

DIVERSION AND/AS DECARCERATION

KATHERINE BECKETT*

I

INTRODUCTION

Mass incarceration and mass criminalization are increasingly recognized as pressing social problems. U.S. incarceration and supervision rates began their unprecedented ascent in the 1970s, after which time the number of people under criminal legal supervision increased more than fivefold. Although the U.S. incarceration rate has declined notably since its peak in 2008,¹ it remains among the highest in the world² and there is reason to believe that prison and jail populations may rebound as pandemic-induced slowdowns ease.³ Mass incarceration is characterized by its highly disproportionate impact on people of color, especially young Black men.⁴ Although these racial disparities have decreased in recent years, substantial racial inequities in incarceration persist. In 2010, for example, the imprisonment rate among Black residents was six times higher than among White residents; in 2020, it was 5.1 times higher.⁵

The U.S. criminal legal system is also characterized by comparatively harsh practices that run afoul of international human rights law and norms. These include uniquely violent policing practices,⁶ prison conditions that range from austere to brutal, the widespread use of solitary confinement,⁷ and a punitive—and

Copyright © 2023 by Katherine Beckett.

This Article is also available online at <http://lp.law.duke.edu/>.

* Katherine Beckett is Chair and Professor in the Law, Societies, and Justice Department and S. Frank Miyamoto Professor in Sociology at the University of Washington.

1. John Gramlick, *America's Incarceration Rate Falls to Lowest Level Since 1995*, PEW RSCH. CTR. (Aug. 16, 2021), <https://www.pewresearch.org/fact-tank/2021/08/16/americas-incarceration-rate-lowest-since-1995/> [<https://perma.cc/5ST9-ZCG8>].

2. See *Highest to Lowest – Prison Population Rate*, WORLD PRISON BRIEF, https://www.prisonstudies.org/highest-to-lowest/prison_population_rate?field_region_taxonomy_tid=All [<https://perma.cc/2YET-NRC3>] (last visited Jan. 18, 2023).

3. Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2022*, PRISON POL'Y INITIATIVE (Mar. 14, 2022), <https://www.prisonpolicy.org/reports/pie2022.html> [<https://perma.cc/3KGZ-QV6V>].

4. Elizabeth Hinton & DeAnza Cook, *The Mass Criminalization of Black Americans: A Historical Overview*, 4 ANN. REV. CRIMINOLOGY 261, 268 (2021).

5. Ann E. Carson, *Prisoners in 2020 – Statistical Tables*, U.S. DEP'T OF JUST. 10 (Dec. 21, 2021), <https://bjs.ojp.gov/content/pub/pdf/p20st.pdf> [<https://perma.cc/PX5S-33TK>] (author calculations based on data shown in Table 3).

6. See Alexi Jones & Wendy Sawyer, *Not Just “A Few Bad Apples”: U.S. Police Kill Civilians at Much Higher Rates than Other Countries*, PRISON POL'Y INITIATIVE (Jun. 5, 2020), <https://www.prisonpolicy.org/blog/2020/06/05/policekillings/> [<https://perma.cc/5Y3A-HA8V>] (“Compared to police in other wealthy democracies, American police kill civilians at incredibly high rates.”).

7. See Craig Haney, *The Psychological Impact of Incarceration: Implications for Post-Prison Adjustment*, in FROM PRISON TO HOME: THE EFFECT OF INCARCERATION AND REENTRY ON CHILDREN,

counterproductive—approach to a wide range of social problems, such as addiction.⁸ These policies and practices cause significant harm. Incarceration, for example, undermines physical and mental well-being, reduces employment and earnings, and exacerbates racial and class inequality.⁹ Moreover, studies show that contact with the criminal legal system is harmful even when incarceration does not occur.¹⁰ Terms such as “mass criminalization” are used to capture these broader adverse impacts.¹¹

As awareness of the myriad costs associated with U.S. penal practices has spread, so too has interest in alternative approaches to safety and justice.¹² In this context, diversion has emerged as one of the most important tools in the decarceration tool kit,¹³ with many critics of the carceral state calling for its expansion as a means of reducing mass incarceration.¹⁴ Diversion initiatives seek to respond to legal violations in ways that are less harmful than conventional criminal legal responses while also addressing the underlying issues that fuel crime and disorder.

Early efforts to re-route cases away from jails and toward services involved court-supervised diversion, in which prosecutors offer some defendants a chance to avoid jail or prison sentences *after* those individuals are arrested, booked into jail, and, often, charged with a crime. Many of these therapeutic court programs require that defendants plead guilty to participate.¹⁵ Moreover, it is increasingly

FAMILIES AND COMMUNITIES 1, 12 (2002) (discussing the increasing use of “supermax-type” units in prisons, the majority of which are used for solitary confinement); CRAIG HANEY, CRIMINALITY IN CONTEXT: THE PSYCHOLOGICAL FOUNDATIONS OF CRIMINAL JUSTICE REFORM 198 (2020).

8. Sonya Goshe, *The Lurking Punitive Threat: The Philosophy of Necessity and Challenges for Reform*, 23 THEORETICAL CRIMINOLOGY 25, 35 (2017).

9. Katherine Beckett & Allison Goldberg, *Effects of Imprisonment in a Time of Mass Incarceration*, 51 CRIME & JUST., Sept. 2022, at 353–73.

10. See, e.g., Sarah Brayne, *Surveillance and System Avoidance: Criminal Justice Contact and Institutional Attachment*, 79 AM. SOCIO. REV. 367, 370 (2014) (discussing how “negative interactions with legal authorities can erode public perceptions of police legitimacy and trust in government,” and can cause labelling consequences that negatively impact employment).

11. See generally Hinton & Cook, *supra* note 4 (synthesizing the historical literature on the mass criminalization and incarceration of Black Americans).

12. See generally KATHERINE BECKETT, ENDING MASS INCARCERATION: WHY IT PERSISTS AND HOW TO ACHIEVE MEANINGFUL REFORM (2022) (discussing how mass incarceration persists in America and how political and policy shifts may reduce the scale of punishment).

13. Leah Wang & Katie Rose Quandt, *Building Exits off the Highway to Mass Incarceration: Diversion Programs Explained*, PRISON POL’Y INITIATIVE (July 20, 2021), <https://www.prisonpolicy.org/reports/diversion.html> [<https://perma.cc/Z5YB-QS2T>].

14. See, e.g., Micah W. Kubic & Taylor Pendergrass, *Diversion Programs are Cheaper and More Effective than Incarceration. Prosecutors Should Embrace Them*, ACLU (Dec. 6, 2017), <https://www.aclu.org/blog/smart-justice/diversion-programs-are-cheaper-and-more-effective-incarceration-prosecutors> [<https://perma.cc/YPY6-86NH>] (explaining diversion programs).

15. Tracy Valazquez, *The Verdict on Drug Courts*, NATION (Dec. 9, 2010), <https://www.thenation.com/article/archive/verdict-drug-courts/> [<https://perma.cc/4BG2-J69D>] (“[G]enerally a person must plead guilty to participate, with the conviction reduced or overturned only if he or she is successful.”).

clear that court-supervised diversion as practiced in the United States fails to reduce criminal legal system involvement in the aggregate.¹⁶ There is also evidence that court-based diversion frameworks have modest, if any, effects on recidivism¹⁷ and increase, rather than decrease, racial inequities.¹⁸ In addition, the success and impact of all types of diversion initiatives depend on the quality of the care and services that are provided to referred persons—and many researchers have raised important questions about the treatment programs with which U.S. drug courts often partner.¹⁹

Over the past decade, law enforcement-led pre-booking diversion initiatives have also proliferated. In this approach, police officers divert people suspected of committing a criminal offense after arrest—or prior to likely arrest—but in lieu of a jail booking and criminal charges. Pre-booking diversion avoids booking and prosecution, and is therefore found less coercive, less harmful, and more cost-effective than court-supervised diversion.²⁰ Still, law enforcement led, pre-booking diversion often—but not always—occurs in the context of arrest,²¹ which can be harmful, and leaves significant discretion in the hands of law enforcement,

16. David R. Lilley, *Did Drug Courts Lead to Increased Arrest and Punishment of Minor Drug Offenses?*, 34 JUST. Q. 674, 677 (2017); David R. Lilley, Megan C. Stewart & Kasey Tucker-Gail, *Drug Courts and Net-Widening in U.S. Cities: A Reanalysis Using Propensity Score Matching*, 31 CRIM. JUST. POL'Y REV. 287, 303 (2019); Eric L. Sevigny, Harold A. Pollack & Peter Reuter, *Can Drug Courts Help to Reduce Prison and Jail Populations?*, 647 ANNALS AM. ACAD. POL. & SOC. SCI. 190, 193 (2013); NATASSIA WALSH, JUST. POL'Y INST., *ADDICTED TO COURTS: HOW A GROWING DEPENDENCE ON DRUG COURTS IMPACTS PEOPLE AND COMMUNITIES* 4 (2011).

17. David DeMatteo, Douglas B. Marlowe, David S. Festinger & Patricia L. Arabia, *Outcome Trajectories in Drug Court: Do All Participants Have Serious Drug Problems?*, 36 CRIM. JUST. & BEHAV. 354, 363–364 (2009); Sanjay Shah et al., *Addiction Severity Index Scores and Urine Drug Screens at Baseline as Predictors of Graduation from Drug Court*, 61 CRIME & DELINQ. 1257, 1272 (2015).

18. See Douglas B. Marlowe, *Achieving Racial and Ethnic Fairness in Drug Courts*, 49 CT. REV.: J. AM. JUDGE ASS'N 40, 43–45 (2013) (noting the disparities in outcomes between non-Hispanic Caucasians and participants of color in drug courts); Daniel Howard, *Race, Neighborhood, and Drug Court Graduation*, 33 JUST. Q. 159, 160 (2016) (“Non-white clients have been shown to be less likely to graduate [from drug court] than white clients in some drug court evaluations.”).

19. Teresa Gowan & Sarah Whetstone, *Making the Criminal Addict: Subjectivity and Social Control in a ‘Strong-Arms’ Rehab*, 14 PUNISHMENT & SOC'Y 69, 71 (2012) [hereinafter Gowan & Whetstone, *Making the Criminal Addict*]; Kerwin Kaye, *Rehabilitating the ‘Drugs Lifestyle’: Criminal Justice, Social Control, and the Cultivation of Agency*, 14 ETHNOGRAPHY 207, 212–23 (2012); KERWIN KAYE, *ENFORCING FREEDOM: DRUG COURTS, THERAPEUTIC COMMUNITIES, AND THE INTIMACIES OF THE STATE* chs. 3 and 4 (2020); Douglas B. Marlowe, David S. DeMatteo & David S. Festinger, *A Sober Assessment of Drug Courts*, 16 FED. SENT'G REP. 153, 155–56 (2003); FORREST STUART, *DOWN, OUT, AND UNDER ARREST: POLICING AND EVERYDAY LIFE IN SKID ROW* 78–124 (2016); REBECCA TIGER, *JUDGING ADDICTS: DRUG COURTS AND COERCION IN THE JUSTICE SYSTEM* 73–114 (2017); Sarah Whetstone & Teresa Gowan, *Diagnosing the Criminal Addict: Biochemistry in the Service of the State*, 12 ADVANCES MED. SOCIO. 309, 311 (2011) [hereinafter Whetstone & Gowan, *Diagnosing the Criminal Addict*].

20. Mary Fan, *Street Diversion and Decarceration*, 50 AM. CRIM. L. REV. 165, 187–90 (2013); Wang & Quandt, *supra* note 13.

21. Some initiatives, including LEAD, have created mechanisms whereby police officers can divert people in the absence of arrest. See Forrest Stuart & Katherine Beckett, *Addressing Urban Disorder Without Police*, 43 L. & POL'Y 390, 391 (2021).

which can lead to racial inequities, non-participation, and other problematic outcomes.²²

Most recently, a third type of diversion has emerged. Community referral processes, sometimes called “pre-police” initiatives,²³ enable neighbors, family members, business owners, social workers, treatment providers, defense attorneys, and others to identify people at high risk of arrest and in need of services. Crucially, such referrals need not be approved by law enforcement. As a result, this way of re-routing people away from the criminal legal system reduces the power of the police to serve as gatekeepers to services.²⁴

Community-based diversion models offer many other advantages as well: they avoid both arrest and incarceration, create avenues by which vulnerable people who might otherwise be arrested and jailed can access services and support, enable providers to ensure racial equity in case management and receipt of services, and represent an important step toward the construction of community-based approaches to public safety.²⁵ However, community referrals may not be the most efficacious way to reduce the number of people who are booked into jail and charged with a crime when aggressive law enforcement practices are prevalent. They also risk raising community expectations to such an extent that disappointment and cynicism become widespread and raise difficult ethical questions about prioritization of marginalized people in the context of on-going capacity constraints. In short, both law enforcement led pre-booking diversion and community referral processes offer a complex mix of advantages and disadvantages.

This article analyzes diverse diversion models in the context of the United States and considers the benefits and challenges associated with each approach in greater detail. Secondary literature on court-based diversion models, and especially drug courts, in the United States and primary research and analysis of the LEAD model in Seattle and elsewhere inform the analysis. These data were collected as part of a larger, multi-method case study that has been underway since 2013. This research has involved qualitative observations, interviews, and focus groups with LEAD staff, participants, partner organizations, and stakeholders in local criminal justice agencies in Seattle, Washington and a handful of other cities.²⁶ To inform this particular analysis of diversion methods, I also interviewed a co-executive director, two case managers, two project managers, and a

22. Fan, *supra* note 20, at 192; Saba Rouhani et al., *Police Attitudes Toward Pre-booking Diversion in Baltimore, Maryland*, 65 INT’L J. DRUG POL’Y 78, 82 (2019); Wang & Quandt, *supra* note 13.

23. Wang & Quandt, *supra* note 13.

24. David Kroman, *Seattle’s Arrest Alternative, LEAD, Moves Beyond Police*, CROSSCUT (Jul. 17, 2020), <https://crosscut.com/2020/07/seattles-arrest-alternative-lead-moves-beyond-police> [<https://perma.cc/9RFH-P22Z>].

25. See generally Katherine Beckett, Monica Bell & Forrest Stuart, *Beyond Harm Reduction Policing*, in DRUG LAW ENFORCEMENT, POLICING AND HARM REDUCTION: ENDING THE STALEMATE (Matthew Bacon & Jack Spicer eds., 2022); Stuart & Beckett, *supra* note 21, at 393; Wang & Quandt, *supra* note 13.

26. See Katherine Beckett, *The Uses and Abuses of Police Discretion: Toward Harm Reduction Policing*, 10 HARV. L. & POL’Y REV. 77, 87 (2016) (noting the various sources used to assess the LEAD

program director in Seattle as well as two leaders from the LEAD Support Bureau,²⁷ during the summer of 2022. The first part of this article provides an historical account of how diversion emerged as a potentially decarcerative strategy. After describing the advantages and challenges associated with each type of diversion, I analyze how the benefits of arrest and community-based diversion processes might be maximized to produce the most transformative change. I also discuss the difficulty of determining if a pragmatic intervention such as LEAD runs the risk of impeding even more transformative change and the necessity of taking steps to try to prevent this.

II

HISTORICAL CONTEXT

Although the drug war is not the sole or even primary cause of mass incarceration, the most recent anti-drug campaign has been characterized by an unprecedented number of arrests, record levels of incarceration, and massive racial disparities in criminal punishment.²⁸ Throughout the 1980s and 1990s, lawmakers ratcheted up criminal sanctions for those who possessed or sold drugs, especially crack cocaine.²⁹ Against this backdrop, the number of drug arrests nearly quadrupled—from just over a half a million in 1981 to a peak of nearly 1.9 million in 2006. Black and Brown people bore the brunt of law enforcement’s intensified campaign to punish those who used or sold controlled substances. Between 1980 and 2006, for example, the national Black drug arrest rate increased from roughly 5 to 15.9 per 1,000 residents, while the White drug arrest rate increased much more modestly, from approximately 2.2 to 5 residents.³⁰

Over the past two decades, awareness of the many failures of the war on drugs has grown and the politics around it have shifted. For example, whereas some Black political leaders (including the Congressional Black Caucus) initially supported the expansion of the drug war,³¹ most have since recognized the devastation it causes to Black families and communities. Now, the racial disparities and

program); Beckett, Bell & Stuart, *supra* note 25; Steve Herbert, Katherine Beckett & Forrest Stuart, *Policing Social Marginality: Contrasting Approaches*, 43 L. & SOC. INQUIRY 1491, 1505 (2017).

27. The LEAD Support Bureau provides technical support to LEAD sites across the country and abroad. *About the Bureau*, LEAD NAT’L SUPPORT BUREAU, <https://www.leadbureau.org/about-the-bureau> [<https://perma.cc/CTC9-Y7AK>] (last visited Jan. 18, 2023).

28. See MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 8 (2010); DORIS MARIE PROVINE, *UNEQUAL UNDER THE LAW: RACE IN THE WAR ON DRUGS* ch. 5 (2007).

29. ALEXANDER, *supra* note 28, at 140–44; *see also* Mona Lynch, *Crack Pipes and Policing: A Case Study of Institutional Racism and Remedial Action in Cleveland*, 33 L. & POL’Y 179, 184 (2011) (noting that the rhetoric surrounding crack-cocaine resulted in the enactment of legislation that made the threshold to trigger mandatory prison sentences in crack-cocaine cases far lower than in powdered-cocaine cases).

30. Howard N. Snyder, Alexia D. Cooper & Joseph Mulako-Wangota, *Arrests in the United States, 1980 to 2014*, BUREAU OF JUST. STAT. (July 15, 2020), <https://bjs.ojp.gov/content/pub/pdf/aus8009.pdf> [<https://perma.cc/AR3E-L9UT>].

31. JAMES FORMAN JR., *LOCKING UP OUR OWN* 10–11 (2017).

injustices of the drug war are a top priority for racial justice advocates, from the NAACP to Black Lives Matter.³² In addition, a well-funded international drug policy reform movement involving high profile advocates has emerged. This movement is increasingly bipartisan. While many on the left have long been critical of the failures and inequities of the drug war, a growing number of conservatives have also become concerned about its fiscal and social costs.³³ In this context, a variety of diversion models have spread across the country.

III

COURT-SUPERVISED DIVERSION: THE CASE OF U.S. DRUG COURTS

Growing concern about the efficacy and fairness of the drug war triggered the proliferation of drug courts across the United States.³⁴ Drug courts operate on the premise that incarceration alone does not address the “root cause” of illegal drug use and associated behaviors and that it represents an expensive and ineffective response to the problem of addiction.³⁵ Drug courts therefore offer some defendants who have been charged with qualifying drug violations the opportunity to have their case diverted to drug court. Notably, diversion is often predicated on defendants’ willingness to plead guilty and surrender many of the due process rights they ordinarily possess.³⁶

Although drug courts vary across U.S. and other jurisdictions, they are generally organized around a core set of principles and practices that characterize the “therapeutic justice” movement more generally. Primary among these is the emphasis on treatment. Courtroom encounters are used to craft a treatment plan, monitor compliance with that plan, and determine when sanctions should be imposed and which defendants should be “failed” from the program.³⁷ In addition, drug and other therapeutic courts employ a “team approach,” whereby legal actors—including judges and both prosecuting and defense attorneys—seek to minimize the adversarial nature of the courtroom. In fact, in therapeutic courts, courtroom actors acquire a range of new roles that focus more on treatment and

32. See, e.g., *End the War on Drugs*, M4BL, <https://m4bl.org/policy-platforms/end-the-war-on-drugs/> [<https://perma.cc/M45P-NR6H>] (last visited Jan. 18, 2023) (noting that the War on Drugs “has been a primary driver of mass criminalization, incarceration, and law enforcement violence targeting Black people over the past five decades, devastating families, communities, and generations”).

33. DAVID DAGAN & STEVEN M. TELLES, *PRISON BREAK: WHY CONSERVATIVES TURNED AGAINST MASS INCARCERATION* xi (2016).

34. JAMES L. NOLAN JR., *REINVENTING JUSTICE: THE AMERICAN DRUG COURT MOVEMENT* 5 (2001).

35. The literature on these courts is now quite large. Useful introductions include: GREG BERMAN, JOHN FEINBLATT & SARAH GLAZER, *GOOD COURTS: THE CASE FOR PROBLEM-SOLVING JUSTICE* (2005); Michael Dorf & Jeffrey Fagan, *Problem-Solving Courts: From Innovation to Institutionalization*, 40 AM. CRIM. L. REV. 1501 (2003); Peggy Hora, William Schma & John Rosenthal, *Therapeutic Jurisprudence and the Drug Court Movement: Revolutionizing the Criminal Justice System’s Response to Drug Abuse and Crime in America*, 74 NOTRE DAME L. REV. 439 (1999); NOLAN JR., *supra* note 34.

36. Valaquez, *supra* note 15 (“[G]enerally a person must plead guilty to participate, with the conviction reduced or overturned only if he or she is successful.”).

37. KAYE, *supra* note 19, at ch. 2.

compliance than on the law itself. As a result, drug court judges often make health care decisions that they are not trained, and are often unprepared, to make.³⁸

Drug courts exemplify an “interventionist” model of therapeutic justice in which courts seek “to intervene to change the way in which ex-offenders [sic] perceive themselves as responsible agents, as a means to preclude socially disfavored misconduct.”³⁹ Once in drug court, participants are required to engage with treatment providers and to meet other court requirements. For example, having a full-time job is a graduation requirement in many U.S. drug courts.⁴⁰ People who are unable to comply with the court’s requirements fail to “graduate” from the drug court program and are typically required to serve the original confinement sentence.⁴¹

In the United States, drug courts and probation and parole departments generate the majority of all referrals to publicly funded drug treatment programs.⁴² But the treatment programs with which drug courts and other criminal legal institutions partner often utilize treatment modalities that are comparatively ineffective and heavy-handed. In particular, these programs are often based on the therapeutic community (TC) model and tend to adopt a stern, behaviorist approach that involves long-term residential stays, a high degree of staff surveillance, numerous time and programmatic commitments, and regular sanctions, including incarceration, for non-compliance. Most drug courts and the programs with which they partner do not condone the use of medication assisted treatment (MAT) other than methadone, despite evidence that MAT is the most effective treatment modality for people with opioid use disorder.⁴³ These programs also tend to assume that addiction is *always* the root issue that drives criminal involvement and that sobriety is the only solution to this problem.⁴⁴ This approach “works” for some people,⁴⁵ but many others are unable to comply with its many burdensome requirements, including, but not limited to, sobriety. Others reject

38. *Id.* at 42.

39. Eric Miller, *The Therapeutic Effects of Managerial Reentry Courts*, 20 FED. SENT’G REP. 127, 127 (2007).

40. KAYE, *supra* note 19, at 74–5.

41. Miller, *supra* note 39, at 129.

42. SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., TREATMENT EPISODE DATA SET (TEDS) 1998–2008: STATE ADMISSIONS TO SUBSTANCE ABUSE TREATMENT CENTERS (2010), https://www.samhsa.gov/data/sites/default/files/2008_teds_rpt_st.pdf [<https://perma.cc/49GF-X43B>].

43. BARBARA ANDRAKA CHRISTOU, THE OPIOID FIX: AMERICA’S ADDICTION CRISIS AND THE SOLUTION THEY DON’T WANT YOU TO HAVE 7 (2020).

44. Gowan & Whetstone, *Making the Criminal Addict*, *supra* note 19, at 87–88; Marlowe, DeMatteo & Festinger, *supra* note 19, at 153–54; TIGER, *supra* note 19, at 88; Whetstone & Gowan, *Diagnosing the Criminal Addict*, *supra* note 19, at 316–17.

45. Kaye, *supra* note 19, at 207–10.

the identity—that is a recovering addict—that drug court programs often demand.⁴⁶

Although progressive advocates and academics have become increasingly critical of therapeutic courts and other forms of “coercive benevolence,”⁴⁷ drug courts continue to enjoy strong bipartisan support across the United States. By 2014, an estimated 2,800 drug courts existed in the fifty states and territories; at least half of all U.S. counties now have at least one drug court.⁴⁸ The proliferation and embrace of drug courts—even in conservative jurisdictions—is not too surprising: drug courts serve as a politically acceptable way for local officials to embrace an alternative to the drug war without embracing *too* sharp a break with its logic. For although drug court advocates invoke the language of rehabilitation and treatment, they also preserve prosecutorial and judicial discretion and keep people who use drugs under the authority of the courts—and often in jail. As legal scholar Eric Miller puts it, drug and other problem-solving courts “appear all things to all people.”⁴⁹

Drug courts have been the subject of much evaluation. In general, this literature suggests that drug courts modestly reduce recidivism relative to the conventional criminal legal system response.⁵⁰ Drug court advocates have read this evidence as overwhelmingly positive and recommend expanding the drug court model on the basis of it.⁵¹ Other analysts, however, note that the evaluations upon which most meta-analyses are based are characterized by significant methodological flaws, including non-random selection, non-equivalent comparison groups, the inability to control for many relevant variables, confidence intervals that include null effects, and highly variable outcome measures.⁵² Moreover, the inclusion of significant numbers of people who do *not* contend with significant chemical dependency issues in drug court programs has inflated estimates of the capacity of these programs to reduce recidivism.⁵³ As a result of these methodological complexities and weaknesses, the capacity of drug courts to reduce reoffending remains unclear.

46. Stacy Lee Burns & Mark Peyrot, *Tough Love: Nurturing and Coercing Responsibility and Recovery in California Drug Courts*, 50 SOC. PROBS. 416, 424 (2003); Gowan & Whetstone, *Making the Criminal Addict*, *supra* note 19, at 76–77.

47. *See generally* TIGER, *supra* note 19; STUART, *supra* note 19.

48. DRUG POL’Y ALL., MOVING AWAY FROM DRUG COURTS: TOWARDS A HEALTH CENTERED APPROACH TO DRUG USE 1 (2014).

49. NOLAN JR., *supra* note 34, at 81.

50. Marlowe, DeMatteo, & Festinger, *supra* note 19, at 183; Deborah Koetzle Shaffer, *Looking Inside the Black Box of Drug Courts: A Meta-Analytic Review*, 28 JUST. Q. 493, 513 (2011); David B. Wilson, Ojmarrh Mitchell & Doris L. MacKenzie, *A Systematic Review of Drug Court Effects on Recidivism*, 2 J. EXPERIMENTAL CRIMINOLOGY 459, 479 (2006).

51. *See, e.g.*, Michael Rempel et al., *Multi-Site Evaluation Demonstrates Effectiveness of Adult Drug Courts*, 94 JUDICATURE 154, 154–57 (2012).

52. Steve Aos, Marna Miller & Elizabeth Drake, *Evidence-Based Public Policy Options to Reduce Future Prison Construction, Criminal Justice Costs, and Crime Rates Individual State Developments*, 4 FED. SENT’G REP. 275, 281 (2006); Wilson, Mitchell & MacKenzie, *supra* note 50, at 464.

53. DeMatteo, Marlowe, Festinger & Arabia, *supra* note 17, at 364.

Moreover, recent studies have found that drug courts impose a number of burdens and costs. First, they appear to lead to net-widening. Specifically, drug courts tend to *increase* both drug arrests and time served behind bars.⁵⁴ For example, one recent study found that cities that established drug courts experienced a nearly seventeen percent increase in misdemeanor drug arrests annually.⁵⁵ Similarly, drug courts appear to *increase* confinement time in the aggregate.⁵⁶ This is because while successful drug court graduates may avoid jail time, those who are unable to meet courts' many requirements and therefore fail to "graduate" often face even more severe penalties than they would have if they had not participated in drug court at all.⁵⁷

Drug courts also appear to enhance rather than alleviate racial inequality in drug-related incarceration. This is in part a result of the screening and eligibility criteria utilized by many drug courts. As one analyst notes, "[s]ince people of color are more likely to have a felony conviction on their record at the time of an arrest related to drug abuse, they are more likely to be excluded from consideration for drug court participation."⁵⁸ In addition, some studies find that sanctions are greater for drug court participants of color than for White participants who violate drug court program rules.⁵⁹ For these and possibly other reasons, people of color, and Black people in particular, have lower graduation rates than White drug court participants and are therefore subject to greater confinement time even when their cases are diverted.⁶⁰ There is also evidence that cities with larger non-White populations were more likely to create drug courts, and once established, drug courts were associated with a higher arrest rate for Black—but not White—residents.⁶¹

In short, studies indicate that U.S. drug courts fail to reduce the scope of the criminal legal system and racial inequities in it. They also have limited effects on recidivism, are costly to operate—mainly due to the involvement of expensive legal personnel in the delivery of treatment and services—and raise important questions about the dignity and rights of the people who participate in them.⁶²

54. Lilley, *supra* note 16, at 302–03; David R. Lilley, Kristen DeVall & Kasey Tucker-Gail, *Drug Courts and Arrest for Substance Possession: Was the African American Community Differentially Impacted?*, 65 CRIME & DELINQ. 352, 353 (2019); Walsh, *supra* note 16, at 353.

55. Lilley, *supra* note 16, at 299.

56. Sevigny, Pollack & Reuter, *supra* note 16, at 192.

57. *Id.*

58. Walsh, *supra* note 16, at 21.

59. *Id.*

60. *Id.*; see also Marlowe, *supra* note 18, at 44 (noting the disparities and offering possible explanations); Howard, *supra* note 18, at 160 ("Non-white clients have been shown to be less likely to graduate than white clients in some drug court evaluations.").

61. Lilley, Stewart & Tucker-Gail, *supra* note 16, at 300.

62. Judges and attorneys operating in problem-solving courts outside the United States (particularly in Scotland and Australia) are much more careful about preserving due process rights, avoiding incarceration, treating defendants with dignity and respect, and giving greater credence to harm reduction approaches. See generally NOLAN JR., *supra* note 34. These differences likely reflect the fact that dignitarian ideas are more deeply rooted in European and other Western legal systems than in the United States.

For these and other reasons, a variety of pre-booking diversion initiatives have emerged over the past fifteen years.

IV

PRE-BOOKING AND PRE-ARREST POLICE DIVERSION

In light of the limits of therapeutic courts, and in recognition of the fact that even short-term incarceration is often traumatic and harmful, officer-led, pre-booking and pre-arrest diversion initiatives have proliferated over the past decade. In pre-booking initiatives, law enforcement officers do make an arrest but, rather than booking someone in jail, initiate a “warm hand-off” to a case manager. In pre-arrest models, officers can also refer people they believe are high risk of arrest to services without waiting to accumulate sufficient evidence of law-breaking and to make an arrest. In both pre-booking and pre-arrest diversion frameworks, police officers are mainly or entirely responsible for making and approving program referrals.

LEAD, which stood originally for Law Enforcement Assisted Diversion but has been renamed as Let Everyone Advance with Dignity, was one of the first known pre-booking diversion processes for people arrested on drug and prostitution charges in the United States. Launched in October 2011 in Seattle, Washington, this approach grew out of legal challenges to vast racial disparities in Seattle drug law enforcement outcomes. LEAD involves a wide range of organizational partners and seeks to reduce the neighborhood and individual-level harm associated with drug and sex markets—and conventional enforcement practices—by diverting people who would otherwise be arrested on low-level charges into intensive case management and services guided by harm reduction principles. Over time, the pool of people who may be diverted to Seattle’s LEAD has expanded to include people who are arrested—or are likely to be—for prostitution, misdemeanor theft, misdemeanor property destruction, criminal trespass, unlawful bus conduct, and obstruction of a police officer.⁶³ The LEAD framework has now spread to seventy-four jurisdictions across the country,⁶⁴ and in some of these jurisdictions, stakeholders have identified yet more “LEAD-eligible” offenses.⁶⁵

LEAD began as a pre-booking framework. That is, police officers were authorized and encouraged to make arrest referrals by offering people who were

63. See generally LEAD Policy Coordinating Group, Law Enforcement Assisted Diversion (LEAD) Referral and Diversion Protocol (Nov. 2018) (on file with author). Qualifying drug arrests are those that involve seven or fewer grams of illicit drugs. If the person is arrested for drug delivery or drug possession with the intent to deliver, the person arrested is LEAD-eligible as long as they are not dealing for profit above a subsistence income.

64. *LEAD: Advancing Criminal Justice Reform Since 2011*, LEAD NAT’L SUPPORT BUREAU, <https://www.leadbureau.org/> [<https://perma.cc/C5JN-59KY>] (last visited Jan. 18, 2023).

65. ALLI MALM, DINA PERRONE & ERICA MAGAÑA, CAL. STATE UNIV. LONG BEACH, LAW ENFORCEMENT ASSISTED DIVERSION (LEAD) EXTERNAL EVALUATION: REPORT TO THE CALIFORNIA STATE LEGISLATURE (2020).

arrested on certain charges and would otherwise be booked into jail the option of enrolling in LEAD instead. Police were also authorized to make social contact referrals for people who had frequently been arrested in the past and whom officers believed would likely be arrested in the future, even in the absence of a current arrest. In so doing, LEAD developed a pre-arrest diversion mechanism that co-existed with an arrest and pre-booking diversion option for law enforcement officers.⁶⁶ By the end of 2019, pre-arrest, social contact referrals constituted a striking eighty-one percent of the referrals made in Seattle and neighboring Burien.⁶⁷

Whereas most drug courts partner with treatment programs that emphasize the need for tough love and abstinence, the harm reduction philosophy is central to LEAD. Harm reduction holds that some people will always engage in behaviors, such as drug use, that are stigmatized and risky.⁶⁸ Harm reduction practitioners emphasize that while the path toward abstinence is often long, and sometimes non-existent, meaningful reductions in human suffering can be achieved in the absence of sobriety. From a harm reduction point of view, the active intervention of the criminal legal system causes harm and shame and is generally counterproductive.

As a harm reduction initiative, LEAD does not require abstinence. Instead, LEAD operates on the theory that substance use disorder has many complex causes and is often rooted in trauma as well as extreme poverty; healing occurs when traumatized and marginalized people form trusting relationships with people who help them clarify their own goals and priorities, and support them in their efforts to pursue those goals. From this perspective, sticks, threats, and sanctions reinforce the isolation, stigma, and hardship with which people with substance abuse disorders already contend and are therefore unhelpful. It is only by helping people to feel less alone, and more supported, that meaningful, long-term change is likely to occur. This harm reduction orientation has made LEAD unpopular with some police officers, although some eventually come to understand and even embrace its logic.⁶⁹

In interviews, Seattle LEAD stakeholders and leaders of the LEAD Support Bureau noted that, despite LEAD's embrace of harm reduction, there is cross-over between drug court and LEAD in jurisdictions in which they co-exist. This appears to happen in two ways. First, some LEAD clients wind up being charged with more serious crimes than they allegedly committed after their referral to, and enrollment in, LEAD. When this occurs, prosecutors may elect to offer drug court as an option. Seattle LEAD stakeholders emphasized that their clients who

66. Over time, Seattle Police Department (SPD) officers became far more likely to utilize the social contact/pre-arrest referral mechanism. Stuart & Beckett, *supra* note 21, at 399.

67. *Id.* at 398.

68. For overviews of harm reduction, see generally ALAN G. MARLATT, HARM REDUCTION: PRAGMATIC STRATEGIES FOR MANAGING HIGH-RISK BEHAVIORS (2002).

69. Beckett, *supra* note 26, at 96–97; see also Robert E. Worden & Sarah J. MacLean, *Discretion and Diversion in Albany's LEAD Program*, 29 CRIM. JUST. POL'Y REV. 584, 596–602 (2018) (discussing causes of the lack of officer buy-in for LEAD).

accepted these offers were often damaged by their subsequent involvement in drug court. As one case manager explained,

Being in drug court is like a full-time job. You gotta go to class, you gotta meet with a counselor, you gotta UA, then you gotta live in their special housing where there's like thousands of rules, I mean it's a pretty – our therapeutic court system is actually quite demanding of people's time and energy. And a lot of our clients – especially clients with psychotic spectrum disorders, brain injuries, significant trauma history, they really struggle with the challenge of putting together a schedule for the day and they tend to not be successful in some of those compliance-based models even if they were interested in ceasing the use of substances.

A Seattle program manager concurred, adding that “mainstream court can often be a better option for our folks, because the pressure of trying to get through drug court, and the shame of not making it through, is even worse than their addiction.”

Alternatively, LEAD Support Bureau staff report that in some jurisdictions, some drug courts ask LEAD to accept referrals for defendants who are deemed unlikely to succeed in the drug courts' more compliance and sobriety-oriented environment. According to these stakeholders,

There seems to be more recognition of 'needs-exceed' situations [by drug court personnel]. A lot of courts are now referring to LEAD if people are just not gonna make it in drug court. And it benefits them – they can claim that they made a referral out so they don't have to report that the person failed. And this is something we are trying to be in deeper collaboration with drug courts around, trying to encourage judges, probation officers, attorneys to make those referrals to LEAD.

As shown in this statement, some stakeholders expressed enthusiasm for this trend, seeing it is a way to ensure better care for LEAD clients. Others agreed that shifting people from drug court to LEAD would generally accomplish this goal. But these people also noted that although accepting referrals from drug court risks creating a situation in which the only way to secure LEAD's harm reduction-oriented case management and services is by being arrested, booked, and charged. As one leader put it,

There should be no wrong door. If capacity was not an issue, then we could take people from any door. But when you are designing a system in a context of limited capacity you really have to be mindful of incentives. And having incentives that encourage people to book and prosecute, that is a counter-productive design.

Outcome evaluations suggest that LEAD as the originally designed, officer-led pre-booking initiative—what stakeholders sometimes refer to as LEAD 1.0—has been quite effective in reducing the harm associated with illicit drug use and criminal legal system involvement. One study compared approximately 200 Seattle LEAD participants with 115 others with similar criminal records who, by virtue of the time or place of arrest, did not participate in LEAD. The results reveal statistically significant reductions for the LEAD group in average yearly criminal legal system utilization and associated costs. For example, LEAD clients spent thirty-nine fewer days in jail than similarly situated people who did not enter LEAD. Similarly, the odds that a LEAD participant was sentenced to prison in the first year after their enrollment in LEAD were eighty-seven percent lower than for people who were not referred to LEAD. As a result, criminal legal sys-

tem costs associated with LEAD clients decreased by roughly thirty percent relative to the year prior to enrollment in LEAD, while those costs for non-LEAD participants more than doubled.⁷⁰ Similarly, in San Francisco, felony and misdemeanor arrests were two-and-a-half and six times higher, respectively, among the non-LEAD comparison group than among LEAD participants after twelve months.⁷¹

Studies suggest that LEAD has a number of other positive effects as well. In particular, Seattle LEAD participants reported notable improvements in their health and well-being. For example, participants were twice as likely to have been sheltered, and were eighty-nine percent more likely to have obtained permanent housing, after their referral to LEAD. Participants were also thirty three percent more likely to receive income and/or benefits subsequent to their LEAD involvement.⁷²

Despite these positive effects, both pre-booking and pre-arrest diversion frameworks are characterized by several limitations and challenges. First, officer-led diversion initiatives leave significant discretion and power in the hands of police. Early on, some LEAD stakeholders—and critics—expressed concern that police officers might be more inclined to refer White people rather than people of color to LEAD, an understandable concern given Seattle’s history of extreme racial inequity in drug law enforcement. In Seattle, stakeholders have collected and monitored data regarding the racial and ethnic composition of LEAD clients. In general, these data show that more than half—compared to thirty percent of the Seattle population—of people enrolled in LEAD are people of color; the most recent data for April of 2022 show that nearly two-thirds—62.5% of LEAD participants—are people of color.⁷³ Similarly, in San Francisco and Los Angeles, half to three-fourths those participating in LEAD are people of color.⁷⁴ In all three sites, roughly four of five participants are homeless; most others are unstably housed. Still, it remains possible that any discretion can and will be exercised in problematic ways, and it appears that police in some jurisdictions have sometimes been more inclined to White people to LEAD. Although LEAD project management staff describe taking active steps to ensure that Black and brown people are not underserved by LEAD, and the LEAD model includes and recommends this practice, pre-booking diversion models without a community referral option lack a built-in mechanism to prevent racial inequities in diversion practices from occurring in the first place.

70. Susan E. Collins, Heather S. Lonczak & Seema L. Clifasefi, *Seattle’s Law Enforcement Assisted Diversion (LEAD): Program Effects on Criminal Justice and Legal System Utilization and Costs*, 15 J. EXPERIMENTAL CRIMINOLOGY 201, 206–08 (2019).

71. MALM, PERRONE & MAGAÑA, *supra* note 65, at 118.

72. Seema L. Clifasefi, Heather S. Lonczak & Susan E. Collins, *Seattle’s Law Enforcement Assisted Diversion (LEAD) Program: Within-Subjects Changes on Housing, Employment, and Income/Benefits Outcomes and Associations with Recidivism*, 63 CRIME & DELINQ., 429, 435 (2017).

73. Data provided by Brenton Zachry, Data and Quality Manager, Public Defender Ass’n.

74. MALM, PERRONE & MAGAÑA, *supra* note 65, at 56. Ideally, the composition of LEAD divertees would be compared with people arrested for eligible offenses, but these data are not always available.

Moreover, police willingness to make referrals to LEAD at all appears fickle and unreliable. As one leader with the Support Bureau explained,

Police buy-in is still a challenge. Departments are recognizing that they need to not only make it part of their training, and to identify officers that are going to utilize it as part of their everyday work. They need to put this in day 1, you know, put this in the Academy and really make this truly a part of how they provide public safety. We need to make departments realize that this isn't some fly by-night thing, and that this needs to be part of everyday culture and practice. This is part of public safety, and this a way to provide public safety in a way that is much better than just arresting folks. I think that is the challenge.

The extent to which officers are reluctant to make referrals varies across jurisdictions and over time, but securing police buy-in is clearly a challenge in some contexts. Research in Albany revealed a high degree of unwillingness by police officers to make referrals to LEAD.⁷⁵ Similarly, in the early years of Seattle's LEAD initiative, interviews with police officers revealed a high degree of mistrust and resistance to LEAD, and especially toward the harm reduction philosophy on which it is founded.⁷⁶ Although LEAD stakeholders were able to convince police officers for a time to make many referrals to the program, SPD referrals to LEAD dropped precipitously during the pandemic and the aftermath of the murder of George Floyd as a result of dramatic personnel shortages and possibly other factors.⁷⁷ The SPD also began to slow down the speed with which it cleared people referred via the social contact referral process, thus effectively blocking access to LEAD services and support. These developments underscored the risk associated with relying on arrest as the moment of intervention and on the police to serve as gatekeepers to services. LEAD 1.0 gave law enforcement the capacity to determine whether the program could function as intended. In this context, and in light of ensuing conversations about the possibility of defunding the police by up to fifty percent, Seattle LEAD stakeholders made the decision to terminate the role of police as gate-keepers to the program⁷⁸ and to create a novel community referral process, described below.

V

COMMUNITY REFERRALS

LEAD's comparatively new community referral process empowers non-police actors—including LEAD staff, other service providers, family members, residents, public defenders, business owners, merchant associations, and others to initiate LEAD services and case management for people who are experiencing extreme poverty and behavioral health challenges. These community referrals are approved by the LEAD Project Management team. This structure prevents law enforcement from serving as gatekeepers to services. Through a variety of

75. Worden & MacLean, *supra* note 69, at 597–98.

76. Beckett, *supra* note 26, at 95.

77. Beckett, Bell & Stuart, *supra* note 25.

78. Kroman, *supra* note 24.

channels, concerned community members alert LEAD staff—typically the area’s LEAD Project Manager—about an individual whom they believe is contending with behavioral health challenges, at risk of arrest, and would benefit from services and support. Because demand currently far exceeds capacity, stakeholders in Seattle use three criteria to prioritize services: (1) evidence of high acuity behavioral health issues; (2) race and ethnicity, with people of color prioritized for service; and (3) geographic considerations, favoring people who spend significant time in neighborhoods experiencing especially pronounced public safety challenges.⁷⁹ Project managers then identify priority referrals to case managers, who then commence outreach and service provision. LEAD was renamed Let Everyone Advance with Dignity to reflect the fact that law enforcement no longer serve as the primary entryway to services. Stakeholders also refer to LEAD initiatives that offer both law enforcement and community referral processes as LEAD 2.0.

LEAD is not only a passive recipient of community referrals. Stakeholders employ a variety of techniques to identify people who disrupt neighbors and are at high risk of arrest, consistent with the underlying goals of improving public safety while also reducing reliance on the criminal legal system. For example, LEAD project managers invite police leadership and patrol officers in local precincts to compile a “priority list” made up of those individuals that officers consider to be the most frequent targets of complaints by businesses. Equipped with this list, LEAD case managers conduct outreach with those individuals to initiate a community referral. Second, LEAD project managers encourage local businesses and resident associations to compile their own priority lists. Third, once a working relationship has been established with local businesses and residents, project managers provide them with a series of alternative complaint mechanisms—to use in place of 911—that have the potential to activate community referrals and service provision without police involvement. LEAD’s goal in implementing these techniques is to reduce the chances that 911 calls will trigger the arrest of highly vulnerable and marginalized people.

Although community referrals were not part of the original LEAD design, they quickly became the primary method of referral during the height of the pandemic in Seattle, as both arrest and social contact referrals from law enforcement essentially ceased. As a result, community referrals became part of an alternative system for addressing civilian complaints and improving public safety without reliance on the police. In fact, the ultimate goal of this system is to reroute a vast majority—if not all—complaints about people who violate the law and experience some combination of extreme poverty and behavioral health challenges directly to the LEAD program in a manner that wholly precludes police contact. In this way, community referral processes may reduce the degree to which be-

79. Zoom interview with Tara Moss, Co-Executive Director of Programs, Public Defender Ass’n (Apr. 28, 2022).

havioral health issues are conceived as crime—rather than health-related matters—and the extent to which the police are seen as the appropriate response to related behaviors.⁸⁰

LEAD stakeholders report that community referrals offer other benefits as well. First, program staff are able to ensure that the most vulnerable, marginalized, and disruptive are prioritized for services and that people who may be deemed ineligible or too dangerous by police are offered services. As one Seattle LEAD case manager explained:

What I really appreciate about them [community referrals] is that we have the opportunity to work together to identify people who are most vulnerable in our system, so, folks of color, and people who have had legal competency raised, so people with profound behavioral health conditions. That to me has made a huge difference, with us being able to identify ok, out of these 20 people, here are 12 that are really within our scope of care where we can really do something for them. There's a ton of people who have come in through the community referral process that I don't think we ever would have met, and it's been a real gift.

Many LEAD stakeholders also noted that community referrals enabled LEAD to build relationships and trust with communities and neighbors, particularly with people who do not wish to call 911. As one Seattle LEAD Project Manager put it,

Now, we are actually able to be responsive to people without having to depend on law enforcement. I think it saved us over the past few years with the community that called for defunding the police because the criticism was 'we are a police program, and you are putting people on the police radar without know that the police were going to approve them'. And so, the community referral avenue really, really, really helped in many ways, especially with the defund activism over the past few years.

A leader with the LEAD Support Bureau also expressed appreciation for the educative role of community referrals:

LEAD is so much about relationships. So [with community referrals] you also get the opportunity for the store owner to engage with the police officer about what they are trying to do. So, what you are doing is you are actually creating opportunities for business owners, churches, neighbors, to actually communicate with officers in a way that really helps to start to build that trust back in the community . . . This is the one of thing communities have been asking for. We don't want to not have protection. We want to have safety. We also want not to be harmed and killed. We want to be part of the conversation when things happen so we can say hey, let's not do this, let's call LEAD.

Despite their clear utility and advantages, community referrals also pose some challenges, particularly in the context of on-going capacity constraints and a seemingly insatiable need for services and support.⁸¹ First, publicity about the advent of the community referral process in Seattle led to inflated expectations about LEAD's capacity to fix poverty. As one Project Manager put it,

80. Stuart & Beckett, *supra* note 21, at 399.

81. One such challenge appears to be specific to Seattle, where a program leader reported that, Community referrals reduce our ability to coordinate with the criminal legal system and specifically law enforcement. If they [the police] didn't sign off, and they view people in LEAD as not 'their LEAD' then they are less likely to invest. It's great that they didn't get picked up today, but what if they get picked up tomorrow?

We have to manage a lot of community expectations . . . we get inundated with requests from council members and other community leaders asking us to respond to particular situations. And some of those requests are unrealistic. I mean, we aren't going to be able to resolve a giant RV encampment without any resources, right? And the other thing is homelessness, people are like, can LEAD fix this encampment, can LEAD go to this encampment, and we always try to explain what LEAD can do and that it is about individual resources. And no, we can't fix homelessness without resources.

Another Seattle LEAD stakeholder concurred after the advent of the community referral process, "They are giving us tape and glue and asking us to hold it together." The magnitude of the demand and need for services posed especially daunting challenges and questions about fairness:

In the same way that police referrals flipped from arrest to social contact referrals, we should flip from law enforcement referrals to community referrals. Nobody is against this. But the pool is so enormous. How do you create a prioritization system that is fair and accountable? Once you let people know about it, how do you not get so swamped that it generates disappointment and cynicism?

Relatedly, prioritizing geographic areas about which residents, business owners, and city leaders are inclined to express concern and call 911 makes sense if the goal is to keep people out of the criminal legal system. At the same time, it often means focusing on the downtown core and other prime areas rather than in communities of color. As one program leader put it,

We haven't been able to do community referrals in communities of color that have historically been ignored. Our community referrals are coming from non-profits, defense attorneys, business owners, politicians. They don't want to see poverty, right? But what would it really look like to be in home-grown communities where people really need the support? We haven't been able to get that far because we don't have enough capacity to be in every neighborhood.

Third, use of the community referral process offers a less direct method for ensuring that people who are at the highest risk of arrest are not, in fact, arrested, jailed, and charged. Although LEAD project managers prioritize people with extensive criminal records and whose behavior generates significant concern for community referrals, law enforcement patterns, practices, and priorities are both obscure and ever-changing. As a result, heavy reliance on community referrals alone could lead to a disconnect between arrests and community referrals, thereby diminishing the capacity of this diversion initiative to reduce criminal legal system involvement. Recognition of this dilemma shapes the degree to which some jurisdictions are implementing community referral processes. As one leader with the Support Bureau noted,

Some places are starting off with social contact referrals partly to get that officer buy-in and also recognizing that, like, if there are 15 people taking up eighty percent of officers

By contrast, LEAD Support Bureau leadership reported that this more territorial approach was found mainly or even solely in Seattle, and not elsewhere. As one leader put it, "I was pleasantly surprised nationally that most of the folks we spoke with, most police agencies, were actually open to community referrals." Another confirmed this observation and added that "I think a lot of officers were relieved, they were like thank God, that relieves a lot of pressure on us. They see it as having their cake and eating it too. They're like well, if I can still get the benefit of LEAD, but I don't have to do all that work on the front end to make that referral, this is a win-win."

time, we also want to get those folks out of the system and into LEAD so we can make a major impact first and then go from there to community referrals.

Finally, the roll-out of community referral processes underscores, ironically, the crucial role of, and need for, on-going communication and coordination with law enforcement. If officers are unaware that particular individuals have been referred to LEAD, they may continue to arrest those individuals, undermining any progress case managers and clients have made. As one Support Bureau leader explained,

In Minnesota, community referrals [are] where they want to start. And that's awesome, we see that as a victory. But it can't only be about the front-end. Because if there's no contact with police and prosecutors, there's way too much potential for harm to happen and it [LEAD] turns into a social services program because we have no actual linkage that makes it possible to ensure that the system is not doing harm. . . . In our workgroup meetings, we're making an actual decision about how we are going to work together to make sure this person has better opportunities to not keep getting pulled in and staying in the system.

Recent political developments have underscored the challenge of using community referral processes to reduce criminal filings and jail bookings. In the context of rising homicide rates and growing concern about unsheltered homelessness, many politicians—including moderate Democrats—were elected to office in 2021 and 2022 in blue cities such as New York, San Francisco, and Seattle largely on the basis of their public safety platforms.⁸² In Seattle, for example, newly elected Mayor Bruce Harrell campaigned largely on a public safety platform, emphasizing his interest in funding the police more robustly and the need to hold people living unsheltered accountable if they decline to relocate to existing shelters.⁸³ In New York City and San Francisco, Mayors London Breed and Eric Adams offered similar platforms and pledged to reinvigorate police responses to both low-level and serious crime.⁸⁴

In Seattle, LEAD staff report that this political shift has had a notable impact on both referrals and arrests. As one case manager explained, “With the new administration, it's just going back to the old way. Yes, some officers are diverting to us. But as far as upper management, it's very short-sighted. Its, yep, arrest them all.” Another Seattle stakeholder agreed:

We really do need to be there [in conversation with police] because otherwise any pressure on police means that there is no protection for our people. So, we have to anticipate that and be there as an offramp. We could do a lot of great community referrals and still see a linear rise in the incarceration rate.

In short, at a time of intensified law enforcement focus on unsheltered homelessness and low-level disorder, tilting the scales toward community referrals and

82. Jay Caspia King, *In Big City Politics, a Call to Fund the Police*, N.Y. TIMES (Dec. 20, 2021), <https://www.nytimes.com/2021/12/20/opinion/mayors-fund-police.html> [<https://perma.cc/23L5-YW9G>].

83. Chris Daniels, *Seattle Mayoral Candidate Bruce Harrell Says Homeless Who Refuse Shelter Should Face Consequences*, KING 5 NEWS (Sep. 2, 2021), <https://www.king5.com/article/news/local/homeless/seattle-mayoral-candidate-bruce-harrell-homelessness-lorena-gonzalez/281-425c9172-2883-4e7f-b155-4f636a74307b> [<https://perma.cc/4K8U-9PEP>].

84. King, *supra* note 82.

away from arrest referrals may reduce LEAD's capacity to keep significant numbers of people out of jail.

VI

CONCLUSION

Few things are certain in the world of diversion. Still, there is strong evidence that at least in the United States, therapeutic courts that are intended to divert people from the criminal legal system may provide needed support for some individuals but do not reduce mass incarceration or racial inequities in the criminal legal system in the aggregate. By contrast, officer-led pre-booking diversion has been shown to produce many benefits, including reduced criminal legal system involvement and improved client well-being. It is, however, a complex undertaking and also poses many risks and dilemmas. This risk and complexity have fueled constant innovation, including the advent of community referral processes as a means of re-routing people away from the criminal legal system without reliance on the police as gatekeepers. In this way, LEAD continually searches for the least restrictive politically feasible alternative.

Both law enforcement diversion and community referral models promise and offer a complex mix of opportunities and challenges. Although law enforcement diversion is the most direct method for re-routing people who are arrested away from the criminal legal system, reliance on this approach alone leaves significant gatekeeping capacity in the hands of law enforcement. As both recent and past events have shown, this is risky and can lead to racial inequities, de facto shut down, or both. Community referrals avoid this problem and represent an important step toward construction of community-based approaches to public safety in which the police do not serve as gatekeepers. Yet they, too, create challenges and ethical dilemmas—such as how to prioritize services—particularly where the need for services is high but capacity constraints persist. Sadly, various system and institutional failures continue to produce enormous levels of human suffering. In this context, both the need for services and capacity constraints continue to intensify in many locales.

Community referrals thus also remain an imperfect solution to a complex social problem, raising important questions about whether, and to what extent, diversion can serve as a means of reversing mass incarceration in the context of massive social inequality and myriad institutional failures. Contemporary instantiations of racial capitalism—combined with housing policies that fail to ensure the availability of affordable housing—a mental health system that does not meet existing need, the absence of universal health care, and a myriad of other institutional failures work to continually produce a level of suffering and human misery that may simply be beyond the reach of diversion's healing capacities. Addressing these system failures appears essential but is unlikely to occur in the near term. Still, it is crucial that leaders of any type of diversion initiative are aware of, and call attention to, the need to address racial inequities, extreme poverty, and the many institutional and policy failures that reproduce these social ills, rather than

seeking only to augment their program budget. This is important for several reasons and may help to reduce the risk that diversion frameworks can be used to justify the status quo. At the same time, to press only for broader structural changes, including police abolition, and forgo diversion because it does not address the underlying structural conditions would be to consign many to repeatedly endure the harm caused by criminal legal punishment for as long as a criminal legal system exists.

An alternative approach would involve working to reverse mass criminalization by effectuating true decriminalization, thereby rendering diversion moot. Some progress has been made toward this goal, with the legalization of marijuana being a prime example. And in many cities, the casual criminalization of poverty has become, at the very least, contested, with protesters routinely seeking to block encampment sweeps and other such practices. At the same time, the recent election of liberal leaders in progressive cities who promise to hold people experiencing unsheltered homelessness accountable for their choices suggests that decriminalization on any meaningful scale remains an elusive goal. Moreover, as sociologist Neil Gong points out, replacing mass criminalization with tolerant containment—in which people earn the right to be homeless but not to housing, to use drugs but not to harm reduction services and behavioral health treatment, to non-prosecution but not to care and support—would hardly be a victory.⁸⁵ In short, while reversing mass criminalization is an essential goal, the path toward it is fraught and obscure, and tens of thousands are booked into jail daily.

In recent years, yet another alternative has gained popularity: alternative crisis response initiatives. These initiatives—which authorize civilians to respond to 911 calls involving people in crisis—are receiving significant attention and acclaim. They are a welcome development. Alternative crisis response programs address a very real problem—namely, over-reliance on police. They reflect and help realize a more holistic understanding of what public safety entails and what it requires. And they are clearly superior to many of the inhumane and utterly pointless tactics—including arrests, sweeps, and banishment—that have been used in the past.

Despite their popularity, however, alternative crisis response initiatives are unlikely to reduce the need for diversion, for several reasons. First, these initiatives focus on calls that are coded as “mental health crises” and “mental health disturbances” that do not involve weapons; some also prioritize other non-criminal issues such as public intoxication and syringe disposal.⁸⁶ This separation of crisis and crime—and the treatment of the latter as largely off-limits for civilian first responders—limits the extent to which these initiatives will reduce the scale and scope of the criminal legal system. And research on implicit bias suggests that

85. Neil Gong, *California Gave People the ‘Right’ to be Homeless but Little Help in Finding Homes*, WASH. POST (May 20, 2021), <https://www.washingtonpost.com/outlook/2021/05/20/california-homeless-addiction-drugs/> [https://perma.cc/3HED-DBVR].

86. Katherine Beckett, Forrest Stuart & Monica C. Bell, *From Crisis to Care*, INQUEST (Sep. 2, 2021), <https://inquest.org/from-crisis-to-care/> [https://perma.cc/X9VU-2L9S].

reliance on 911 callers and dispatchers to identify situations that involve crises but *not* crime or weapons raises the very real possibility that calls involving White people in crisis are more likely to be deemed eligible for an alternative response than those involving people of color.⁸⁷ Moreover, most alternative crisis response models do not invite widespread reconsideration of our collective reliance on 911 to address issues and behaviors that are currently defined as crimes, as community referral processes do. Finally, alternative crisis response models typically do not entail ongoing support for the people they assist or any significant reallocation of resources. While they may help reduce police encounters between police and vulnerable populations, alternative crisis response models appear unlikely to alter the scale and scope of the criminal legal system or enhance social supports in ways that obviate the need for diversion.

Until the larger structural and political context is altered, then, diversion remains a necessary, albeit imperfect, method for reducing the scope of the criminal legal system and the harm it causes, while also enhancing access to care and support for our most vulnerable and marginalized neighbors. Avoiding court-based diversion and relying instead on both pre-booking diversion and community referral processes appears likely to maximize diversion's decarcerative potential, in part because this multi-faceted approach allows for flexibility when political dynamics shift. In Seattle, community referrals came to play a crucial role as police referrals ground to a halt in the context of the pandemic and the aftermath of the murder of George Floyd. Yet, the subsequent election of a city attorney and mayor who are committed to increasing arrests and penalties, for both serious and low-level offenses, at the end of 2021 led LEAD stakeholders to re-emphasize the primacy of arrest diversion to divert as many vulnerable people as possible. This revival of arrest referral does not solve all pre-existing problems, and its coexistence with community referral processes creates some new ones—especially frustration at LEAD's inability to fix poverty and homelessness among residents, business owners, and city leaders who have become aware of the community referral option.

Moreover, it is far from certain which diversion approach is optimal when both are options and need vastly outstrips capacity. As one Seattle leader put it, when capacity and resource constraints exist,

You have to decide what lesson you want to teach with the limited number of referrals you can take. One goal could be teaching SPD about LEAD. Or should we be prioritizing community referrals so people don't flood the emergency call system. But you can't do both when you are so capacity constrained.

Still, a flexible approach that allows program administrators to shift in response to changing political circumstances appears to be the best that diversion can accomplish given existing conditions. The existence of the community referral process means that program administrators can find a way around law enforcement

87. See generally JENNIFER EBERHARDT, *BIASED: UNCOVERING THE HIDDEN BIAS THAT SHAPES WHAT WE SEE, THINK AND DO* (2020).

reluctance to clear certain people for referral to LEAD. And over time, the continued development and utilization of community referral processes may help to generate support for addressing the broader structural conditions. These broader structural conditions produce the widespread human suffering that underlies so many calls for emergency response and fuels over-reliance on jails as the de facto response to human misery.