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Reducing Racial Disparities through Decriminalization in Massachusetts: What Seems to Work and What Makes Matters Worse

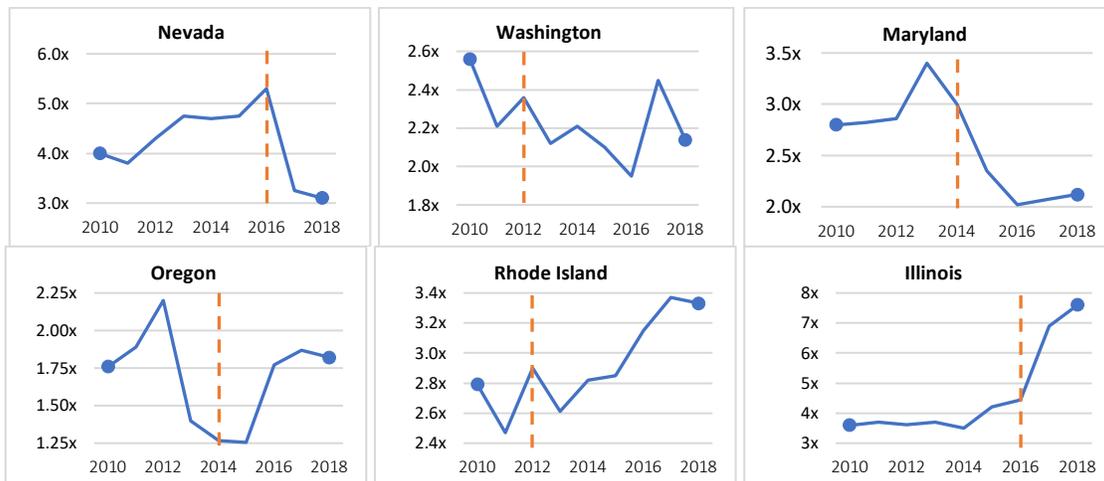
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1. Introduction

Racial disparities persist in the criminal legal system, in part driven by over-criminalization and over-policing practices of primarily low-level misdemeanor offenses. Because mass misdemeanor criminalization is one major driver of racial disparities in arrests, prosecutions, and convictions,¹ decriminalizing many such offenses should result in reductions in racial disparities. It is unclear, however, that this is so. As of February 2020, for instance, 25 states and D.C. have passed laws decriminalizing possession of marijuana, and 11 states have legalized its recreational use. However, reductions in racial disparities have not always followed cities' and states' decriminalization efforts.

After marijuana legalization in Nevada and Washington and marijuana decriminalization in Maryland, for instance, in absolute terms, racial disparities in arrest rates *declined* substantially (though not necessarily permanently).² After Oregon legalized and Rhode Island and Illinois decriminalized marijuana, however, racial disparities *grew* substantially.

Figure 1: Racial disparities in marijuana arrests before and after marijuana legalization/decriminalization



Source: ACLU Research Report, *A Tale of Two Countries: Racially Targeted Arrests in the Era of Marijuana Reform*, 2020 using data from FBI/Uniform Crime Reporting Program

These divergent trends caused the ACLU to conclude, “The absolute difference between Black and White arrest rates was narrower in legalized states at the end of the decade than at the beginning, but racial disparities remain in every legalized state and every decriminalized state.”³ Still, these divergent trends raise an important question: After decriminalization and legalization, why do racial disparities decline significantly in some contexts and increase significantly in others? And what does the answer to this question mean for the Commonwealth?

2. Conceptualizing “Decriminalization”

At the heart of the puzzle is how we conceptualize and operationalize the term “decriminalization.” Most often it has referred to the removal or reduction of the criminal sanction attached to certain behaviors. While the sanction attached to criminalization is undoubtedly important, a vast array of sociological literature demonstrates the ways in which the reach of the criminal legal system extends far beyond the legal sanction alone, which typically represents the final stage of the legal process.⁴ Jordan Blair Woods, for instance, highlights how one’s interactions with the criminal legal system are shaped by more than just the explicit punishment attached to certain criminalized behaviors. Police behavior and enforcement mediate the impacts of sanctions – and can do so even after those sanctions are removed – as the law grants significant discretion in who they stop and why.⁵ Thus, since narrowing the scope of policing is critical to effective decriminalization, decriminalization should emphasize the enforcement of sanctions as well as the reduction or elimination of sanctions. The *process* of decriminalization merely *begins* with eliminating the sanctions associated with certain behaviors and therefore must target police enforcement as well. With this distinction in mind, Woods sees four approaches to decriminalization that vary in terms of how sanctions are reduced or eliminated but also in terms of their implications for police engagement and enforcement.

3. Four Approaches to Decriminalization

Woods’ four categories of decriminalization include *substitution*, *de facto decriminalization*, *pure decriminalization*, and *reclassification*. Attention to categories of decriminalization illuminate ways that such policies can often fall short of stated goals, including reducing or eliminating racial disparities. Below is a breakdown of each category and a contemporary example of each.

- a. *Substitution* entails replacing criminal sanctions with nonpunitive interventions. Drug courts are an example of substitution, as the typical punishment of incarceration is replaced with drug court diversion. However, these interventions often still rely on police officers to detect “wrongdoing” and serve as the funnel for harm-reduction interventions. Thus, individuals still come into contact with drug courts as a result of an initial arrest. Under substitution, an offense such as drug possession maintains the same violation status in the law, and the legal system continues to target these “offenses.” Furthermore, diverted cases can still result in incarceration if the person “fails” to comply with the often-draconian program requirements.
- b. *De facto decriminalization* involves informal policies that encourage police and/or prosecutors to refrain from enforcing specific criminal laws. Suffolk County specifically has pursued a broader scope of de facto decriminalization under District Attorney Rachel Rollins, who issued a policy memo upon entering office in 2019 outlining a set of 15 low-level, nonviolent misdemeanors that her office would

decline to prosecute.^{6,7} Berkshire County DA's office has done something similar.⁸ Both offices' policies are also examples of the substitution approach since prosecutors can consider alternatives to criminal adjudication focused on treatment as well. Because de facto decriminalization typically only addresses how prosecutors choose to engage with certain offenses once they are already brought to the court system, it does not explicitly target the policing behavior that brings individuals into contact with the legal system in the first place. As a result, it is unclear how this will impact policing behavior, including patterns of arrest. Just as they can choose to continue policing behaviors even after certain types of laws change, police can also choose to not arrest or cite for certain offenses – producing de facto decriminalization themselves.⁹

- c. Pure decriminalization involves legislation passed by the state or locality to strip the criminal sanction label attached to certain behaviors. But in of itself, pure decriminalization does not restrict police's ability to use these offenses as pretext for a stop. For example, in 2016, Philadelphia City Council voted to *decriminalize* disorderly conduct, failure to disperse, public drunkenness, and obstructing public passage. The same executive order stipulating the implementation of this policy also states that the decriminalization order shall not be construed to limit a police officer's ability to make any arrest.¹⁰ Police are granted wide discretion in justifications for conducting a search or arrest, especially when their justification is an alleged criminal violation. Pure decriminalization means that prosecutors and judges no longer treat certain "offenses" as criminal violations. This should restrict arrest discretion, given that such behaviors are no longer considered *criminal* violations. Given little accountability over police practices, however, that is not necessarily the case.¹¹
- d. Reclassification is a step beyond decriminalization, either completely removing the sanction (i.e. legalization), downgrading it to a lower type of offense (for example, from a felony to a citation), or doing a combination of both. Pure decriminalization is overwhelmingly accompanied by reclassification, as the offense is typically relabeled as a civil rather than criminal violation, or it is legalized altogether. For example, Oregon voters approved a ballot initiative in November 2020 to reclassify possession of small amounts of nearly all illegal drugs as a civil rather than criminal violation. Individuals caught with a small amount of a drug receive a \$100 fine and a citation, similar to the process of receiving a traffic ticket.¹² In Massachusetts, Representatives Liz Miranda and Mike Connolly introduced legislation H2119 in February 2021.¹³ Modeled after Oregon's ballot initiative, the bill would replace the criminal penalties for controlled substance possession with a *civil* fine up to \$50 – an example of pure decriminalization and reclassification as the bill replaces the criminal label with a civil violation and removes discretion around criminal prosecution for those behaviors. The legislation also incorporates a substitution approach by giving individuals the option to avoid the civil fine if they opt into a health screening.

These approaches to decriminalization can be initiated by different actors of the criminal legal system. Legislatures have the greatest latitude and can implement substitution, pure decriminalization, and reclassification approaches. In many of the states that have passed pure decriminalization and reclassification, legislative action was precipitated by voter-initiated ballot initiatives. Prosecutors can substitute and de facto decriminalize; police can de facto decriminalize as well. While judges are a critical component of the legal system, because the primary responsibility to change criminal codes rests with legislatures in the country, the courts typically do not enact statutory decriminalization. However, they have played a role in bridging the gap between amended sanctions and the enforcement of those sanctions, interpreting changes to police discretion as a result of reclassification.

The above categories also demonstrate that as you move along the spectrum of decriminalization efforts, greater efforts are made to minimize the sanctions placed on individuals brought into the system.¹⁴ Decriminalization policies that have been purely sanction-based have done little to minimize racial disparities in arrests because a primary mechanism for such disparities – law enforcement behavior – remains untouched. Law enforcement maintain essentially unrestrained latitude in who they stop and why. This discretion is a primary reason why disparities can persist and even worsen: although the absolute number of arrests do decrease, police continue to disproportionately target Black and Brown individuals in enforcement. Pure decriminalization (which is most often accompanied by reclassification) should be more effective in mitigating racial disparities in arrests than the former two approaches as it indirectly limits police’s enforcement powers. Reclassifying offenses as civil rather than criminal violations – or even better, completely eliminating the classification of “violation” through legalization¹⁵ – should limit law enforcement contact as pretextual searches and arrests must theoretically be conducted only on the basis of an alleged criminal, *not civil*, violation.¹⁶ Indeed, out of the four approaches, reclassification holds the most promise for targeting enforcement and mitigating racial disparities because behaviors that were once labeled as *criminal* – providing law enforcement with legally valid reasoning to conduct a search or arrest based solely on that behavior – now lose that classification, and thereby justification for an arrest.

Formal reclassification, however, is not always enough to curtail the practices that bring people into the sanction process in the first place: police stops and arrests. While in some of the prior examples, pure decriminalization occurs alongside reclassification, those reforms still do not necessarily place formal limits on police’s enforcement power. For instance, even if drug possession is reclassified as a civil citation rather than criminal offense – indirectly targeting enforcement – absent legislation that directly narrows police discretion in pretextual stops, changes to the sanction alone can prove insufficient in mitigating disparities in arrests.¹⁷

4. A Way Forward: Sanction- and Enforcement-based Decriminalization

To address racial disparities, we need to broaden the scope of decriminalization to include narrowing the scope of policing.

Nevada offers an example of a promising approach to decriminalization that *does* reduce racial disparities in arrests. The state passed a ballot initiative to legalize the personal possession and use of cannabis in 2016. Nevada is one of the only states that saw a decrease in racial disparities in arrests for marijuana possession after legalization, with a drop in disparity from 4.0 to 3.0 from 2010 to 2018.¹⁸ Nevada’s legalization is an example of reclassification, and importantly it also included an explicit limit on police’s enforcement power regarding cannabis use. The amended law states that any action reclassified as legal under the law cannot be used as the basis for “the seizure or forfeiture of any property of the person or for the imposition of a civil penalty,” thereby curtailing a significant tool, and motivation, for searches and arrests.¹⁹ While there is a lack of research dissecting the reasons for Nevada’s unique drop in disparities post-legalization relative to other states, it is likely that formal limits on policing power played a role.

San Francisco and Philadelphia represent two cities that have recently taken even stronger and broader stances on limiting police enforcement power under decriminalization. In February 2020, San Francisco District Attorney Chesa Boudin issued a policy memo to limit pretextual stops. The memo called for non-prosecution for contraband possession charges where the search stemmed from an infraction with no other probable cause.²⁰ While promising, this memo represents a *de facto* approach as it does not explicitly bar the use of

infraction-based pretextual stops but aims to merely disincentivize their use. Going a step further, Philadelphia became the first city to pass formal legislation to limit the scope of pretextual and traffic stops after a City Council vote in October 2021. The Council voted to bar police officers from conducting pretextual stops and searches for low-level motor vehicle infractions, citing strong racial disparities in traffic stops and arrests as the motivation for the legislation.²¹ Although we would expect a narrowing of disparities as a result of such limits on enforcement power, given the recency of both these policies, we do not yet have empirical evidence to conclude that these policies have had the impacts on racial disparities in arrests that we predict.

5. Decriminalization in Massachusetts

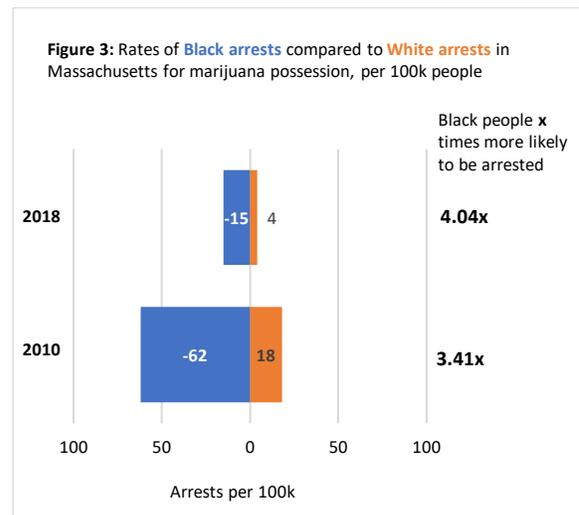
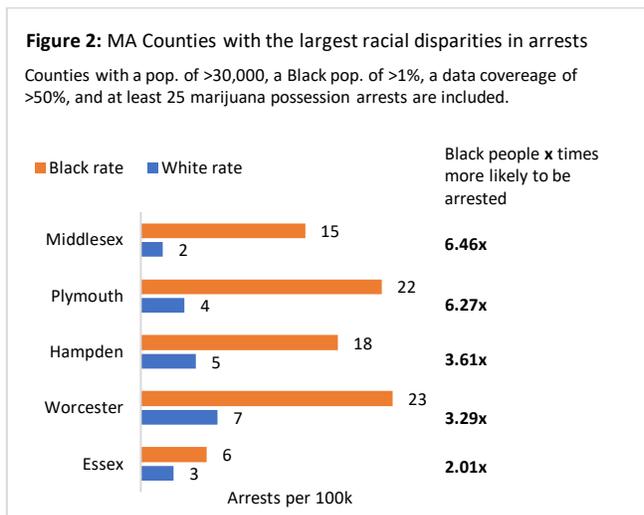
Massachusetts has also taken significant steps towards decriminalization, in particular regarding marijuana possession and more recently, nonviolent misdemeanor offenses. Where racial disparities are concerned, these have produced mixed results.

a. Marijuana Decriminalization and Legalization

Despite comprising about 8% of the state population and roughly 6.6% of total marijuana users in the state, Black residents made up 24% of possession and 41% of sales arrests in 2014.²²

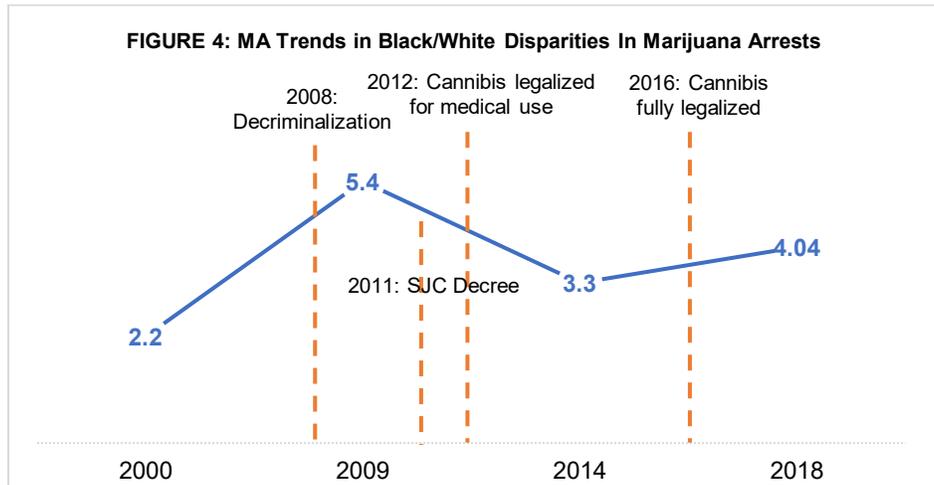
Since 2000, residents of Massachusetts voted to decriminalize marijuana (2008);²³ the highest court in Massachusetts decreed that in order for police to conduct a motor vehicle search, the alleged offense must be *criminal* (2011);²⁴ residents voted to legalize cannabis for medical use (2012); and cannabis use for people 21 and over was fully legalized (2016).²⁵

Still, since 2000, racial disparities, which vary significantly across Massachusetts' counties (see below),²⁶ have grown overall. As shown below, disparities in arrests for marijuana possession seem to *increase* after the state voted to decriminalize marijuana in 2008. Black residents were arrested for marijuana possession at 2.2 times the rate of White residents in 2000, a disparity that increased to 5.4 in 2009, fell to 3.3 times the White arrest rate in 2014,²⁷ and then increased to 4 times the rate by 2018.²⁸ In other words, racial disparities remain a persistent issue in the Commonwealth, despite statewide policy changes regarding marijuana possession in the past decade.



Source: ACLU Research Report, *A Tale of Two Countries: Racially Targeted Arrests in the Era of Marijuana Reform*, 2020.

How can this be? We can only guess. In 2009, the Black-White racial disparity was 5.4, but the rate for 2008 is unknown; it could have been the same or higher. If we assume that it was the same or similar in 2008 as 2009, then we actually see a sharp decline in disparities from 2008 to 2014, when Massachusetts decriminalized, decreed a narrowing of police enforcement, and legalized cannabis for medical use. In this case, it seems that decriminalization — in its pure form and as reclassification combined with some limits to police enforcement — might have effectively reduced racial disparities. In 2014, disparities were greater than they were in 2000, but they were substantially lower than they were when decriminalization took effect in the late aughts.



Source: Gettman, Whitfield, and Allen. *The War on Marijuana: In Black and White*. American Civil Liberties Union of Massachusetts, October 2016. ACLU Research Report, *A Tale of Two Countries: Racially Targeted Arrests in the Era of Marijuana Reform*, 2020.

The question, then, is what happened after 2014 to increase disparities yet again? Full legalization of cannabis in 2016 should have contributed to further declines, but it does not appear to have done so. The state’s ultimate decision to legalize cannabis use is an example of reclassification, but it is still a purely sanction-based measure as the amended law does not explicitly mention any changes to law enforcement behavior as a result of legalization.²⁹ Were there changes in enforcement that drove up differences in treatment by race? Racial disparities might have declined or been eliminated had legalization — pure decriminalization and reclassification — been combined with explicit limits on police enforcement power to reduce disparities in the state. The legislation introduced earlier this year to decriminalize personal use and possession of any controlled substance on the state level similarly does not explicitly mention police enforcement power. As a result, it might also be the case that state decriminalization under this bill would not significantly mitigate racial disparities in enforcement.

b. De Facto Decriminalization of Nonviolent Misdemeanors

As mentioned earlier in the brief, in 2019, D.A. Rollins announced that her office would decline to prosecute 15 low-level, nonviolent misdemeanor offenses, although ADAs would still retain substantial discretion in their charging decisions for those offenses. Based on a recent analysis of the policy’s impact on current and future penal system outcomes, nonprosecution reduces prosecution rates significantly, but it does so differentially by race.³⁰ White defendants experienced a 5.1 percentage point decrease in the prosecution rate for offenses the DA’s office declined to prosecute. This is more than double the 2.1 percentage point decrease experienced by Black defendants. But Hispanic defendants saw the largest decreases in prosecution rates — by about 8.75

percentage points.³¹ In sum, preliminary analyses suggest that SCDAO's de facto decriminalization approach did not narrow racial disparities and might have exacerbated them, given the policy's differential impacts.

On the question of police enforcement, the Supreme Judicial Court's recent *Sweeting-Bailey* decision will likely have significant implications for racial disparities.³² In a 4-3 decision, the Court ruled that, during a traffic stop, New Bedford police officers were legally justified to pat-frisk a backseat passenger, Zhaquan Sweeting-Bailey, because *another* passenger in the vehicle, who the same officers had racially profiled numerous times in the past, had displayed anger toward them.³³ In other words, the Court expanded the grounds of reasonable suspicion and in so doing expanded police discretion in enforcement. Given this, even in a context of de facto and pure decriminalization, we would expect disparities in stops and arrests to increase as officers use their expanded discretion to target Black and Hispanic residents.

6. Areas for Opportunity and Next Steps

Recent analysis of the impact of Suffolk County's nonprosecution policy suggests promising next steps for decriminalizing certain offenses. Although the policy targeted 15 offenses, there was significant heterogeneity in its impact: driving with a suspended license experienced the largest reduction in prosecution due to the policy (and was the most charged offense among those listed in the memo), followed by resisting arrest and breaking and entering. However, many of the offense categories did not see a statistically significant difference in prosecution – in other words, the significant discretion still afforded to ADA's under the policy meant that most of the offenses on the list effectively faced no decriminalization. The report also finds no adverse impact on recidivism among both nonviolent and violent offenses from the policy. But the recidivism results also present an aggregate picture.³⁴ Because the policy directive primarily impacted motor vehicle offenses, we can say with relative certainty that decriminalization did not produce a public safety tradeoff for motor vehicle offenses in particular. Less clear are the impacts of decriminalization on future offending among the offenses that were included on the list but effectively untouched in practice. Future research should aim to identify the public safety impacts of decriminalizing the offenses under the policy that experienced no significant changes in prosecution.³⁵

The key question that arises from that research is whether we would face similar outcomes if those offenses – such as disorderly conduct or possession with intent to distribute – were *actually* decriminalized. If it is the case that decriminalizing those offenses similarly produces no adverse public safety impact, then they represent an area to push for pure decriminalization on both the sanction and enforcement level. But if analyses instead demonstrate that there is a slight tradeoff for decriminalizing specific low-level misdemeanor offenses – that we cannot ignore certain behaviors with impunity – that is still more indicative of the need for *some* type of response, rather than evidence for the criminal legal system as *the* response. Given the number of harms associated with criminal legal contact, it is important to explore a variety of alternative approaches to behaviors that we deem do warrant response.

a. Engage with interventions to address behaviors targeted in decriminalization policies.

Although much of this report focuses on marijuana, the scope for decriminalization is much broader – for example, behaviors that people may still be concerned about even if the appropriate response should not be criminalization. Broadening the scope of decriminalization involves not only including enforcement-based approaches but also expanding the categories of offenses to decriminalize and building out non-penal

interventions to address those behaviors. What follows are suggestions for interventions for specific buckets of concerning behaviors.

i. Behaviors Requiring a Public Health Response

There is a clear need for a public health – rather than criminal – response to behaviors caused by substance abuse, mental health, and homelessness as well as the harms caused by interventions led by the criminal legal system. To create such a response, we need pure decriminalization and reclassification of offenses – such as public urination, disorderly conduct, disturbing the peace, breaking and entering into vacant property/trespass, and drug possession – that evince a public health need. We also need to limit the scope of police engagement around these behaviors.

It is also necessary to build up alternative responses such that police no longer act as first responders. CAHOOTS in Oregon is a well-known model of this type of alternate response to health crises.³⁶ Boston recently announced a new mental health pilot diversion program in August 2021. As part of a promise to emphasize de-escalation in mental health emergencies, the Mental Health Crisis Response Working Group in Boston proposed three pilot programs and models as alternative responses to 911 calls. The first initiative standardizes the process of a mental health worker joining police officers on calls involving a safety risk. The second model removes officers' involvement entirely when there is no risk of violence and pairs EMS responses with mental health workers instead. The third model involves an entirely peer-led response for mental health interventions.³⁷ By supplanting rather than supplementing law enforcement response, the latter two models will likely also produce fewer racial disparities. However, it will likely be important to get buy-in from law enforcement to ensure that police officers stop engaging during mental health emergencies and truly turn over that task to the mental health or peer workers. Without this agreement, the absolute number of mental health emergencies that police deal with may diminish, but racial disparities may rise if officers' discretion becomes even more targeted.

ii. "Quality of Life" Violations

Massachusetts General Law labels many quality-of-life violations – such as public urination, disorderly conduct, indecent exposure – as a "disturbance of the peace," a type of misdemeanor offense. These violations were part of the 15 low-level, misdemeanor offenses that D.A. Rollins de facto decriminalized. Thus, they represent a potentially fruitful area to combine pure decriminalization and reclassification with changes to enforcement practices related to them. Addressing the enforcement of these offenses is especially important given expanded police discretion in stops allowed by the recent SJC *Sweeting-Bailey* decision.

Although much of the public understandably wants to limit these behaviors, responding to them with the heavy-handedness of the criminal legal system is unproductive and harmful. Instead, we should promote efforts to decenter the police and criminal response to these behaviors and replace the existing response with alternative approaches that evidence suggests have greater efficacy. For instance, we might consider something like a Civil Public Safety Force, as advocated by Professor Deborah Ramirez.³⁸ The Civil Public Safety Force would be an entity consisting of professionals, such as community-trained mediators, social workers, EMTs, and traffic and quality of life monitors. The purpose for this force would be to mitigate the risks associated with traffic stops and quality of life violations. These models also address the public's concerns with troubling behaviors, but importantly, does so outside the criminal legal system.

iii. Behaviors Requiring No Response

Law enforcement's individual discretion represents a major source for racial disparities not only because it allows police to target who they stop, but also because it allows them to choose who they ignore. Although Black and White folk use marijuana at roughly the same rates, Black individuals are disproportionately criminalized for its use. In other words, for the majority of White Americans, *de facto* decriminalization for many of the above offenses *already* occurs. There are a number of "offenses" such as loitering or public urination, for which no response outside of a warning or request to disperse is necessary. Officially decriminalizing those types of offenses – many of which fall under the 15 low-level offenses under Rollins' nonprosecution policy – and barring police from conducting an arrest or even issuing a citation on the basis of those offenses, is necessary to remove those behaviors from the purview of the criminal legal system. These offenses also represent areas for *proactive* action, such as instituting more public restrooms or creating more housing/shelter options, led by departments *outside* of the criminal legal system.

The Nyoongar Patrol in Australia represents a promising example of ways to handle such instances in a manner that, while not state-driven, is state-supported and sanctioned. The Patrol is a night patrol led by Aboriginal people to establish a buffer between community members and the police before they are at risk of being arrested. The Patrol is composed of dedicated community programs and is well-funded by the government, and they are engaged in preventative and direct mediation work. As Sociologist Patrick Sharkey describes during a visit, in many cases, Patrol staff have designated sections of the city and walk along the streets with the following main goals: "maintain a presence in the public spaces where young people hang out, to search for Aboriginal people who look as if they could use some help, and to give anyone who is causing trouble the chance to cool off or to go home before the police get involved."³⁹ In these instances, no formal state response is necessary to maintain the peace or enhance the quality of life. The Patrol presents a powerful model Boston and the state can look towards.

b. Focus on data

Finally, as much of the report underscores, the lack of administrative demographic data has made it difficult to dissect the impacts of such policies on racial disparities. Thus, an immediate need is for statewide data (broken down by county) on the racial breakdown of the top offenses for arrest and specifically arrests related to marijuana. This will allow an evaluation of the efficacy of different decriminalization approaches undertaken in the state in mitigating racial disparities across the state, enabling the identification of offense categories to target for future work and policy intervention.

Endnotes

¹ Natapoff, Alexandra. 2018. *Punishment Without Crime: How Our Massive Misdemeanor System Traps the Innocent and Makes America More Unequal*. First edition. New York: Basic Books; Hinton, Elizabeth, and DeAnza Cook. 2021. “The Mass Criminalization of Black Americans: A Historical Overview.” *Annual Review of Criminology* 4 (1): 261–86.

² Ezekiel Edwards, Emily Greytak, Brooke Madubonwu, Thania Sanchez, Sophie Beiers, Charlotte Resing, Paige Fernandez, and Sagiv Galai. [A Tale of Two Countries: Racially Targeted Arrests in the Era of Marijuana Reform](#). American Civil Liberties Union, 2020. This ACLU research report calculates racial disparities in enforcement of marijuana possession laws by dividing the Black marijuana possession arrest rate by the White marijuana possession arrest rate to estimate the likelihood of arrest for Black residents relative to White residents. This number is the “rate ratio” (see the report’s “Methodology and Limitations” section for more details on how this rate ratio was calculated. A ratio of one indicates no disparity – Black and White residents are arrested for marijuana possession at the same rate. A ratio above one indicates a disparity in arrest rates – for example, a rate ratio of three means Black folks are three times as likely to be arrested than White folks (28-9).

³ ACLU, *A Tale of Two Countries*, p. 35.

⁴ Interactions with law enforcement – prior to contact with the court system and formal legal sanction involved – are associated with a range of deleterious impacts. Some scholars such as Rory Kramer and Brianna Remster, from the Department of Sociology and Criminology at Villanova University, argue that the lens of [slow violence](#) – the “more attritional, dispersed, and hidden” racial and class-based harms inflicted by the state” – allows us to better recognize the greater collateral violence – including generational trauma – inflicted by policing on individuals’ peers, families and communities.

Moreover, police still have wide discretion to arrest individuals, even if the vast majority of arrests they conduct ultimately result in no conviction – i.e. are not subject to the formal legal sanction. Over 10.5 million arrests were made in the U.S. in 2016. Yet only 5% of those arrests were for violent offenses – 80% were for low-level offenses. And while most arrests are ultimately dismissed, even that initial involvement with the legal system produces significant destabilizing and negative consequences. Issa Kohler-Hausmann’s article “[Misdemeanor Justice: Control without Conviction](#)”, published in the *American Journal of Sociology* in 2013, demonstrates the significant impacts of contact with the legal system through misdemeanor court, even when the majority of charges are ultimately dismissed. Pretrial detention is another major component of the criminal legal process that precedes conviction and formal sanction. Recent research indicates that spending any more than one day in pretrial detention can have devastating consequences: pretrial detention significantly and substantially erodes individuals’ physical and psychological well-being (Bick 2007 ; Beck et al. 2013 ; Noonan 2016); reduces employment, wages, and annual earnings ([Dobbie, Goldin, and Yang, 2017](#)); increases the burden of legal financial obligations, often shared with family members (deVuono- powell et al. 2015; Stevenson 2018); and increases the likelihood of future criminal legal system involvement (Digard and Swavola, 2019).

⁵ Woods, Jordan Blair. 2015. “[Decriminalization, Police Authority, and Routine Traffic Stops](#).” *UCLA Law Review* 62 (3): 672–759.

⁶ The 15 offenses [are](#): trespassing, shoplifting, disorderly conduct, larceny under \$250, disturbing the peace, receiving stolen property, minor driving offenses, breaking and entering (into a vacant property or for the purposes of sleeping/seeking refuge from the cold), wanton/malicious destruction of property, threats, minor in possession of alcohol, drug possession, drug possession with intent to distribute, standalone resisting arrest charge, and a resisting arrest charge combined with any of the above offenses.

⁷ A new study, “[Misdemeanor Prosecution](#)” (2021), by Amanda Agan, Jennifer Doleac, and Anna Harvey offers a rigorous analysis of the effects of Rollins’ non-prosecution policy. The study found that by shifting to a presumption of non-prosecution of 15 low-level, non-violent offenses, the DA’s office increased by 15 to 20 percentage points the rates of

non-prosecution for all nonviolent misdemeanor cases, not just the 15 on the DA's list. More importantly, increasing rates of non-prosecution led to reductions, on the order of 56 percentage points, in new criminal complaints within one year of the current case, with no detected increase in reported crime.

⁸ According to [Commonwealth Magazine](#) Berkshire County D.A. Andrea Harrington has also pursued an approach of nonprosecution for certain low-level offenses such as non-violent traffic violations or drug possession, another example of de facto decriminalization undertaken by the D.A.'s office in the state. There does not appear to be an official memo stating the policy, however, as is the case in Suffolk County. Similarly, there does not appear to be empirical evidence or evaluations of the effects of her policy as of now.

⁹ As a slightly different example of de facto decriminalization, the City Councils of Somerville, Cambridge, Northampton and Easthampton, Massachusetts have passed resolutions this year stipulating that possession and use of psychedelics should be "among the lowest enforcement priority" for police and prosecutors. Although an official resolution passed by each city, the policy still represents a de facto approach since only the state government has the power to officially decriminalize in Massachusetts.

¹⁰ Kenney, James. "[Executive Order No. 08-16: Implementation of Decriminalization of Disorderly Conduct and Related Offenses.](#)" City of Philadelphia Law Department, June 23, 2016.

¹¹ Sekhon, Nirej. "[Police and the Limit of Law.](#)" Columbia Law Review 119 (6).

¹² The Circuit courts – tasked with managing this new branch of Class E violations – waive the fine if the defendant agrees to a health screening through the addiction recovery hotline.

¹³ <https://malegislature.gov/Bills/192/HD3439>

¹⁴ Portugal's 2001 decriminalization law represents a combination of the approaches described above. In 2001, the Portugal legislature passed legislation decriminalizing all drug use, *reclassifying* drug possession and use as a civil rather than criminal offense. In the years prior to the law's passage, Portugal had also largely decriminalized drug possession in a de facto manner: jail time had largely been replaced by the use of fines as the primary sanction for individuals arrested for drug use. The law also established "Commissions for Dissuasions of Drug Addiction" to be responsible for any sanctions related to drug use. While the Commissions cannot mandate treatment, they can – and often do – condition the suspension of sanctions on treatment. In this way, the law also involves a component of *substitution* as the fine associated with the civil offense can be replaced by participation in treatment. Moreover, Portugal complemented decriminalization reform with a concerted investment in harm-reduction and health-based responses to drug addiction, which produced significant increases in the number of individuals seeking and receiving treatment. [Portugal](#) set up a central agency to coordinate its treatment response efforts and launched outreach teams in each district to visit people dealing with substance abuse to understand and respond to their needs. Importantly, the country also increased its spending on treatment and healthcare interventions by 9% between 2000 and 2010. The number of people in treatment rose by 147% from 1999 to 2003 ([Greenwald, 2001](#)), and more than half of opioid users were involved in some type of treatment program in 2012, a far higher take-up rate than that in Canada ([CBC News](#)).

¹⁵ In his U.C. Davis Law Review article, "[Marijuana Legalization and Pretextual Stops](#)," Professor Alex Kreit argues that even pure decriminalization is insufficient to lessen the excessive use of pretextual stops as officer power to conduct searches and seizures largely remains intact, especially if such decriminalization is not accompanied by limits placed on law enforcement authority to conduct searches based on these decriminalized violations. Kreit explains that legalization is the most viable approach to mitigate pretextual stops, and the racial disparities produced by them, since something like marijuana possession no longer gives officers probable cause for a stop or search.

¹⁶ See [Terry v. Ohio, 392 U.S. 1, 30-31 \(1968\)](#).

¹⁷ Kreit, Alex. 2016. "Marijuana Legalization and Pretextual Stops." U.C. Davis Law Review 50 (2): 741.

¹⁸ ACLU, *A Tale of Two Countries*, p. 35.

¹⁹ See Adult Use of Cannabis, [NRS 678D.200](#) Chapter 678D § (2017).

²⁰ San Francisco District Attorney's Office policy directive: "[Declination of Contraband Charges Based on Pretextual Stops.](#)"

²¹ Walsh, Sean Collins. "Philly has become the first big city to ban minor traffic stops said to criminalize 'driving while Black.'" *The Philadelphia Inquirer*, October 14, 2021. <https://www.inquirer.com/news/philadelphia-city-council-isaiah-thomas-police-driving-while-black-20211014.html>.

The new legislation is projected to have a major impact on policing in the city, as about 97% of police vehicle stops are for low-level infractions. As a result, the Defender Association predicts that the new law will lead to 300,000 fewer police encounters each year. This legislation limiting police authority for all low-level vehicle infractions is important given [evidence](#) of prior substitution among police behavior: a leaked internal memo from the South Philadelphia police district directed officers to focus more on vehicle code violations after the 2011 settlement of a federal discrimination lawsuit began monitoring the police department's use of pedestrian stops and searches.

²² Gettman, Jon, Emily Whitfield, and Matthew Allen. "[The War on Marijuana: In Black and White.](#)" American Civil Liberties Union of Massachusetts, October 2016.

²³ "Massachusetts." Marijuana Policy Project, June 22, 2021. <https://www.mpp.org/states/massachusetts/>.

²⁴ Woods. "Decriminalization, Police Authority, and Routine Traffic Stops." 2015.

²⁵ "Massachusetts." Marijuana Policy Project, June 22, 2021. <https://www.mpp.org/states/massachusetts/>.

²⁶ Although not included in that figure, Suffolk County had the lowest racial disparity in arrests for marijuana possession among the state's counties in 2018, with a disparity of 1.2. See this [ACLU data tool](#).

²⁷ Gettman et al. 2016.

²⁸ Edwards et al. "[A Tale of Two Countries.](#)" 2020.

²⁹ See "[Section 7: Personal Use of Marijuana](#)" under Title XV, Chapter 94G of the Massachusetts General Law.

³⁰ The report also finds no corresponding increase in recidivism associated with the non-prosecution policy, both for nonviolent misdemeanors and violent offenses.

³¹ Owusu, Felix Y. 2022. [Forthcoming]. "Presumptive Declination and Diversion in Suffolk County, MA." *Rappaport Institute for Greater Boston*. Policy Report.

³² Ramirez, Deborah and Sandra Susan Smith. "[SJC takes big step backward on racial justice: Decision improperly expands police discretion in traffic stops.](#)" *Commonwealth Magazine*, February 12, 2022.

³³ Ellement, John. "Supreme Judicial Court broadens police power to use pat frisks in sharply divided opinion." *Boston Globe*, December 22, 2021.

³⁴ Owusu, "Presumptive Declination and Diversion in Suffolk County, MA."

³⁵ For example, offenses such as possession with intent to distribute, property destruction, receiving stolen property, threats and disorderly conduct did not experience a significant change in prosecution after the policy went into effect. Shoplifting and larceny saw a slight, but statistically significant, increase in prosecution post policy.

³⁶ More about CAHOOTS under the White Bird Clinic [here](#).

³⁷ The different pilot programs will be rolled out in [phases](#). The first program is slated to begin in October, with response cars carrying both officers and mental health workers set to serve neighborhoods with the highest number of mental health-related calls for service. Regarding the second model, the city's Health and Human Services Chief stated that the department is currently finalizing the details with the unions, and hoping to rollout the pilot citywide once that concludes. The city plans to issue a request for proposals to hire a facilitator to lead a group of trained community members for the third pilot. The HHS Chief mentioned that the goal is to begin a community-design process in December to develop next steps for that program. Boston's new mental health pilot programs' [\\$1.75 million budget will come from the Health and Human Services](#) budget, [despite](#) BPD's budget being 2.7 times larger than the FY21 proposed budget for the Cabinet of Health of Human Services (\$414 million compared to \$151 million and HHS consists of nine individual departments).

³⁸ See Northeastern Professor of Law Deborah Ramirez's [proposal](#) for the creation of a civilian-trained public service corps.

³⁹ See Chapter 9 "The Next Urban Guardians" of Patrick Sharkey's *Uneasy Peace: The Great Crime Decline, The Renewal of City Life, and the Next War on Violence*.

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About the Roundtable on Racial Disparities in Massachusetts Criminal Courts

In the fall of 2020, the release of *Racial Disparities in the Massachusetts Criminal System* marked a potentially important turning point in efforts to address long-standing racial inequities in the Commonwealth's court system. The Report's troubling key findings about substantial bias-driven disparities in criminal caseloads, dispositions, sentencing, and incarceration provided an opening for a conversation long in the making, both about the extent, nature, and source of racial disparities, but also about how poor data quality and limited quantity have stymied efforts to better understand the scope and roots of the Commonwealth's problems. Building on the momentum of the report, in June of 2021 the Program in Criminal Justice Policy and Management kicked off the Roundtable on Racial Disparities in Massachusetts Criminal Courts. The overall goal of the Roundtable is to influence future policies, practices, and procedures in Massachusetts that will help to eradicate sources of racial inequities and resulting disparities in the courts.