to preserve discretion over which cases the policy was applied to. This was often intentionally kept informal, and temporary or conditional in nature to allow for consideration on a ‘case-by-case’ basis.

Finally, some instituted a policy of “unconditional declination,” which was often explicitly announced, written or otherwise disseminated as formalized public policy. Those pursuing this model noted that unconditional declination, without the need to consider individual-level or substance-related case-by-case details, would save more personnel time and resources for serious offenses and potentially be more equitable in its application to people who use drugs.

While all jurisdictions continued to prosecute drug selling and distribution, several abandoned the threshold limits as the sole criterion distinguishing possession from possession with intent to distribute, thereby requiring additional evidence of drug sales or trafficking to bring charges.

Exhibit 2: Four models of de facto drug policy reform with cross-cutting implementation considerations.

Expanded Diversion	Substance-specific declination	Case-by-case (unwritten) declination	Unconditional (formalized) declination
<ul style="list-style-type: none"> <li>➤ No declination policy</li> <li>➤ Diversification of pre-arrest, pre-trial, and pre-charge diversion programs via expanded eligibility, relaxed completion requirements</li> </ul>	<ul style="list-style-type: none"> <li>➤ Declination to prosecute specific substances (e.g. buprenorphine, psilocybin)</li> <li>➤ Explicitly written and publicized</li> </ul>	<ul style="list-style-type: none"> <li>➤ Temporary or informal declination policy (e.g., COVID era temporary measure)</li> <li>➤ Unwritten, surreptitiously implemented or explicitly not advertised</li> </ul>	<ul style="list-style-type: none"> <li>➤ Declination to prosecute possession of all drugs and drug paraphernalia</li> <li>➤ Threshold limits vary if applied</li> <li>➤ Explicitly endorsed, written, and disseminated to public</li> </ul>

<p><b>Level of multi-sectoral engagement</b></p> <p>Engagement of law enforcement, community-based organizations, health service providers, and harm reduction agencies early in the policy design and implementation process was considered a best practice; lack of buy-in from police or other law enforcement actors hindered implementation and perceived impact.</p>	
<p><b>Public or formalized nature of policy</b></p> <p>Perceived as reliant on political context. Reported benefits included increased community trust, public support and likely impacts due to transparency and accountability. Reported drawbacks included greater media attention, public scrutiny, and political, procedural, and legislative threats to implementing discretion policies and retaining office.</p>	
<p><b>Level and nature of service linkage</b></p> <p>Service linkage seen as critical for securing public support. While diversion scenarios varied in level of mandated treatment, many in declination scenarios felt it was burdensome and ineffective. Prosecutors expressed frustration that access to quality services was reliant on healthcare systems' capacity and funding, which was beyond their sphere of influence.</p>	

**2. Cross-cutting implementation considerations across models included i) level and nature of multi-sectoral partnerships, ii) policy communication approach, and iii) service linkage embedded in the policy** (Exhibit 2). While some jurisdictions sought buy-in and collaboration from law enforcement, the health department, and civil society groups during policy planning, others sought to implement the policy expeditiously (e.g., as an emergency COVID measure) and then work towards compliance after the fact. Policy communication to different stakeholders also differed substantially, with some jurisdictions hesitant to broadcast policy details due to concerns about media and political attacks. However, others noted that reforms would be more likely to achieve intended goals of reducing fear of policing and arrest among people managing complex substance use issues only if they were effectively disseminated. Lastly, the level of built-in linkage to services differed across models, in part due to the availability of treatment services. While the expanded diversion model inherently included linkages to care, other settings eschewed any form of mandated treatment due to concerns about coercion and lack of evidence-based and quality services accessible via the criminal legal system.

### 3. Contrasting *de facto* models reported shared implementation barriers.

**Poor data availability and quality** were resoundingly seen as barriers to designing policies that were responsive to community needs, and interviewees from prosecutorial offices further cited a lack of internal capacity to measure key indicators of progress and impact. Participants reported concerns that policies would be inadequate to address disparities in the carceral system, citing insufficient resources to enact **retroactive measures** (e.g. dismissing pending warrants for drug possession) for those historically most impacted and the possibility that people with substance use disorders would still face arrests for other low-level offenses. **Law enforcement and police union opposition** were a common barrier, and susceptibility to police discretion was viewed as a greater challenge in the absence of legislative decriminalization. The threat of **policy reversal** was salient and immediate, with concerns cited about opposition campaigns or efforts to recall or impeach elected prosecutors or limit their powers by invoking dereliction of duty. At the time of analysis, 3 of 14 jurisdictions already had declination policies overturned by new prosecutorial leadership.

### 4. *De jure* and *de facto* approaches are distinct but not mutually exclusive.

Many stakeholders drew comparisons between Oregon's *de jure* decriminalization and the *de facto* efforts reviewed here. *De jure* decriminalization was often seen as a gold standard for decriminalization: it can be more transparent, can be legally binding, can earmark funds to invest in substance use and community services, and may be more resilient, though not impervious, to policy reversal efforts. However, the process is lengthy and politically infeasible in many settings, particularly in states which do not have direct citizen initiatives or popular referenda to endorse ballot measures. *De facto* reforms are highly flexible and can be immediately implemented, but may be limited in their purview (e.g., lacking a mandate to route resources to other sectors like health or housing), and susceptible to being rapidly repealed. Nonetheless, study participants working in national advocacy cited *de facto* approaches as key for achieving rapid reductions in carceral involvement and "softening the ground" for legislative efforts, noting that in Oregon, *de facto* measures were

important precursors to the passage of legislation. There was consensus among participants that pursuing these approaches is not mutually exclusive, with one noting:

“ *Politics is a matter of what's possible at the time and place.* ”

## RECOMMENDATIONS

Substantial variation in policy models must be carefully considered in evaluation efforts, as it is likely to have implications for impacts on criminal legal involvement, substance use outcomes, and racial disparities.

**Based on our findings, recommendations to optimize *de facto* decriminalization include:**

- 1) Tailor policy provisions to the local social and political context by weighing community needs and concerns, substance use burden, law enforcement culture and political feasibility;**
- 2) Establish multi-sectoral collaboration as early as possible in the policy process, especially with police leadership where possible to encourage buy-in and cooperation among street-level officers;**
- 3) Establish partnerships with universities and research groups to support data and evaluation capacity and quality; and**
- 4) Adopt specific measures to maximize policy impacts for communities of color most impacted by criminalization, such as improving internal prosecutorial office diversity, applying retroactive measures, and ensuring that race data are collected at every stage of the criminal procedure.**



# CONCLUSIONS

At the jurisdiction level, public officials and policymakers can substantially influence drug policy and support efforts to decriminalize possession and personal use in the absence of political will for legislative reform. However, guidance and consensus on effective policy design and implementation are lacking, and emerging models vary considerably. Our supplementary document, **Practical considerations in the design and implementation of *de facto* decriminalization**, outlines in greater detail key decision points relevant for offices seeking to implement declination strategies to reduce the role of the carceral system in managing the substance use crisis. Our study found that decisions around specific details of *de facto* decriminalization policies were rooted in prosecutorial offices' perceptions of the political context and their ideologies and beliefs around substance use disorders, **suggesting an important and underutilized avenue for health and harm reduction advocates to dialogue and share data with elected prosecutors.**

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# PART II:

## PRACTICAL CONSIDERATIONS IN THE DESIGN AND IMPLEMENTATION OF DE FACTO DRUG POLICY REFORM

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This document serves as a companion to the report “*Depenalizing and decriminalizing drug possession in the US: Emerging models & recommendations for policy design and implementation*,” which provides an overview of efforts to implement *de facto* drug decriminalization (i.e. the use of prosecutorial discretion to depenalize and/or decriminalize the possession of drugs other than cannabis). Based on 22 interviews with i) key stakeholders in 14 jurisdictions that have decriminalized illicit drugs other than cannabis and ii) drug policy and criminal legal reform advocates, the report outlines the four models of *de facto* decriminalization we identified in our analysis: expanded diversion, substance-specific declination, case-by-case unwritten declination, and unconditional, formalized declination.

Below, we outline several key decisions that must be considered by administrations seeking to implement *de facto* drug policy reform via prosecutorial discretion and provide examples of how jurisdictions responded to them.

## **1. What substances and threshold limits will be covered under the policy?**

The range of drugs that are covered by *de facto* decriminalization policies varied substantially across jurisdictions. In some jurisdictions, only one specific substance was explicitly covered by the policy, such as the illicit purchase of medications for opioid use disorder (e.g. buprenorphine or methadone). Other settings began with decriminalizing only cannabis and then expanded their policy to cover all entheogenic plants, including naturally occurring psychedelics. Finally, some jurisdictions opted to decriminalize possession of all substances and paraphernalia.

Another consideration at this stage is whether the jurisdiction wishes to set threshold limits on drug possession (quantities under which the decriminalization policy applies, and over which possession is still charged as a criminal offense). Decisions around thresholds were based upon the assumed distinction between possession for personal use and possession with the intent to sell/distribute and were inconsistent across sites. Several sites reported enacting a 1-gram threshold irrespective of the substance, based on an assumption or external advice that this was

approximately equivalent to the amount consumed daily by a person who uses drugs. It is unclear, however, whether people with expertise in substance use, including people who use drugs themselves, informed these thresholds in any way. Other jurisdictions selected their weight thresholds for their policies based on legal statutes for charging classifications.

Given the variation in drug potency and each individual's tolerance, choosing an appropriate threshold is a critical decision if the goal is to reduce the criminal punishment of substance use disorders. One office described efforts to root this policy within the local drug use context by conducting a review of the common quantities of different drugs seen among simple possession charges and defining their thresholds accordingly. It is important to note that any strict threshold may necessitate having the sample weighed in a crime lab to confirm policy eligibility, which can be an onerous requirement amid sample backlogs and resource constraints. Alternatively, thresholds may be determined on a case-by-case basis, with the prosecutorial team assessing each individual case involving the possession of drugs for personal use or with the intent to distribute. Some policies included vague language such as "a substantial quantity" or "a small amount" to determine cut-off thresholds for policy enactment, noting that the amount that constitutes this level was subjective and could differ by drug type. Finally, some sites felt that specifying a specific threshold amount would be arbitrary, and instead opted to define what they considered to be clear indicia of what constituted selling/trafficking (i.e., scales, baggies, large amounts of cash, or weapons).

## 2. Will the policy apply retroactively?

Given the disproportionate level of past carceral involvement (and therefore criminal records) in low-income communities of color, the decision of whether to enact retroactive measures has implications for equity. Many settings decided to take a minimum level of action related to past drug offenses through dismissal of pending personal use cases. Some jurisdictions additionally worked with courts to quash outstanding warrants related to simple drug possession, though this was described as arduous and sometimes infeasible given the requirement for a judge to dismiss each individual case in court. While one jurisdiction established a special unit to assist with the expungement process, many localities noted

that they did not have the capacity to take retroactive action on past drug-related charges due to a lack of personnel and limited resources. Other settings were able to dismiss past possession charges as part of efforts to address COVID-19-related backlog. Any intention to take retroactive measures will require explicit planning and financing by offices interested in pursuing declination policies.

Even without overt retroactive measures, particular policy provisions can be designed to interrupt the repeating cycle of criminalization of individuals for low-level drug offenses. For example, the policy directive can explicitly state that offenses which are no longer being prosecuted (i.e., drug possession) will also not constitute a violation of probation or parole. Similarly, the policy may bar prosecutors from citing past drug possession charges during bail negotiations on the basis that those charges are no longer prosecutable offenses.

### **3. What will the office's approach be to internally build consensus and understanding of the policy?**

Offices reported varying approaches and challenges to cultivating internal buy-in for the policy changes. Some reported internal resistance and the need to build in appropriate time for consensus-building and allow for collaborative development of policy details with a wider team. Other offices adopted a more top-down approach, mitigating internal resistance by hiring and onboarding additional attorneys who endorsed or were experienced in implementing reform-minded policies. Irrespective of the approach, offices considering the implementation of *de facto* decriminalization and similar reforms should prepare for a diversity of ideologies and opinions internally.

Key features of a successful internal planning process may include:

- Building in time for collaborative development and/or effective communication of policy minutia;
- Training internal staff on the policy, which may entail discussing case studies and discussing best practices under different scenarios;
- Preparing an oversight plan to ensure that Assistant State's/District Attorneys are implementing the policy consistently according to clear protocols;
- Monitoring data and outcomes throughout policy implementation.

One example of why these measures are necessary was shared by a participating office that implemented a full *de facto* decriminalization policy applied to all substances with no explicit thresholds. During the monitoring phase of initial policy implementation, it was noted that while stand-alone cases (individuals charged with only drug possession) were being declined, prosecutors were not dropping the drug possession charge for individuals with grouped charges (e.g., robbery and drug possession together). Office leadership, therefore, had to specify and communicate internally that individuals with multiple charges would still have their drug possession charge dropped under the directive. This scenario illustrates the importance of working through multiple real-life scenarios with staff as well as monitoring how the policy is (and isn't) being applied in real-time to ensure it can achieve its intended impacts.

#### **4. How and when will the office engage with partners across different sectors?**

Most jurisdictions emphasized the importance of multisectoral partnerships throughout the policy planning and implementation process. However, sites differed substantially on which partners were engaged and at what phase. For example, in some settings, multidisciplinary relationships were heavily relied upon in the policy planning phase, including stakeholders from non-profit/advocacy organizations, private foundations, recovery organizations, health care providers, researchers, political leaders, law enforcement, union heads, and community leaders (such as school officials or public housing representatives). Jurisdictions leveraged existing inter-agency bodies or set up working groups with representatives from these sectors to inform policy design with activities explicitly rooted in harm reduction and public health-oriented philosophies. Some such sites also highlighted the importance of working directly with community members with lived experience, including people who use drugs, to inform their approaches.

However, other offices took the approach of finalizing policy details internally and engaging external partners such as law enforcement, community groups, political leaders, health sector representatives and prospective evaluation partners to notify them of the changes post-hoc.

This was viewed as a more expeditious route to policy implementation, but one which was also more susceptible to pushback or criticism from external partners who felt cut out of the process. Offices that intentionally kept all processes internal were likely to inform only immediately implicated actors within the criminal legal system (i.e., the judiciary and public defender's office).

Across settings, the issue of how best to achieve police buy-in was challenging. While some offices reported engaging law enforcement leadership at early stages as a strategy to buffer against dissent from street-level officers, these efforts were not unilaterally successful. Nonetheless, many reported having one supportive member in police leadership was an important political asset. Broadly, respondents from settings adopting various approaches to working with the police consistently expressed frustration at the lack of buy-in at best and overt resistance at worst, particularly from police unions. However, several sites reported that after an initial period of resistance, officers became frustrated with conducting arrests that did not progress through the system, and gradually stopped arresting for crimes included in the declination policy.

## **5. Will the policy be formalized and publicized?**

Jurisdictions took substantially different approaches when deciding whether to issue a formalized policy announcement and publish their declination policy. Generally, prosecutors who ran or were elected on a progressive platform found that formalizing declination policies was important for fulfilling commitments to their constituents. Those who created official, written and publicly available directives considered this transparency a key factor in policy success and sustainability as it enabled them to clearly refute any false accusations or mischaracterizations of their approaches. Others noted that the intended impacts of the policy would not be realized if it remained covert—specifically, that promoting trust and reducing fear of arrest among people who use drugs would not be achieved unless the policy was formalized and effectively disseminated to them.



In contrast, several jurisdictions chose to keep declination policies unwritten and fully internal. These settings were more likely to take a case-by-case approach to declination and have less explicit standards for their policy's implementation. Often, these were jurisdictions in which prosecutors had concerns about strong political opposition and threats to retaining office. Opting to keep policies less formal or public was a way to maintain flexibility with the policy and avoid backlash. However, while covert and case-by-case policies were often viewed as politically necessary, it was also noted that case-by-case declination (rather than declination per formalized eligibility guidelines) could perpetuate existing biases within the criminal legal system (i.e., if declination was found to disproportionately benefit more 'sympathetic' arrestees along race or class lines).

## **6. What communication strategies will be employed?**

Based on the extent to which the policy is formalized, different strategies may be adopted to communicate key policy provisions to some combination of the public, external stakeholders and key groups of interest. Offices with formalized policies often pursued a "proactive transparency" communication strategy about their decriminalization policies. These jurisdictions engaged in broad strategies to communicate policy provisions to the general public, including press releases, social media announcements, publicly available memos, and newspaper op-eds. Strategic messaging to key groups, such as people who use drugs, was additionally pursued by some offices in various ways. One had a community engagement unit which worked directly within open air drug market areas to present and explain their policy, and others partnered with community service providers, harm reduction organizations, and grassroots advocates, who then communicated about the policy to the populations with whom they worked.

Alternatively, many administrations described their communications strategies as more "reactive", with their messaging occurring in response to press coverage generated outside the office. Some noted that in hindsight this was ineffective for controlling the narrative and found it difficult to retroactively refute negative press and the circulation of

misinformation. By contrast, another office described using this strategy strategically: by implementing the policy several months before any public attention, they were able to “react” to negative coverage by saying that this policy had been in place for a longer period than publicized and that no negative consequences (i.e., surges in crime) had been noted between its implementation and eventual publicization.

Finally, some offices chose to keep their policies “under the radar,” implementing them without any direct or explicit external communication. This was typically a strategy implemented within jurisdictions facing limited community support for decriminalization. For example, one representative noted that given the backlash towards progressive prosecutors, their team wished to limit the perception that their office was weak on crime. This team specifically did not pursue any media coverage of their declination policy.

## 7. How might the policy impact drug courts?

Drug courts exist in many jurisdictions as an alternative to incarceration for individuals charged with drug-related offenses. While the eligibility criteria and program characteristics vary across jurisdictions, they typically include some level of monitoring/supervision and court-mandated courses of drug treatment. Offices enacting *de facto* decriminalization in settings with active, pre-existing drug courts in place should consider in advance how this policy will impact those systems and be prepared to communicate these changes to other stakeholders and constituents. This is particularly relevant given many who oppose decriminalization have cited concerns about underutilization of drug courts and resulting declines in treatment program intake under a non-prosecution scenario.

Counter to this narrative, jurisdictions that enacted *de facto* decriminalization did not report discontinuation of drug courts. Instead, the drug court infrastructure in those places was often used to re-route other drug-related offenses to forms of case management, social services, or drug treatment. For example, some began defining individuals whose crimes were considered adjacent to or in service of a substance use disorder, such as sex work, robberies or domestic assaults, as eligible for

drug court. These adapted drug courts still varied based on factors such as system capacity and other forms of diversion programming available; however, most required judge oversight, regular drug screening, and weekly check-ins.

### **8. To what extent will the policy rely on diversion programs to reduce criminal legal contacts?**

Diversion programs differ from overt decriminalization because avoiding criminal prosecution or retroactively having charges dropped is contingent upon i) eligibility for diversion and ii) the completion of a set of mandated requirements. The “expanded diversion model” of *de facto* decriminalization (outlined in the main report) was employed by many offices in lieu of overt declination. In settings where declination was pursued, many also took measures to expand diversion options to provide alternatives to incarceration for a wider range of offenses not included in the declination directive. Approaches to diversion varied substantially by eligibility criteria, program requirements, duration of required engagement, and level of supervision oversight.

Offering direct and low-threshold options to avoid criminal prosecution for drug-related offenses was achieved by expanding access and eligibility for traditional diversion models, and/or developing novel models of diversion based upon the principles of restorative justice, with program requirements including conflict resolution, mediation, or some form of community-level restitution.

Methods to expand the reach and desired impact of diversion models included:

- **Ensuring that diversion opportunities were available as early as possible in the process (at the pre-arrest or pre-booking phase);**
- **Expanding eligibility requirements (e.g., to individuals with prior criminal legal involvement) or enacting new diversion programs for special populations (e.g., programs for at-risk youth engaged in drug-selling);**

- **Broadening requirements for program completion (e.g., not reoffending within a given time frame, demonstrating any engagement with case management services rather than mandated completion of a treatment program). The level of supervision and required engagement with services was typically associated with the assessed severity of the crime, and/or the person’s existing criminal history.**

Diversion programs had varying capacities to link participants with social services or resources, with some including specific mental health, housing, case management, and/or other support services. Offices opting for the “expanded diversion model” without broader declination policies often cited it as a strategy to offset political and public opposition to outright decriminalization without attendant service linkage. In contrast, offices that pursued a combined approach noted many diversion options were overstretched and should be reserved for individuals engaged in more serious offenses or with more severe clinical substance use disorders/mental health challenges.

## **9. How will the policy be evaluated?**

Measurement of policy outcomes was viewed as critically important, but not without its challenges. Offices frequently noted a limited capacity for data collection, management, and program evaluation. Challenges included ensuring that appropriate indicators were being collected (e.g., race), lack of resources to regularly query available data, inconsistencies in reporting mechanisms and requirements, gaps in arrest data, and antiquated data systems. Several teams noted that race was not consistently documented in their arrest data, making identifying existing disparities and measuring racial equity impacts particularly challenging. Many also noted that there were separate tracking systems and public reporting requirements for drug courts and diversion systems which made it difficult to access these data or consolidate outcomes across programs. Overall, offices felt that the internal capacity to effectively measure policy outcomes was limited by these factors as well as resource constraints.

To address these issues, offices reported earmarking funding (or acquiring external grant support) to hire in-house data analysts and develop internal data units. Some articulated a commitment to transparency and were working to present formal evaluations publicly, such as establishing a public-facing dashboard that tracked individual-level convictions over time. Engaging in partnerships with external agencies, including foundations, non-profit organizations, and universities (usually law and/or public health programs), to conduct program evaluations was often cited as best practice. These partnerships were utilized to improve data measurement methods and refine indicators, provide analytic support, and offer independent evaluations of reform efforts. Participants recommended engaging external research partners as early as possible in the policy design process to capture pre-policy (baseline) indicators, design evaluation plans in advance, and conduct scientifically sound policy evaluations. Importantly, a number of offices felt that these partnerships provided additional credibility to their work given that formalized evaluations were generated by independent, third-party researchers.

#### **10. Can complementary policies be enacted to maximize intended impacts?**

Given the multiple ways that people who use drugs can be criminalized, no single policy will fully address their overrepresentation in the criminal legal system. A number of offices described adjacent or complementary policies adopted to achieve the intended impact of reducing carceral exposure among people with low-level drug offenses. Particular attention to overlapping vulnerabilities such as engagement in survival sex work, homelessness, and other crimes of poverty (i.e., loitering) were discussed as candidates for nonprosecution alongside simple drug possession. Offices gave examples of complementary strategies which the prosecutor's office could voice support for (in the legislation process) or enact a *de facto* version of themselves, including:

- **Elimination of pretextual traffic stops as grounds for stops and seizures, or blanket non prosecution of any cases arising from them;**
- **Initiatives to remove the cash bail system;**
- ***De facto* decriminalization of crimes of poverty including sex work and homelessness;**

- **Defelonization of crimes overlapping with substance use;**
- **Expungement of crimes or quashing of warrants likely to impact people who use drugs, such as past drug offenses, sex work, or crimes associated with homelessness and poverty (loitering, open container, failure to appear for a low-level crime, etc);**
- **One team operated in a state that was proactively working to expunge all past prostitution felony records after prostitution was defelonized in 2012. This was cited as an example of the jurisdiction’s efforts to promote racial equity. Often, it was the sites most openly committed to addressing racial disparities in the criminal legal system that were also enacting these complementary policies.**

Several of these examples were noted to facilitate disproportionately high rates of police contact among racial/ethnic minorities. Jurisdictions working to construct a multi-pronged approach to decriminalizing substance use and poverty were also those most likely to explicitly link these issues to racial justice and take proactive measures to maximize impacts for racial/ethnic minorities in their jurisdictions. One team assembled a multidisciplinary racial equity working group that convened to consult on all policy decisions and helped advise on comprehensive and complementary strategies to address racial disparities in the criminal legal system.

## CONCLUSIONS

In the absence of legislative action to reduce criminal legal exposure among people who use drugs and reduce the burden of low-level offenses cycling through the criminal legal system, settings are increasingly adopting *de facto* strategies to divert, depenalize or outright decriminalize drug possession. A description of four broad approaches to enacting *de facto* decriminalization is included in our report, “Decriminalizing drug possession in the US: emerging models & policy recommendations.” Here, we have outlined specific policy decisions that offices are faced with in considerably greater detail with an aim to promote advance planning and thoughtful policy design and implementation of such policies. Offices, even those operating under the

same overall ‘policy model,’ adopted very different approaches to some of these details. One clear and consistent theme across settings was the salient challenge of well-financed media and political campaigns contributing to public concern about crime as a direct barrier to policy implementation and sustainability.

## REFERENCES

To provide tools for offices seeking to refute such narratives with evidence-based communication strategies, we have included a list of evaluations from settings where declination has been pursued below.

**2022 National Bureau of Economic Research Report:**

Misdemeanor prosecution (Evaluation of non-prosecution in Suffolk County, MA on defendants’ subsequent criminal involvement). Available at: [https://www.nber.org/system/files/working\\_papers/w28600/w28600.pdf](https://www.nber.org/system/files/working_papers/w28600/w28600.pdf)

**2022 Johns Hopkins University Report:**

Evaluation of prosecutorial policy reforms eliminating criminal penalties for drug possession and sex work in Baltimore, Maryland. Available at: <https://publichealth.jhu.edu/sites/default/files/2021-10/prosecutorial-policy-evaluation-report-20211019.pdf>

**2023 Johns Hopkins University and Bloomberg American Health Initiative Report:**

Estimating economic costs of prosecuting simple drug possession in Baltimore City. Available at: <https://publichealth.jhu.edu/sites/default/files/2023-04/estimating-economic-costs-prosecuting-simple-drug-possession-baltimore-city-april-2023.pdf>

**2023 Peer-reviewed publications in scientific journals:**

Sherman S, Tomko C, Rouhani S. *De facto* decriminalization for drug possession and sex work in Baltimore, Maryland. American Journal of Preventive Medicine. Available at:

<https://doi.org/10.1016/j.amepre.2022.10.021>

Rouhani S, Tomko C, Silberzahn B et al. Racial disparities in drug arrests before and after *de facto* decriminalization in Baltimore. American Journal of Preventive Medicine. Available at:

<https://doi.org/10.1016/j.amepre.2023.04.004>

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