



Research Paper

“What I should be doing is harm reduction, if I’m doing my job right”: Engagement with harm reduction principles among prosecutors enacting drug policy reform in the United States

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ARTICLE INFO

Keywords:

Substance use
Harm reduction
Decriminalization
Policing
Policy implementation
Prosecutorial discretion

ABSTRACT

Background: Prosecutorial discretion to pursue or decline criminal charges is a powerful mechanism determining criminal justice outcomes among people who use drugs (PWUD). In the US, prosecutors are increasingly employing this tool to prevent arrest, incarceration, and subsequent health and social harms among PWUD. Many cite harm reduction as a basis for these reforms; however, the extent of prosecutors’ knowledge and understanding of harm reduction principles, and how they are operationalized in the policy process, remains unclear. **Methods:** We assess references to and application of harm reduction in the policy design and implementation process of prosecutorial drug policy reform in 14 US jurisdictions. In-depth-interviews ($N = 16$) were conducted with elected prosecutors and their policy staff from November 2021-April 2022. Through initial structured analysis, policymakers’ understanding and utilization of the term ‘harm reduction’ emerged as a salient theme which we conducted secondary thematic analysis to further explore. **Results:** While all participants identified as progressive, there was wide variation in their ideologies, policy provisions, and engagement with harm reduction principles. Eleven participants explicitly referred to ‘reducing harms of drug use’ or ‘harm reduction’ as guiding their policy approach; the remainder did not invoke ‘harm reduction’ by name but highlighted relevant concepts like racial equity and ‘public health approaches’ as core policy tenets. While some prosecutors demonstrated familiarity with traditional harm reduction principles (meeting PWUD where they are, reducing *harms to them*), others focused on *harm to the wider community* (the ‘public,’ businesses, etc). Invocation of harm reduction was not always consistent with specific policy provisions: prosecutors implemented policies ranging from unconditional non-prosecution of drug possession to diversion, some of which were odds with core harm reduction principles of dignity and justice (i.e., involving coercive treatment incentives/requirements). **Conclusions:** As prosecutors shift their approach to redress the harms caused by drug criminalization, clarity is needed on what a harm reduction approach to using discretionary powers entails. Targeting reform-minded prosecutors with messaging on the principles, evidence base, and best practices of harm reduction is merited.

Introduction

Prosecutorial discretion to pursue or decline criminal charges is a powerful mechanism determining criminal justice outcomes among people who use drugs. In the United States (US), at the state, county, and municipal levels of government, State’s or District Attorneys (S/DA) are

elected officials who have decision-making power over charging decisions for crimes committed within their respective jurisdictions; for most criminal offenses, the S/DA has sole authority over whether to bring charges or to decline to prosecute (Bibas, 2009). Though legal scholars have debated whether written charging criteria should exist with which to guide the prosecutorial decision-making process, (Krug,

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<https://doi.org/10.1016/j.drugpo.2024.104541>

Available online 26 July 2024

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2002) such policies or regulations are not currently in effect, leaving prosecutors with substantial, unilateral power in their districts. In addition to charging decisions, prosecutors select whether or not to recommend bail, determine the severity of recommended punishment, and control the plea-bargaining process (Young, 2020). Prosecutors have accordingly been referred to as “gatekeepers who ration criminal justice” (Bibas, 2009).

These responsibilities situate prosecutors as highly powerful actors within the criminal legal system. For many decades, prosecutors in the US used this power to enact “tough-on-crime” policies, maximizing charges brought within their jurisdictions and pushing for harsh punishments for those convicted of crimes (Bellin, 2022; Mauer, 1999; Sklansky, 2017) (cite). They were particularly impactful in enforcing the US “War on Drugs,” a set of policies characterized by prohibition of drugs and stringent criminal prosecution of drug possession and its use. Drug War policies have been implemented by prosecutors via recommendation of harsh sentences for drug possession and use, including mandatory minimum sentences for low-level drug crimes and disparate sentencing for crack versus cocaine possession (Lamb, 2014; Walker & Mezuk, 2018). Enforcement has been disproportionately concentrated within low-income and racially minoritized communities, especially Black communities, fueling an exponential rise in the number of incarcerated people of color within the US (Mustard, 2001).

While over one trillion dollars has been invested in this so-called “war,” (Pearl, 2018) evidence demonstrates that it has catastrophically failed to produce any impact on reducing drug supply, availability, or use. A Global Commission on Drug Policy report released in 2011 asserted that beyond fueling mass incarceration, criminalization of drugs exacerbated health harms associated with drug use, leading to an increased risk of overdose fatalities, infectious disease risk, interpersonal violence and mental illness (Global Commission on Drug Policy, 2021; The Leadership Conference Education Fund, 2011). Exposure to the criminal legal system creates barriers to employment, education, and housing; limits eligibility for public assistance; and disenfranchises individuals with felony convictions (Aviram et al., 2017; Cohen et al., 2022). While the number of people incarcerated for drug offenses increased 11 times between 1980 – 2015, (Vera, 2023) there has been no decrease in the availability or use of illicit drugs. In recent years, despite a reduction in overall arrest and incarceration rates nationally, drug arrests have remained stable and continue to be the leading cause of arrest in the US, and remain disproportionately concentrated within the Black community (SAMHSA, 2020; Stanforth et al., 2016). Citing concerns about escalating drug harms and human rights violations among incarcerated populations, the UN Office of the High Commissioner has endorsed the decriminalization of low-level drug crimes in favor of more public-health centered approaches to substance use (United Nations Human Rights Office of the High Commissioner, 2023).

Within this context, a new approach to prosecution has emerged in some localities, referred to as “progressive prosecution” (Chicago Appleeed Center for Fair Courts and Chicago Council of Lawyers, 2024; Davis, 2019). An estimated 70 reform-oriented prosecutors held office in 2022, representing approximately 20% of the US population. Of the 36 most populous US counties, 13 were represented by a reform-oriented prosecutor (Chicago Appleeed Center for Fair Courts and Chicago Council of Lawyers, 2024; Pfaff, 2023). With growing acknowledgement of the failure of the War on Drugs, reform-minded ‘progressive’ prosecutors are pledging either publicly or internally to reduce mass incarceration by pursuing alternative approaches to low-level drug offenses. This approach is known as *de facto* decriminalization, whereby S/DA use their discretion to *decline* bringing charges for offenses such as the possession of illicit drugs or drug paraphernalia, (Young, 2020) often invoking public health and harm reduction as justification for doing so. Despite the increasing use of discretion to reframe substance use as a public health approach in recent years, little is known about prosecutors’ understanding of public health principles surrounding substance use.

Specifically, as harm reduction becomes a more mainstream concept and term utilized in policymaking, questions may arise surrounding its operationalization by different actors, particularly those in the criminal legal system. Harm reduction refers to policies and programs minimizing health, social and legal harms associated with drug use as well as drug policies and their enforcement (Harm Reduction International, 2024). A historically anti-racist and social-justice driven grassroots movement, harm reduction espouses acceptance and advocates minimizing harm through non-judgmental and non-coercive resource and service provision to promote the health and dignity of People Who Use Drugs (PWUD) (National Harm Reduction Coalition, n.d.). The movement is rooted in community-based activism and organizing efforts beginning in the 1960s and has traditionally existed outside of formal systems and funding streams (National Harm Reduction Coalition, n.d.). The US has been slower and more reluctant to endorse harm reduction interventions and policy changes compared to other Western countries (Nadelmann & LaSalle, 2017) with ongoing politicization, negative media coverage and community resistance challenging implementation and sustainability of interventions such as supervised consumption sites, (Barry et al., 2019; Kennedy-Hendricks et al., 2019; Yoon et al., 2022) safer supply, (Ivsins et al., 2020; Kilmer et al., 2018) or legislative drug decriminalization (Greenwald, 2009). However, with the continued escalation of the overdose crisis within the US, the harm reduction philosophy has been more formally adopted in recent years. The White House Office of National Drug Control Policy specifically prioritized harm reduction as a core tenant of the US Department of Health and Human Services’ Overdose Prevention Strategy in 2021, (National Institutes of Health, 2024) officially recognizing the merits of the movement’s philosophy and non-punitive approach to substance use.

As initiatives aimed at reversing the policing and criminalization of PWUD increasingly invoke harm reduction as a guiding principle, many have pointed to inherent tensions between harm reduction and the criminal legal system and questioned whether they are fundamentally compatible (Fair and Just Prosecution, 2019; Neumann, 2023). The majority of these discussions and literature have focused on understanding contradictions, perceptions and practices related to harm reduction among police officers; this has not to our knowledge been extensively examined among prosecutors. Given the rise of ‘progressive prosecution’ and the unilateral power of prosecutors in devising and implementing discretionary policies that influence criminalization of PWUD, understanding knowledge and interpretation of harm reduction in this group is highly relevant to the health and wellness of PWUD. This paper explores perceptions and mentions of harm reduction principles among 16 self-identifying progressive prosecutors implementing a range of *de facto* drug policy reforms in 14 jurisdictions across the US.

Methods

Study context and overview

This study was nested in a larger qualitative study examining emerging models of *de facto* drug policy reform being designed and implemented by progressive prosecutors across the country. The parent study conducted qualitative semi-structured in-depth interviews with policymakers (elected officials and staff leadership from prosecutorial offices; $N = 16$) in 14 jurisdictions and advocates for drug and criminal legal policy reform ($N = 6$) nationwide between November 2021-April 2022. Interview guides and analyses were designed to characterize the emerging policy approach of *de facto* drug decriminalization and detail similarities and differences in policy design and implementation processes between different settings and models.

A diverse range of *de facto* decriminalization policy models were identified in the parent study (Rouhani & Winiker et al., 2024). These were classified into three distinct categories: (i) unconditional declination to prosecute possession of all illicit substances with no restrictions on eligibility; (ii) conditional declination to prosecute possession of

illicit substances, restrictions by type of substance or individual circumstances; and (iii) expansion of pre-arrest diversion options, which relied upon loosening program eligibility and completion requirements to increase opportunities to avert arrest and prosecution rather than declining to prosecute outright.

During initial analysis, policymakers frequently referred to harm reduction (either by name or to its core principles, as defined below). Variation in how they seemed to understand and engage with this concept emerged as a theme of interest, particularly given the unique power they wield in the enforcement of drug prohibition in their respective communities. The current study explores this theme further, evaluating transcripts from semi-structured qualitative in-depth interviews conducted with the subsample of policymakers ($N = 16$) to examine references to harm reduction by prosecutorial actors implementing different forms of *de facto* policies nationwide.

Sampling and recruitment

Prosecutorial participants were recruited purposively via their membership in a Progressive Prosecutor Working Group, a collective of self-identifying progressive prosecutors and their staff that convenes monthly to discuss progressive policy design and implementation. The study PI was introduced to working group members via email and conducted initial recruitment by sending them a study information page and inviting them to participate. Subsequent recruitment was conducted via snowball sampling whereby other prosecutors enacting *de facto* drug reforms were referred by existing study participants.

Eligible prosecutorial staff participants were: (1) aged >18 years, (2) currently working in a prosecutorial office in the US with expertise in the office's drug policy approach (e.g., elected prosecutor, policy director, assistant district attorney), (3) a member of OR referred by a member of the Progressive Policy Working Group, (4) in their current professional position for at least 1 year, (5) able to participate in English, and (6) able to provide informed consent.

Interview guide

The interview guide for the parent study was informed by the Exploration, Preparation, Implementation, and Sustainment (EPIS) framework and were designed to assess policymakers' experiences with drug policy reform and implementation within their jurisdictions. Specific interview domains included: (1) drivers of adopting a progressive policy agenda; (2) characteristics of *de facto* drug policies, (3) facilitators and barriers to policy implementation, and (4) perceived policy impact and evaluation considerations. The interview guide was pilot tested internally by the study team and with the first participant in the sample and iteratively edited thereafter. Guide development was informed by the principles of Constructivist Grounded Theory, (Charmaz, 2014) which emphasize the importance of integrating early findings and emergent themes into the interview guide to sufficiently interrogate emergent themes. Key subdomains relevant to this analysis included the impetus for adopting and implementing 'progressive' policy changes, intended policy impacts, and experiences with law enforcement and community stakeholders. The guide was not explicitly designed to capture attitudes towards harm reduction; rather, in discussing the domains described, participants frequently referred to harm reduction or its principles of their own volition, and these data were extracted and utilized for the current analysis.

Data collection

Interviews were conducted by one of two qualitative researchers trained in in-depth interview methods and familiar with the study orientation and objectives. All interviews lasted approximately 60 minutes, took place virtually over Zoom, and were audio recorded with the consent of participants. Interviewers administered a brief structured

survey at the beginning of each interview to measure participants' sociodemographic characteristics, including age category, race, and length of time in position. Audio recordings of each interview were transcribed verbatim and spot-checked for accuracy prior to analysis.

All participants provided oral informed consent. Participants did not receive monetary compensation for their participation. This study and its protocols were approved by the Johns Hopkins Bloomberg School of Public Health Institutional Review Board.

Data analysis

Analysis for the parent study was conducted using a hybrid inductive-deductive approach, using the framework method (Gale et al., 2013) to summarize domains related to the adoption, design and implementation of different *de facto* policies. Details of this analysis are described in the main outcome paper ((Rouhani & Winiker et al., 2024) et al) (Rouhani & Winiker et al., 2024); briefly, an extraction matrix was used to highlight data relevant to key domains of policy implementation, informed by the EPIS framework (Aarons et al., 2011). To test the extraction matrix, two qualitative analysts independently coded the first three transcripts by extracting and summarizing relevant data within the matrix, then met with the full study team to discuss the fit and review discrepancies. The remaining transcripts were divided between the analysts and each extracted into an individual matrix. Each read and reviewed the other's extraction matrices for accuracy and consistency.

Once the interviews had been individually extracted, the team met to discuss emergent themes and findings that may not have been sufficiently captured through the matrix structure. One such theme was the ways that participants referred to and engaged with the concept of harm reduction when discussing approaches to policy and practice. For this study, an analyst employed an inductive process to review each interview and identify and extract all text segments in which policymakers engaged the term "harm reduction" or discussed policy efforts to "reduce harms." Through this process, we identified several analogous, related, or alternative terms relating to the concept of "harm reduction" that were used by policymakers: these included "harms," "public health," "health," "public health approach," and "racial equity." All such segments were coded during this second wave as an emergent theme. A final review of transcripts was then conducted to ensure no such references had been missed. Each participant's engagement with these terms was then enumerated in a table and compared with other elements of their drug policy reform agenda, including the type of drug policy reform model engaged, specific policy provisions, challenges faced, and other unique features of their experience with reform implementation. We also examined differences by geographic region. The goal of this analysis was to assess whether engagement with the harm reduction philosophy systematically differed by any of these elements.

All extracted harm reduction-related quotations were then iteratively discussed, reviewed, categorized, and compared against our analytical definition of "harm reduction" by the study team to generate the present analysis.

Defining 'harm reduction'

There exist many definitions of harm reduction as a philosophy, movement, and practice. This analysis was guided by the following consolidated definition of the harm reduction philosophy as it relates to the design and implementation of drug policy reforms:

An approach to policymaking, program design, and service delivery that acknowledges the reality of drug use and aims to mitigate the health, social, and structural harms that can be associated with it, with a goal of improving health and wellbeing and upholding and respecting autonomy of people who use drugs. This approach is cognizant of and responsive to the harms of punitive drug criminalization and its enforcement, informs non-judgmental and non-coercive services, and does not privilege

abstinence from drugs, cessation of drug use, or entry into drug treatment programs over other outcomes (Harm Reduction International, 2024; Marlatt, 1996; National Harm Reduction Coalition, 2024).

Harm reduction falls under the umbrella of public health-oriented, rather than punitive, approaches to substance use and incorporates key public health strategies (prevention, risk reduction, and health promotion) to empower people who use drugs to live healthy, self-directed, and purpose-filled lives (SAMHSA, 2023).

Results

Sixteen participants are included in this analysis, representing 14 prosecutor offices. They included $N = 4$ elected prosecutors (either State's or District Attorneys [SA/DA]), $N = 6$ Assistant District Attorneys (ADA) and unit chiefs, and $N = 6$ policy directors for elected prosecutors. These included representatives from all US Census regions (West $N = 3$, Midwest $N = 2$, South $N = 5$, Northeast $N = 4$). Participants ranged in age from 28- 64 years old. 81% reported identifying as white, and participants had worked in their current role for an average of three years. Before this current role, they served in a range of positions including as private attorneys, directors of policy reform organizations, or other local government roles.

Engagement with the term "harm reduction" varied substantially among interviewed participants. While some did not explicitly mention the term, they still endorsed the philosophy of reducing the harms of criminal legal engagement as a fundamental component and driver of their reform agenda. For example, one participant described that their experience in prosecution had shown them the harms of the system: "while I thought I was doing something good, I think I ended up perpetuating the harm ... that has made me understand that looking at drug addiction, substance use disorder and behavioral health issues through the lens of the law was doing extra harm to people. So that made the urgency of building the instead, what are [we] going to do instead?" (Participant #2, Elected Prosecutor). Over half of the sample formally mentioned "harm reduction" as a guiding principle or practice of their own policy efforts; as one explained, "what I should be doing is harm reduction, if I'm doing my job right... always just meeting people where they're at and trying to meet their needs to put them in a better place and keep them safe" (Participant #4, Elected Prosecutor). However, there was considerable variation in how harm reduction was discussed and operationalized into specific policy components, and across the sample, explicit referral to harm reduction did not correlate with either the type of policy adopted to reduce criminal punishment of PWUD nor the region that the prosecutors were operating in. Evaluation of interviews for the presence of stigmatizing, non-person first language when referring to PWUD (National Institute on Drug Abuse, 2021) found that half employed the terminology 'user' and one referred to PWUD as 'drug/heroin addicts'; no other terms to avoid were found in any of the interviews. Moreover, the use of these terms was not more prevalent in one group or another. Findings describing engagement with harm reduction principles and policy models implemented among prosecutors who did vs. did not formally invoke harm reduction are described below.

Participants who did not explicitly refer to 'harm reduction'

Engagement with harm reduction principles

Of the 16 policymakers interviewed, 5 did not use the term "harm reduction" or any language related to "reducing the harms" of the criminal legal system, but this did not necessarily coincide with implementation of less progressive policies. The majority of these participants discussed engaging a "public health" approach, characterizing substance use and addiction as health (rather than criminal) issues that required solutions, expertise, and oversight by actors and institutions outside of the criminal legal system. For example, one participant stated, "Well, there are attorneys within our office, including myself, who prefer a

more public health approach to drug possession (Participant #15, ADA/ Unit Chief)." Another acknowledged not wanting to be "part of a system that criminalizes what's essentially a public health issue (Participant #1, Policy Director)" when referring to substance use and addiction. Some of these participants also described being motivated to pursue progressive policies by the goal of devoting office resources to 'crimes with victims' rather than to those such as drug possession that they considered victimless. One stated:

We got together as a team and created the declination policy. Drug cases are included in that, non-violent financial crimes without impact were included in that, and some other lower-level felony crimes where there was not restitution or victim impact involved, so those were the cases that we could alleviate. (Participant #15, ADA/ Unit Chief)

Finally, all five of these participants reported being driven by a goal of increasing racial equity within the criminal legal system. Specifically, many mentioned historic harms caused to people of color by over-policing and the harsh criminalization of substance use over past years. In response to a question about their office's motivations for the adoption of a declination policy, one participant stated:

I think there's been a general switch around the country when it comes to criminal justice and looking at mass incarceration from that racial equity lens that I don't think was there even like five, ten years ago... people are looking at it more and considering it more. Being part of the system, we have an obligation to critically examine our role in perpetuating racial inequity within the criminal justice system. (Participant #9, ADA/Unit Chief)

Another highlighted:

Because we knew that most of the people who were subject to these [drug] prosecutions were Black and brown people and young Black and brown men... [the DA] wanted to know how [to] get to a point where there was equity in the criminal legal system. (Participant #16, Policy Director)

Policy models implemented

Two participants in this category implemented substance-specific (conditional) declination with case-by-case consideration for other drug categories, and the remainder were in settings where simple (i.e., nonviolent) drug possession charges were unconditionally not prosecuted.

Participants directly referring to harm reduction principles or the formal harm reduction movement

Engagement with harm reduction principles

The remaining 11 participants either referred to or formally invoked "harm reduction" as a guiding principle, practice, or consideration of their policy work. However, these lawmakers did not engage the term consistently and demonstrated wide variation in how it was applied to their policy-making process.

Several participants demonstrated knowledge of harm reduction as a general concept and related it to aspects of the policy process. One participant, who stated their intention to "reduce the harms" of the criminal legal system, raised harm reduction in the context of their policy's shortcomings. This participant had used prosecutorial discretion to downgrade personal use drug possession charges from a felony to a misdemeanor, believing this could reduce the harms of criminal legal engagement for PWUD. In retrospect, however they had come to recognize that this approach still perpetuated or caused harms for those with substance use disorders. They stated:

I don't think I fully understood how even a misdemeanor prosecution can set a person back. It involves warrants and jail, just enough jail

time so that you lose your job and your kids and your apartment and— It wasn't really helping anybody. I thought I was doing something that would help people, to de-felonize it. "You won't go to prison. This won't count as a point." But in fact, it's the same hassle only locally at the misdemeanor prosecution. So if I look back, I *thought* I was doing something to reduce the harm that we were doing to people with substance use disorder. (Participant #2, Elected Prosecutor)

One member of this group referred to harm reduction in relation to their local health department's approach to addressing substance use in the community. This participant reported being motivated to follow the lead of those health-sector participants advocating for harm reduction and thus based their policy decisions off of this model.

Our Health Commission has as a principle of harm reduction and there's explicit... policy around a harm reduction approach for our Department of Public Health... all of this has us at this critical juncture where the criminal legal system can say, "Let's listen to our public health officials and leadership around the most appropriate approach." (Participant #14, Policy Director)

Finally, participants described an awareness of the ineffectiveness of criminalizing drug use, discussing their goal of instead engaging a "public health" approach to drug policy. One shared their desire for an overdose prevention center within their county as a more comprehensive means of reducing the harms of substance use.

I would love it if, in [Redacted County], there was a true harm reduction site or a number of sites where people could use safely. If we just didn't prosecute any drugs under [some] amount, and if services could be provided for people who want to get help and just take it all out into the public health arena. You can be an alcoholic, and you're not going to jail unless you drive drunk. Why is it different if you're using some substance? Doesn't make sense. (Participant #8, Policy Director)

A number of additional participants who referred to harm reduction demonstrated a deeper knowledge and engagement with the principles aligned with the formal harm reduction movement. These participants cited fuller definitions of harm reduction. One demonstrated familiarity with a range of harm reduction and public health frameworks relied on community expertise in guiding their policy:

"The lesson I would draw is, in the design of a public policy framework, to consult less with advocates and more with people who actually take care of people and figure out where are the broken pieces and what would have to happen to unbreak the channels towards stabilization and recovery in the way that SAMHSA uses the term "recovery"— not abstinence but stabilization."

In discussing harm reduction specifically, they noted

"...our job is to take the harm seriously— one of the principles of the Harm Reduction Movement, Principle #8. The Harm Reduction Coalition Website is "Take the Harm Seriously," and we do. We take it seriously."

However, this principle was used by the same participant as justifying ongoing police and prosecutorial involvement in the substance use crisis, rather than adopting a more hands-off declination approach. In discussing their jurisdiction's decision to pursue a more comprehensive pre-booking diversion program, they said:

"Someone's got to come. If that can be us [a direct pre-booking referral service], great. If that's not us and it's police... And also, we have to be responsible for whether it works and whether the conditions in public or the effects on retailers or whatever are actually better or worse. (Participant #10, Policy Director)

This interview illustrated some of the nuances and contradictions

observed in understanding how actors within the criminal legal system operationalized harm reduction. While the *harms* of arrest and prosecution for PWUD were clearly acknowledged by this participant, the perceived *harms* of drug use to the wider community (i.e., businesses) was cited as something that also needed to be addressed by the criminal legal system.

Indeed, several policymakers highlighted pressure from the general public to continue to incarcerate or force drug treatment upon people using drugs in public spaces based on perceived threats to public safety. Requests for law enforcement to "come and move them on and get them treatment" (Participant #1, Policy Director) or accusations that "It's all my [elected prosecutor's] fault that there's homelessness and addiction because I won't put these people in jail." (Participant #2, Elected Prosecutor) were made by constituents even in more politically progressive jurisdictions. This underscores a key challenge in designing and implementing policies with fidelity to a true harm reduction approach, which rejects coercive treatment and centers the autonomy and dignity of PWUD. As one policymaker put it, "People will often agree with us that people who use drugs shouldn't be prosecuted, but then they don't really know what to do when people refuse to get help and that's where they don't have a lot of patience or grace." (Participant #4, ADA/Unit Chief)

Another participant felt that reducing perceived harms to the public was inherently compatible, rather than at odds with, the harm reduction movement. They stated:

Something I try to describe to people all the time is I am the top law enforcement officer in this county. My main goal is public safety, right? Public safety is harm reduction. You are usually coming into people's lives after something has already happened. You're responding to it. The best-case scenario is that you meet people where they're at and you try to limit the harm on them and the community. So to me, it's like— and this is not how I always thought, but from what I learned about harm reduction, all I do is harm reduction. At least what I should be doing is harm reduction, if I'm doing my job right. (Participant #6, Elected Prosecutor)

In contrast, other participants referred to more traditional harm reduction interventions (e.g., syringe exchange services) directly relevant to reducing harms of overdose or other outcomes among PWUD. Some cited evidence of the effectiveness of such policies in comparison to punitive drug policies, with one describing:

In general terms, I was writing a whitepaper for specific policy actions. You know, not prosecuting needle exchange programs, not prosecuting buprenorphine and methadone in small possession quantities. There're statistics, there are scientific studies that say even if they're unregulated, even if they weren't obtained pursuant to prescription, the presence of buprenorphine and methadone in small quantities ultimately has a positive net result on the reduction of overdoses in a particular geographical area. So, there's no reason for us to intervene and stop a good harm reduction policy from having some effect. Particularly in light of our overdose spikes. (Participant #12, ADA/Unit Chief)

Policy models implemented

While all eleven participants who mentioned harm reduction shared a stated goal of reducing the harms historically created and perpetuated by the criminal legal system, their approaches to *de facto* drug policy reforms varied substantially. Some engaged a comprehensive *de facto* decriminalization approach, characterized by declination of charges for any personal use drug possession cases regardless of substance. This was often fully publicized as a method to improve police trust and reduce police avoidant behaviors which can compromise harm reduction behaviors (e.g., hesitancy to access services, carry sterile paraphernalia or call 911 in the event of an overdose). One participant engaging this approach described it as, "Essentially, if you are arrested on a simple

drug possession charge, we will not prosecute that case. We will dismiss that case immediately” (Participant #1, Policy Director). Another SA described adopting a more limited approach to declination, limited to a single substance (buprenorphine), as a strategy explicitly used to reduce harms of the use of what were perceived as more harmful opioids:

When I became SA... the Executive Director of our syringe exchange was like “We need to be flooding our community with buprenorphine. People can’t get it. People want it and it will save people’s lives.” So, I was going to [decline] prosecuting for it regardless, but then out of those conversations, we started getting the Mayor involved. We started getting the hospital involved. We started getting the police department involved, and that’s when it became a much bigger community-wide effort ... The non-prosecution of it was actually a messaging thing more than anything. We wanted to send a message to the community that if you have this choice and it’s heroin or unprescribed buprenorphine, we want you to get the unprescribed buprenorphine. I don’t care where it comes from, we just want you to make that choice and we won’t prosecute you for it. (Participant #6, Elected Prosecutor)

Other participants in this category, however, still opted for policies which centered law enforcement and relied on completion of program requirements to qualify for relief from criminal prosecution. These participants expanded their pre-arrest diversion and/or law-enforcement assisted diversion programs, requiring individuals to successfully complete a range of program requirements to avert criminal prosecution. However, these cases *could* still result in a conviction, as described by one participant:

So we basically have created off ramps at the various levels of prosecution, but someone could say, “No, I don’t want to do diversion. No, I don’t want to show proof of treatment. No, I don’t want to...” and would still elect to go to trial, and then we’re kind of stuck between a rock and a hard place because if we don’t try the case the perception is it disincentivizes people from doing anything before that.... So as much as we try not to prosecute for these offenses the social pressures and the volume and just basically running out of options kind of leaves us at the end the road with unfortunately still prosecuting some. (Participant #4, ADA/Unit Chief)

Others adopted diversion approaches that included court-ordered treatment approaches, aligning with a philosophy of coerced treatment. This is in direct opposition with the principles of the harm reduction movement, despite invoking these principles as a guiding philosophy for policy change and stating clear intentions of *not* wanting to criminalize substance use. One participant said:

One of the main goals of this unit is to develop kind of a comprehensive set of policies to do direct referral of individuals who have substance use disorder (SUD) and are identified either by the law enforcement agency that made the arrest or by the Sheriff’s Office during the booking process or even by the court during their first appearance...so that the court-ordered compliance with treatment as a condition of bond can be monitored ... The goal being we don’t want to file charges. We don’t want to prosecute individuals suffering from substance use disorder. We want to get them into treatment, try to coerce them into treatment as much as possible, but we don’t want to file charges on them, create felons out of them, or even have open felony charges over them that are going to be an additional onus on their ability to move through the treatment process. We want them to focus on treatment. (Participant #12, ADA/Unit Chief)

Discussion

Exposure to the criminal legal system is a major contributor to the structural risk environment for PWUD, (Rhodes, 2009) producing drug-related health harms, long term consequences like housing and financial instability, and profound racial inequities therein. US prosecutors have immense discretion in determining who faces this system and to what extent they become entrenched in it. Given this, understanding their perspectives on emerging ‘public health approaches’ to prosecution is highly relevant to the health and wellness of PWUD and their wider communities. In particular, as “harm reduction” is increasingly integrated into the lexicon of US institutions, understanding its applications to policy and fidelity to core principles is important for accountability and ultimate impacts. This study is the first, to our knowledge, to examine references to and applications of harm reduction among prosecutors enacting drug policy reforms in the US. We observed variation in the use of the term and the way that it is operationalized; no clear pattern emerged between invocation of harm reduction terminology and other factors such as specific policy details, geographic location within the US, or the use of stigmatizing language. Findings point to variable and ultimately incomplete or inconsistent harm reduction literacy among some prosecutors, highlighting a need for targeted messaging to clarify harm reduction tenets and best practices to these key stakeholders in the criminal legal system.

Though not all participants specifically referred to “harm reduction,” there was widespread acknowledgement of how the criminal legal system constitutes *harm*, and the need for a more public health centered and racially equitable approach to the substance use crisis. However, throughout these interviews, the question of *harm for whom* often arose as a theme. Some prosecutors did consistently refer to the harms to PWUD of a punitive approach to drug use through mechanisms such as police harassment, time spent in detention, loss of healthcare, racial inequities, and drug market consequences. Others however shifted focus to what they perceived as *harm to the community at large*, an important distinction which can have fundamentally different policy implications. For example, perceived harm to the broader community may include things like shoplifting, public drug use, and other forms of public disorder which have historically been used to justify *more* punitive measures, which in turn *increase* harm to PWUD. Doe-Simkins and colleagues have highlighted this paradox in the context of law enforcement, arguing that harms to PWUD of increasing the role of law enforcement in overdose response are given insufficient weight (Doe-Simkins et al., 2022). In the current study, (Kammersgaard, 2019) the equating of harm reduction with public safety may represent a similar paradox or at least beg the questions, *whose safety? Harm to whom?*

Indeed, as a part of the increasing movement to enact “harm reduction policing” or integrate harm reduction principles into law enforcement functions, discourse has emphasized synergistic effects of public health and safety (Anderson et al., 2022; Michaud et al., 2023). However, many object to this by highlighting that what is seen as public safety is often at odds with harm reduction approaches to promoting the health and wellness of PWUD. Michaud and colleagues argue that while this integration presumes that public health will *positively* influence law enforcement and thereby promote trust in institutions among PWUD, it in fact achieves the opposite: it repositions therapeutic and support services as functioning *in service of* criminal legal institutions, eroding trust in health and harm reduction actors among populations they aim to serve (Michaud et al., 2023). Inherent tensions between public health and safety have been noted by police officers themselves, who have reported feeling that they need to juggle multiple roles and balance accountability to different actors when functioning as both agents of law

enforcement and medical personnel (Lloyd et al., 2023). Literature focused on these contradictions is concentrated among police officers, who possess immense discretion in street-level interactions, whether PWUD are met with stigma, harassment, and/or arrest of PWUD. It remains largely unexplored however among prosecutors, who hold greater power in determining the advancement of cases through the criminal legal system thereafter, which can result in lasting disruptions to critical supports including housing, healthcare, and social, professional, and financial stability. Expanding the body of research to better understand prosecutors' own perceptions of competing interests and responsibilities, as well as PWUD level of trust or mistrust of prosecutorial initiatives, is merited to elucidate both synergistic potential and possible harms of this growing approach.

Ultimately, whether participants specifically referred to harm reduction principles did not correlate with adoption of any particular prosecutorial declination policy. Despite some prosecutors explicitly discussing or defining harm reduction, their drug policy details remained fundamentally at odds with its principles. Specifically, conditions of diversion that included coerced treatment sometimes featured in policies being discussed as progressive and public health or harm-reduction aligned. This incongruity points to the perils of divorcing of harm reduction philosophies from harm reduction interventions; when interventions alone are taken up by policymakers, they may be adapted to the same carceral logics and structures that generate harms for PWUD in the first place. These provisions directly contradict the principle and practice of meeting people where they are at and ensuring that treatment and/or abstinence remain a *choice*, which are core tenets of harm reduction. The conflation of harm reduction with treatment, and the potentially coercive power dynamics arising when harm reduction is integrated into medical settings (e.g., hospitals, health departments) and carceral settings alike, is a noted concern about the impacts of the institutionalization of harm reduction (Khan et al., 2022; Michaud et al., 2023). In particular, coercive forms of diversion and treatment have been criticized for perpetuating a paternalistic model of recovery that prioritizes crime prevention over health and autonomy (Hunt & Stevens, 2004). Harm reduction, in contrast, is rooted in the provision of non-judgmental and pragmatic options to support individuals at any stage on the "spectrum from safer use to managed use to abstinence" (Marlatt & Witkiewitz, 2010). The extent to which diversion programs, whether or not they entail coerced treatment, can reconcile their completion requirements with supporting individuals anywhere along this spectrum remains a key point of discussion and debate in the field of drug policy and harm reduction (Michaud et al., 2023).

Whether the integration of public health and safety structures is seen as a necessary and promising step in drug policy reform, or a dangerous sign of co-option of harm reduction by the criminal legal system, it is increasingly occurring in US policing and judicial systems. As our findings illustrate, the use and application of harm reduction varies widely in its fidelity both to the founding principles of the movement, and the strong body of scientific research that has been conducted thus far. For example, beyond the ethical debates surrounding coercive treatment and to some extent diversion programs, significant barriers to program completion have been documented, particularly among individuals at greatest risk of overdose mortality, including those who use opioids, are racially minoritized, and are in the lowest income brackets (Gallagher, 2013; McKean & Warren-Gordon, 2011; Physicians for Human Rights, 2017). This suggests that pursuing these strategies may be less likely to achieve prosecutors' own stated goals of improving treatment outcomes and keeping people out of the carceral pipeline.

Policy actors in other contexts have also highlighted how formalization of harm reduction concepts may lead to outsized attention on individual-level harm reduction interventions that ignore upstream social and structural contributors to the risk environment (Gehring et al., 2022; US Department of Health and Human Services, n.d.) In our study, participants frequently referred to issues of broader structural vulnerability, expressing frustration both at their own lack of power to address

intersecting issues such as housing insecurity, and at their constituents' lack of appreciation of the myriad structural factors collectively producing the societal issues they want solved. Pressure from even progressive electorates to pursue conditional or coercive diversion or abandon reforms altogether was noted as a barrier to policy success (Rouhani & Winiker et al., 2024). Messaging which defines harm reduction comprehensively and couches it within frameworks of social and structural determinants of health may be useful both for promoting fidelity to harm reduction among policymakers, and as a tool they can use for communication with their constituents when enacting reforms. For example, as some participants themselves noted that evidence around increasing access to particular drug formulations (e.g., buprenorphine) and reducing the policing of drug paraphernalia is strong (Davis et al., 2019; Pozo et al., 2020). Providing information like this may assist other prosecutors in practical policy decisions that are more aligned with harm reduction evidence. Harm reduction advocates have acknowledged the need for persuasive messaging to be tailored to actors in the criminal legal system, including prosecutors and police (White et al., 2023). In practice, most messaging and training modules have been developed for police officers. Our findings highlight the need to widen these efforts to include prosecutors as well.

This study has limitations. First, since this analysis was conducted on a sub-sample of participants from the parent study, the sample size is limited. Further, due to the recruitment methods, we only spoke with prosecutors who self-identified as progressives and who were in different stages of enacting drug policy reforms already. Finally, this sub-analysis was conducted based on a theme of interest emerging from our initial analysis; as such, we may not have reached saturation on policymakers' conceptualization of "harm reduction" as we did not systematically probe for this during data collection. As the concept of harm reduction becomes more integrated into mainstream U.S. policy and institutions, studies examining its conceptualization more explicitly among prosecutors and other criminal legal system actors are warranted. These factors limit the generalizability of our findings; however, they do illustrate that *even* among those actors who have shown some level of buy-in, there remains work to be done in terms of harm reduction communication efforts.

Nonetheless, this study represents an important contribution to the nascent body of literature characterizing the growing deployment of prosecutorial discretion in the drug policy arena, and what that may mean for PWUD exposure to the criminal legal system and its consequences. As harm reduction is increasingly integrated into the US political establishment, there is a tangible need for communication and education campaigns to promote understanding of its principles, practices, and evidence base among policy stakeholders; this study illustrates the importance of including US prosecutors as a key target audience.

Ethics approval

The authors declare that they have obtained ethics approval from an appropriately constituted ethics committee/institutional review board where the research entailed animal or human participation.

Johns Hopkins Bloomberg School of Public Health IRB Committee.

Funding sources

This research received funding from the following sources.

Johns Hopkins Bloomberg School of Public Health Pilot Award: Ending Structural Racism.

CRediT authorship contribution statement

Saba Rouhani: Writing – original draft, Supervision, Investigation, Funding acquisition, Conceptualization. **Abigail K Winiker:** Writing – original draft, Methodology, Investigation, Formal analysis. **Leanne Zhang:** Writing – review & editing, Project administration, Formal

analysis. **Susan G Sherman:** Writing – review & editing, Funding acquisition, Conceptualization. **Sachini Bandara:** Writing – review & editing, Supervision, Investigation, Funding acquisition, Conceptualization.

Declaration of competing interest

The authors declare that they have no known competing financial interests or personal relationships that could have appeared to influence the work reported in this paper.

Acknowledgements

This work was funded by the Johns Hopkins Bloomberg School of Public Health. Authors have no disclosures or conflicts to report.

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