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Street Diversion and Decarceration

Mary Fan

University of Washington School of Law

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STREET DIVERSION AND DECARCERATION

Mary Fan*

ABSTRACT

States seeking more cost-effective approaches than imprisoning drug offenders have explored innovations such as drug courts and deferred prosecution. These treatment-based programs generally involve giving diversion discretion to prosecutors and judges, actors further down the criminal processing chain than police. The important vantage of police at the gateway of entry into the criminal system has been underutilized. The article explores developing the capacity of police to take a public health approach to drug offending by engaging in street diversion to treatment rather than criminal processing. This approach entails giving police therapeutic discretion—the power to sort who gets treatment rather than enters the criminal justice system. The article draws insights from medicine and the experience of treatment courts about how to guide therapeutic discretion, mitigate the risk of racial disparities in selection of beneficiaries, and offer checks and balances on power.

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INTRODUCTION

Today is a green light day in an experimental new role for police in dealing with drug offenders in urban Seattle.¹ In a program called “the first of its kind in the United States,” police officers in the downtown Belltown area take drug and prostitution offenders—among the main staples of the criminal justice mill—to rehabilitative and social support services rather than criminal processing on select days.² The program also treats prostitution as a divertible offense because of the community’s understanding that while male addicts are often arrested for drug offenses, female addicts are often picked up for prostitution.³ The police-community partnership project is called LEAD—short for Law Enforcement

1. “Green-light days” is the term officers implementing the program use to refer to days when they may choose to divert people to rehab rather than arrest. See LAW ENFORCEMENT ASSISTED DIVERSION (LEAD), BELLTOWN REFERRAL AND DIVERSION PROTOCOL—FINAL 2 (2011) [hereinafter LEAD Protocol] (document on file with author) (explaining protocol for diversion).

2. See LEARNING FOR ACTION (LFA) GROUP, LAW ENFORCEMENT ASSISTED DIVERSION (LEAD) PROGRAM AND EVALUATION PLAN 1 (Oct. 2011) [hereinafter LEAD Plan] (document on file with author) (explaining the “model has not been tried yet in the US” and explaining the ambition that the idea will spread to other jurisdictions); Levi Pulkkinen, “A New Day” for Belltown, SEATTLE POST-INTELLIGENCER (Oct. 13, 2011), <http://www.seattlepi.com/local/article/A-new-day-for-Belltown-2217385.php> (describing program as “the first program of its kind in the United States”).

3. For studies on the interrelationship between addiction and prostitution, see, e.g., Jennifer James, *Prostitution and Addiction: An Interdisciplinary Approach*, 2 ADDICTIVE DISEASES: AN INT’L J. 601, 601–03, 615 (1976) (exploring the connection between prostitution and addiction); John J. Potterat et al., *Pathways to Prostitution: The Chronology of Sexual and Drug Abuse Milestones*, 35 J. SEX RESEARCH 333, 339 (1998) (finding substance abuse generally precedes entry into prostitution); Amy M. Young, Carol Boyd & Amy Hubbell, *Prostitution, Drug Use, and Coping with Psychological Distress*, 30 J. DRUG ISSUES 789, 789–800, 795–97 (2000) (collecting findings that women may enter prostitution to fund drug use and arguing the stress of prostitution intensifies drug dependence). For a thought-provoking argument about the similarities in supply-side criminal regulation of drugs

Assisted Diversion, and an acronym that also captures the hope that the pioneering approach might flourish and spread to other jurisdictions.⁴

The need for wiser approaches to dealing with drug offending is acute. Drug offenses constitute the most prevalent ground for arrest and a major basis of imprisonment in the United States.⁵ Over the last two decades, incarceration has quadrupled and spending on prisons has surged by more than 300 percent, but recidivism has stuck to between 43 percent and 45.4 percent.⁶ In a microcosm of the national problem, police working Belltown's open-air drug markets reported just 54 repeat offenders accounted for 2,700 arrests.⁷ The addicts, pushers, and prostitutes churn through the criminal justice system, from the streets, to arrest, to jail, in seemingly futile repetition.⁸ Hoping to break out of this costly cycle, the LEAD program gives officers the discretion not to arrest and book as usual.⁹ Rather than acting as the muscular arm of the incarcerating state, police serve as the first screen of an offender's suitability for rehabilitation and community reintegration.

Call it street diversion away from the system's standard answer of arrest and jail for drug offenders. The idea is to take a "public health approach" to the problem of persistent reoffending. Officers explain that the role change is a "cultural shift" and an institutional reorientation for policing.¹⁰ This Article is about cultivating such a public health approach to policing drug offenders and designing safeguards for police discretion to divert at the street level.

The opening example of a program in part of downtown Seattle may seem hyper-local—but the embryo of a big idea in a microcosm is chosen as an emblem of greater possibilities. After all, one of the major criminal justice innovations over the last three decades, drug courts, started as a hyper-local Miami program.¹¹ The idea that began in miniature—treatment courts casting judges and prosecutors in rehabilitative roles—has since spurred a massive movement, with more than 2,500 programs across the United States and broad bipartisan support today.¹² The

and prostitution see, for example, Donald A. Dripps, *Recreational Drug Regulation: A Plea for Responsibility*, 2009 UTAH L. REV. 117, 120–21 (2009).

4. LEAD Plan, *supra* note 2, at 1.

5. See, e.g., FBI, UNIFORM CRIME REPORT: CRIME IN THE UNITED STATES, 2009, at 1 (Sept. 2010), <http://www2.fbi.gov/ucr/cius2009/documents/arrestmain.pdf> (reporting the highest arrest counts for drug abuse violations); *infra*, Part I.A. (discussing figures); see also JOHN SCHMITT ET AL., CTR. FOR ECON. AND POL'Y RESEARCH, THE HIGH BUDGETARY COST OF INCARCERATION 2, 4–5 & fig.2 (2010), <http://www.cepr.net/documents/publications/incarceration-2010-06.pdf> (providing comparative per capita incarceration rates).

6. See THE PEW CENTER ON THE STATES, STATE OF RECIDIVISM: THE REVOLVING DOOR OF AMERICA'S PRISON 2, 5, 9, 12 (April 2011).

7. See, e.g., Pulkkinen *supra* note 2, at A1.

8. See, e.g., Sara Jean Green, *Seattle program aims to break the habit of incarceration*, SEATTLE TIMES, Oct. 13, 2011, at A1 (describing "collective fatigue" over revolving cycle).

9. LEAD Protocol, *supra* note 1, at 2.

10. Pulkkinen *supra* note 2, at A1.

11. See discussion *infra* notes 81–83.

12. *Id.*

Article argues for extending our reimagination of traditional criminal justice institutional roles to a crucial and underutilized actor in forging therapeutic alternatives to incarceration—the police who stand at the entryway to the criminal justice system.¹³

Street diversion by police has the potential to help cut costs, reduce prison overcrowding, and promote long-term solutions to public health and order problems.¹⁴ Converging conditions have created an opportune time to develop a rehabilitative role for policing.¹⁵ States and localities are engaged in a widespread search for ways to decarcerate and relieve crushing budgetary pressures.¹⁶ For the first time in more than three decades, the number of people incarcerated declined in 2010.¹⁷ Though the decline was slight—0.3 percent—it was an important change in trend.¹⁸ Many criminal justice reforms are making headway, particularly those tackling the system's approach to drug offenses.¹⁹ Indeed, in a marked shift from the tough-on-crime politics of the past, states are showing political will to reform the punitive orientation toward drug offenses through legislation converting drug felonies to misdemeanors and curbing sentences.²⁰

The notion of police participation in therapeutic sorting is not wholly foreign to the United States. Rehabilitative policing models have evolved in the context of pre-booking diversion of the mentally ill to cope with the deinstitutionalization of mental institutions.²¹ This Article explores the most viable model for the spread of rehabilitative diversion and argues that police-driven sorting by specially trained officers is the most practicable option.²² The challenge is how to cultivate the benefits of rehabilitative policing while allaying concerns over giving police discretion to determine who gets treatment rather than jail. The policing literature is filled with concerns and cautions regarding police discretion, including the

13. See *infra* Part I.B.

14. *Id.*

15. See *infra* Part I.A.

16. *Id.*

17. U.S. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS, BULL. NCJ236096, PRISONERS IN 2010, at 1 (2012).

18. *Id.*

19. See, e.g., Cheryl Cadue, *Budget Cuts Challenge Progress Made by States and Elicit Even Smarter Reforms*, ALLBUSINESS (Feb. 1, 2010), <http://www.allbusiness.com/crime-law-enforcement-corrections/corrections-parole/14359499-1.html> (offering examples of reforms); *State Measures to Close Budget Gaps*, NAT'L CONFERENCE OF STATE LEGISLATURES (2011), <http://www.ncsl.org/issues-research/budget/state-measures-to-close-budget-gaps.aspx> (providing a database of state criminal justice reforms).

20. See, e.g., COLO. REV. STAT. § 18-18-401(b), (c) (2011) (converting drug felony to misdemeanor); *id.* at §1818-18-406 (reducing sentences for a variety of other simple possession crimes); Carrie Teegardin & Bill Rankin, *Georgia Rethinks Its Prison Stance*, ATLANTA J. -CONST., Jan. 3, 2012, at A1 (reporting on recommendations by legislatively-convened expert body that would, among other things, offer probation for most drug possession offenses); Jimmie E. Gates, *Inmates get early release*, CLARION-LEDGER (Miss.), Nov. 29, 2009, available at 2009 WLNR 24110992 (reporting on reform to increase the number of nonviolent drug offenders on house arrest rather than parole); see also *infra* Part I.A.1.

21. See *infra* Part II.A.

22. See *infra* Part II.A–B.

discretion to be lenient.²³ Giving therapeutic discretion to the police rather than prosecutors or judges raises concerns regarding the low visibility of police decision-making on the street, information deficits, the hidden impact of unconscious bias, and the lack of cross-institutional checks.²⁴ The Article argues these are not insurmountable impediments. The benefits of rehabilitative policing outweigh the concerns if mitigating measures are taken.

The dilemmas of discretion are not unique to policing. This Article argues the experience of other professions exercising therapeutic judgment can inform ways to ameliorate concerns about police therapeutic discretion. For example, public health studies have found a host of apparent disparities in the treatments doctors prescribe for the same ailment depending on the patient's race.²⁵ The medical community has explored ways to improve therapeutic discretion, offering insights about how to counteract unconscious biases that influence judgment and decision-making,²⁶ use data-driven monitoring as a check on judgment,²⁷ and improve decision-making based on observations and questioning during brief encounters through communication education.²⁸ Drawing on insights from medical literature on discretion and disparities, this Article provides recommendations on mitigating the dilemmas of discretion in rehabilitative policing.

23. See, e.g., KENNETH CULP DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 83–88 (1969) (discussing the dangers of discretionary justice, including police discretion to be lenient); RONALD WEITER & STEVEN A. TUCH, RACE AND POLICING IN AMERICA: CONFLICT AND REFORM 3 (2006) (discussing how police discretion not to arrest sparks concern over selective enforcement). For more sources, see *infra* discussion at notes 162–163.

24. See *infra* Part II.B.2.

25. See, e.g., BRIAN D. SMEDLEY ET AL., INSTITUTE OF MEDICINE, UNEQUAL TREATMENT: CONFRONTING RACIAL AND ETHNIC DISPARITIES IN HEALTH CARE 160–79 (2003) (collecting circumstantial evidence of biases impacting treatment decisions); Peter A. Clark, *Prejudice and the Medical Profession: A Five-Year Update*, 37 J. L. MED. & ETHICS 118, 118–24 (2009) (collecting an array of study findings); Alexander R. Green et al., *Implicit Bias Among Physicians and its Prediction of Thrombolysis Decisions for Black and White Patients*, 22 J. GEN. INTERNAL MED. 1231, 1237 (2007) [hereinafter Alexander R. Green et al.] (finding implicit bias influences physician decisions on whether to prescribe thrombolysis, a clot-busting treatment, for patients with myocardial infarction); Carmen R. Green et al., *The Unequal Burden of Pain: Confronting Racial and Ethnic Disparities in Pain*, 4 PAIN MED. 277, 278–79, 287 (2003) [hereinafter Carmen R. Green et al.] (collecting evidence of disparities based on patient race in how and whether doctors manage pain); see also, e.g., Elizabeth Cohen, *Does your doctor judge you based on your color?*, CNN News, July 23, 2009 (summarizing studies demonstrating that race and appearance, such as obesity, impact physician perception and judgment); Rahul K. Parikh, *Race and the White Coat*, SALON, Apr. 22, 2008 (summarizing research finding that adjusting for income, age, insurance status and disease severity, physicians treat patients disparately depending on race); *Black and Hispanic Patients with chest pain often downgraded in ER*, CARDIOLOGY TODAY, Oct. 25, 2010, at 23 (reporting emergency triage units were less likely to prioritize Hispanic and Black patients presenting with chest pain than white patient and less likely to order an electrocardiogram, cardiac monitor or pulse oximetry).

26. For an overview of the phenomenon of implicit bias and how to detect it see, for example, Anthony G. Greenwald & Mahzarin Banaji, *Implicit Social Cognition: Attitudes, Self-Esteem and Stereotypes*, 102 PSYCH. REV. 4, 19–20 (1995); Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945, 947–53 (2006). For a sampling of the abundant array of literature applying insights on implicit bias to law and legal decision makers, see *infra* note 169.

27. See *infra* Part III.A.2.

28. See *infra* Part III.A.3.

The analysis proceeds in three parts. Part I frames the need for rehabilitative policing, particularly in how the United States deals with drug offenders. This Part analyzes how the costs and ravages of the drug war are producing converging interests between majorities and minorities for change and have spurred reforms. Part II explores models for rehabilitative policing, drawing from experiments in therapeutic sorting among police departments dealing with the deinstitutionalization of mental hospitals. This Part concludes that ultimately a model based on trained officer sorting rather than a team of police and behavioral health professionals is the most practicable method of integrating street diversion into standard practice. The analysis acknowledges the dilemmas of giving police rehabilitative discretion, but argues a model that gives police rather than specialized experts the power is needed to effect change in everyday criminal law. Part III offers answers to potential objections to police discretion, drawing on medical literature on treatment biases and the experiences of drug courts.

I. WHY REHABILITATIVE POLICING AND WHY NOW?

Across the nation, states are searching for ways to cut the crippling costs of punitive criminal processing as usual without endangering safety.²⁹ With growing bipartisan support,³⁰ American criminal justice is starting to come out of the long hangover of the punitive turn after the decline of the rehabilitative ideal—the loss of faith in the hope of reforming offenders—and the launch of the war on drugs in the 1970s.³¹ Across the political spectrum³² people are realizing the urgent need to

29. See, e.g., Roger A. Fairfax, Jr., *The "Smart on Crime" Prosecutor*, 25 GEO. J. LEG. ETHICS 905, 906–908 (2012) (discussing the smart on crime movement); Roger A. Fairfax, Jr., *From Overcriminalization to "Smart on Crime": American Criminal Justice Reform—Legacy and Prospects*, 7 J. L. ECON. & POL'Y 597, 611–612 (2011) (discussing shifting criminal justice reform impetus); Mary D. Fan, *Beyond Budget-Cut Criminal Justice: The Future of Penal Law*, 90 N. CAROLINA L. REV. 581, 594–95, 610–11, 619–20 (2012) (detailing budgetary emergencies and the search for reforms); Monica Davey, *Safety Is Issue as Budget Cuts Free Prisoners*, N.Y. TIMES, Mar. 4, 2010, at A1 (describing numerous state criminal justice reforms trying to redress budgetary shortfalls).

30. See, e.g., Debi Brazzale, *Lawmakers Unite Behind New Approach to Drug Offenders*, STATE BILL NEWS (Feb. 24, 2010), <http://www.statebillnews.com/2010/02/hb10-1352-lawmakers-unite-behind-new-approach-to-drug-offenders/> (quoting Republican legislator and former prosecutor's explanation that "[i]t's time to switch our focus from being tough on crime to being smart on crime" as his reason for bipartisan support of legislation that reduces penalties for drug crimes); Mike Klein, *Thinking Outside the Cell: Texas Innovates to Correct Course in Prison System*, GA. PUB. POL'Y FOUND. (Apr. 20, 2010), <http://www.georgiapolicy.org/thinking-outside-the-cell-texas-innovates-to-correct-course-in-prison-system/> (quoting Republican Texas legislator's explanation for support of rehabilitation rather than prison: "You're not soft on crime by doing something that's smart"); Alan Johnson, *Sentencing-overhaul law to reduce Ohio's prison population*, COLUMBUS DISPATCH (June 30, 2011, 6:18 AM), available at <http://www.dispatch.com/content/stories/local/2011/06/30/sentencing-overhaul-to-reduce-prison-population.html> (discussing shift in stance by longstanding Republican crime crackdown proponent because of the realization that the 1980s vision of incarceration and toughness was not working).

31. For accounts of the decline of the rehabilitative ideal see, e.g., FRANCIS A. ALLEN, *THE DECLINE OF THE REHABILITATIVE IDEAL: PENAL POLICY AND SOCIAL PURPOSE* 18–19 (1981); DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* 8–20, 28–73, 90–102, 105–37 (2002); JONATHAN SIMON, *GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND*

disrupt the status quo of penal severity and what Joan Petersilia has memorably termed “the prison bubble.”³³ The nation is more receptive—even hungry—now than at any point in the last four decades to find “more humane, effective alternatives” that “fundamentally rethink how we treat and rehabilitate our prisoners.”³⁴ It may come as a surprise that the foregoing quotation came from Newt Gingrich—long considered a “hardcore conservative”—rather than a liberal reformer.³⁵ The lack of controversy surrounding such a policy platform shows how much the nation is coming to embrace the need for decarceration and breaking free of the once-seemingly inescapable one-way ratchet of get-tough crime politics. The need to cut costs is changing the social meaning of reform and overcoming status quo bias when it comes to policy change.³⁶

Although status quo bias remains a challenge for street diversion efforts, the high costs of incarceration and the emergence of new ways to ensure safety are creating the broad constituency needed for change.³⁷ Status quo bias is particularly difficult for decarceration reform because individual winners and losers cannot be precisely specified in advance.³⁸ Since many people assume the winners will be

CREATED A CULTURE OF FEAR 149–51 (2007). For works on the impact of the War on Drugs on American criminal justice and communities across America, see, e.g., R. Richard Banks, *Beyond Profiling: Race, Policing and the Drug War*, 56 STAN. L. REV. 571, 573, 587–88, 594 (2003) (analyzing how blacks and Latinos pay a disproportionate tax in terms of subjection to greater burdens of investigation because of the war on drugs); Steven B. Duke, *Mass Imprisonment, Crime Rates, and the Drug War: A Penological and Humanitarian Disgrace*, 9 CONN. PUB. INT. L.J. 17, 17, 23–24, 28 (2009) (discussing the impact of the long war on drugs, declared in 1973 by President Richard Nixon, on the 800 percent surge in imprisonment over the last forty years); Tracey L. Meares, *Social Organization and Drug Law Enforcement*, 35 AM. CRIM. L. REV. 191, 194, 206–13 (1998) (analyzing how the war on drugs and its heavy impact on disadvantaged communities has contributed to social disorganization, disrupting the community bonds needed to prevent lawbreaking).

32. See, e.g., Newt Gingrich & Pat Nolan, *Saving Money, Saving Lives*, WASH POST, Jan. 7, 2011, at A17, available at 2011 WLNR 1530349 (discussing need “to address the astronomical growth in the prison population, with its huge costs in dollars and lost human potential”).

33. Joan Petersilia, *Beyond the Prison Bubble*, 35 WILSON Q. 52 (Winter 2011).

34. Gingrich & Nolan, *supra* note 32, at A17.

35. See, e.g., *Republicans and the Crime Bill*, CAL. J., Oct. 1, 1994, available at 1994 WLNR 5362177 (terming Gingrich a “hardcore conservative”); Robert L. Koenig, *Gingrich Gets High GOP Post*, ST. LOUIS POST-DISPATCH, Mar. 23, 1989, at 1A, available at 1989 WLNR 374842 (describing Democratic concerns over Gingrich’s “highly partisan style”).

36. See, e.g., Dan M. Kahan, *What’s Really Wrong with Shaming Sanctions*, 84 TEX. L. REV. 2075, 2079 (2006) (discussing how status quo bias impedes receptivity to good ideas in criminal justice reform); William Samuelson & Richard Zeckhauser, *Status Quo Bias in Decisionmaking*, 1 J. RISK & UNCERTAINTY 7, 8–11, 41 (reporting experimental findings of strong status quo bias in a variety of decisionmaking contexts).

37. See, e.g., John Buntin, *How Game Theory is Reinventing Crime Fighting*, GOVERNING (Feb. 2012), available at <http://www.governing.com/topics/public-justice-safety/gov-how-game-theory-is-reinventing-crime-fighting.html> (discussing how budget deficits and the desire to pursue smarter and more effective policies to handle non-violent offenders are driving reforms among the states); Fan, *supra* note 29, at 583, 623–624 (analyzing the power of the social meaning shift).

38. See, e.g., Raquel M. Fernandez & Dani Rodrik, *Resistance to Reform: Status Quo Bias in the Presence of Individual-Specific Uncertainty*, 81 AM. ECON. REV. 1146, 1146, 1152–54 (1991) (offering a model of *ex ante* status quo bias against efficiency-enhancing reforms that might otherwise be quite popular and successful *ex post* where individual gainers and losers under the change cannot be precisely identified *ex ante*).

offenders, they worry the community will be left unsafe.³⁹ Status quo bias is also politically challenging because decarceration reforms primarily benefit marginalized and disadvantaged communities that lack the political power to effectuate legal change. The discrete and insular minority difficulty in democratically determined criminal law compounds the status quo bias against reform.⁴⁰ Appeals for reforms couched in terms of harms to disadvantaged communities and the incarcerated have difficulty gaining political traction because the perceived beneficiaries are people lacking the power to secure change. But conversion of the concern to the language of costs to taxpayers and smarter ways to ensure safety is creating the broader constituency needed for change.

Numbers are creating a compelling case that reform would benefit the majority, both in terms of costs savings and because the odds of getting caught up in the criminal system have dramatically risen. Today, one in thirty-three adults bears the brand of correctional control, either in jail, in prison, on probation, or on parole.⁴¹ Such high rates make it harder to delude oneself that criminal processing happens to other people and one is immune. To sustain the highest reported per capita incarceration rate in the world, Americans spent \$68 billion on prisons in 2008, a 336 percent increase in costs since 1980.⁴² Spending on prisons has become the nation's second fastest growing general fund expenditure draining money away from basic priorities such as education.⁴³ As two-thirds of states faced nearly \$40 billion in budget gaps collectively in fiscal year 2009—a gap that soared to \$84.3 billion by fiscal year 2010⁴⁴—legislators are confronting the heavy costs of incarceration.⁴⁵

What areas of reform will yield the most impact? This section first analyzes why a smarter model of drug policing is a compelling entryway for reform. Drug abuse offenses constitute the biggest basis for arrest in the United States, accounting for

39. For accounts of how the fear of looking soft on crime and accusations of endangering safety have stymied reform, see, e.g., Erwin Chemerinsky, *The Essential but Inherently Limited Role of the Courts in Prison Reform*, 13 BERKELEY J. CRIM. L. 307, 310 (2008); William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548, 2558 (2004); Michael Tonry, *The Mostly Unintended Effects of Mandatory Penalties: Two Centuries of Consistent Findings*, 38 CRIME & JUST. 65, 100–02 (2009).

40. See William J. Stuntz, *Substance, Process, and the Civil-Criminal Line*, 7 J. CONTEMP. LEGAL ISSUES 1, 21 (1996) (explaining countermajoritarian judicially-fashioned criminal procedure protections as vindicating the *Carolene Products* vision of protecting minorities lacking recourse in the political process).

41. LAUREN E. GLAZE, U.S. DEP'T OF JUSTICE, NCJ 236319, CORRECTIONAL POPULATION IN THE UNITED STATES, 2010, at 2 (2011).

42. THE PEW CTR. ON THE STATES, ONE IN 31: THE LONG REACH OF AMERICAN CORRECTIONS 11 (2009). The United States incarcerates 753 people per 100,000 of the population, whereas second-place Russia incarcerates 629 per 100,000, and Rwanda incarcerates 593 per 100,000. JOHN SCHMITT ET AL., CTR. FOR ECON. & POLICY RESEARCH, THE HIGH BUDGETARY COST OF INCARCERATION 4 (2010).

43. CHRISTINE S. SCOTT-HAYWARD, VERA INST. OF JUSTICE, THE FISCAL CRISIS IN CORRECTIONS: RETHINKING POLICIES AND PRACTICES 3 (2009), http://www.vera.org/files/The-fiscal-crisis-in-corrections_July-2009.pdf.

44. NAT'L CONFERENCE OF STATE LEGS., UPDATE ON STATE BUDGET GAPS: FY 2009 & FY 2010, at 2–3 (2009).

45. See *supra* notes 29, 39.

more than 1.6 million arrests in 2009.⁴⁶ Drug offenses are also the leading basis for incarceration in the federal system and one of the major bases for imprisonment across the states.⁴⁷ Across the nation, bipartisan coalitions are exploring reforms to drug laws and punishment as an important part of the reform package.⁴⁸ Majority and minority interests are converging in seeking change to drug offender processing as usual because of the drug war's ravages. The second section argues that the vision of change should widen from rehabilitative courts to rehabilitative policing, providing the threshold decision maker with the ability to divert people before incurring the costs of criminal processing.

A. Seeking Smarter Solutions to the Drug War

As states break free from criminal processing as usual, changes to how the system punishes drug offenders have become an important part of reform packages.⁴⁹ In 2011, at least nine states enacted drug law reforms, which ranged from lowering the prescribed penalties for use and possession offenses, to widening access to substance abuse programs.⁵⁰ The National Conference of State Legislatures forecasts that criminal justice reforms, including drug law reforms, will continue to be a top issue for state legislatures in 2012.⁵¹ Narcotics offenses are often a focal point for states seeking to cut the steep costs of incarceration because drug offenses are a major driver of incarceration.⁵² Moreover, studies indicate that imprisonment has a particularly strong criminogenic effect on drug offenders, who recidivate more rapidly and at higher rates after incarceration than similarly situated offenders who receive only probation.⁵³

Reform supporters—including conservatives—have realized incarceration as usual is not working and costs too much. For example, Republican legislator and former prosecutor Mike Waller, successfully sponsored legislation in Colorado to

46. FBI, UNIFORM CRIME REPORT, *supra* note 5, at 1.

47. See U.S. DEP'T OF JUSTICE, PRISONERS IN 2010, *supra* note 17, at 28 tbl.16B, 30 tbl.18.

48. See, e.g., sources cited *supra* note 20 and discussion *infra* Part IA.

49. See, e.g., Jeremy W. Peters, *Albany Reaches Deal to Repeal '70s Drug Laws*, N.Y. TIMES, Mar. 26, 2009, at A1 (heralding revisions to tough 1970s era drug laws); Teegardin & Rankin, *supra* note 20, at A1 (detailing how conservative Southern states are engaging in criminal justice reforms under the "smart on crime" banner, including drug law reforms); *Top 12 Legislative Issues of 2012 NCSL Highlights Some of the Top Issues that Will Dominate the Legislative Agenda in 2012*, STATES NEWS SERVICE, Jan. 3, 2012, available at <http://www.ncsl.org/press-room/top-12-legislative-issues-of-2012.aspx> [hereinafter *Top 12 Legislative Issues of 2012*] (reporting on strong state interest in drug law and sentencing reform).

50. *Top 12 Legislative Issues of 2012*, *supra* note 49.

51. *Id.*

52. See U.S. DEP'T OF JUSTICE, PRISONERS IN 2010, *supra* note 17, at 28 tbl.16B, 30 tbl.18 (listing major crime categories accounting for imprisonment).

53. Cassia Spohn & David Holleran, *The Effect of Imprisonment on Recidivism Rates of Felony Offenders: A Focus on Drug Offenders*, 40 CRIMINOLOGY 329, 330, 345 (2002).

adopt a treatment rather than incarceration paradigm for addicts.⁵⁴ He explained the rationale for his bill by stating, “warehousing people who are addicts doesn’t do anything to solve the problem.”⁵⁵ The new legislation also converts some narcotics-related crimes from felonies to misdemeanors and requires annual cost savings evaluations and allocation of savings to substance abuse treatment programs.⁵⁶

Georgia, which has one of the top ten highest per capita incarceration rates in the nation, is also joining other conservative southern states in exploring criminal justice reform, including drug law reform.⁵⁷ Trying to cut annual costs of more than \$1 billion for incarceration—primarily for drug and property offenders—state lawmakers enacted House Bill 265, establishing the Special Council on Criminal Justice Reform.⁵⁸ The Special Council reported that Georgia’s incarceration costs were skyrocketing even as crime declined, largely fueled by drug and property offenses, which constituted the most common bases of prison admissions.⁵⁹ Though many drug and property offenders are lower-risk, the average length of prison stay among such offenders more than tripled between 1990 and 2010, fueling crushing incarceration costs.⁶⁰ The Special Council expressed concern that incarceration heightens the risk of recidivism, particularly for felony drug offenders.⁶¹ While controversial, some of the further-reaching drug law reforms considered by the Special Council included presumptive probation for drug possession offenses and giving judges the discretion to depart from drug offense mandatory minimums.⁶²

54. See COLO. REV. STAT. § 18-18-401(b)–(c) (2011) (“Successful, community-based substance abuse treatment and education programs, in conjunction with mental health treatment as necessary, provide effective tools in the effort to reduce drug usage and criminal behavior in communities. Therapeutic intervention and ongoing individualized treatment plans prepared through the use of meaningful and proven assessment tools and evaluations offer a potential alternative to incarceration in appropriate circumstances and should be utilized accordingly.”).

55. Jeffrey Wolfe, *Lawmakers Propose Changes to Drug Sentencing*, ASSOCIATED PRESS, Feb. 23, 2010, available at <http://www.9news.com/news/local/story.aspx?storyid=133332&catid=346>.

56. H.B. 10-1352, 67th Gen. Assemb., 2d Reg. Sess. (Colo. 2010) (referencing amendments to sections 18-18-404, 16-11.5-102 of the Colorado Revised Statutes).

57. See, e.g., Teegardin & Rankin, *supra* note 20, at A1 (reporting Georgia is joining other conservative Southern states in exploring criminal justice reforms); The Henry J. Kaiser Family Found., *Incarceration Rate (Per 100,000 Residents)*, 2010, STATEHEALTHFACTS.ORG, <http://www.statehealthfacts.org/comparamaptable.jsp?ind=760&cat=1> (last visited Nov. 20, 2012) (based on 2010 U.S. Bureau of Justice Statistics and U.S. Census Bureau data).

58. Bill Rankin, *Panel Recommends Reforms to Stem Prison Spending*, ATLANTA J.-CONST., Nov. 18, 2011, at A1.

59. SPECIAL COUNCIL ON CRIMINAL JUSTICE REFORM FOR GEORGIANS, REPORT OF THE SPECIAL COUNCIL ON CRIMINAL JUSTICE REFORM FOR GEORGIANS 9 (2011).

60. *Id.* at 19.

61. *Id.* at 10, 20 (citing Spohn & Holleran, *supra* note 53, at 329–58).

62. *Id.* at 24–25.

The reforms represent a remarkable potential shift in criminal justice politics. For decades, scholars and civil rights litigators have decried the consequences of the drug war, particularly for communities of color, which bear the heaviest burden of investigation and incarceration.⁶³ The very fact that the drug war has had severe racial consequences may explain why political will has long been lacking to do something. A majoritarian system has a hard time protecting the interests of minorities.⁶⁴ Risks of looking soft on crime compound these political concerns.⁶⁵ What is turning the tide, ultimately, has been a conversion of the critique to majoritarian concerns of costs of incarceration.⁶⁶ Interest convergence between majorities and minorities can spark change where appeals to normative commitments such as anti-subordination have difficulty making headway.⁶⁷

When viewed through the lens of incarceration costs, majority and minority interests are converging. In 1995, Michael Tonry wrote that drug offenses are “the

63. For just a sampling of the rich literature, see, e.g., MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 6–7, 47–49, 53, 59 (2010) (arguing the war on drugs has perpetuated mass incarceration of minorities, continuing racial subordination by other means); Banks, *supra* note 31, at 594 (discussing how harms typically decried as racial profiling may stem from drug law enforcement); Steven B. Duke, *Drug Prohibition: An Unnatural Disaster*, 27 CONN. L. REV. 571, 575–95 (1995) (cataloguing the myriad consequences of the drug war, such as creating criminogenic incentives to commit collateral crimes, urban blight, heavy incarceration, dilution of civil liberties, and gross disparities in criminal law enforcement); Meares, *supra* note 31, at 204–17 (analyzing the collateral consequences of the drug war for social disorganization, particularly in disadvantaged communities of color); Ethan A. Nadelmann, *Commonsense Drug Policy*, 77 FOREIGN AFF. 111, 115–16 (1998) (detailing public health consequences such as transfer of disease through dirty syringes and arguing for a harm-reduction approach to containing the consequences of addiction); Kenneth B. Nunn, *Race, Crime and the Pool of Surplus Criminality: Or Why the “War on Drugs” was a “War on Blacks.”* 6 J. GENDER RACE & JUST. 381, 384–88 (2002) (arguing the war on drugs is a mask for a race war); John A. Powell & Eileen B. Hershenov, *Hostage to the Drug War: The National Purse, the Constitution and the Black Community*, 24 U.C. DAVIS L. REV. 557, 580–614 (1991) (arguing the casualties of the drug war are constricted constitutional protections against search and seizure and communities of color). *Cf.*, e.g., DOUGLAS N. HUSAK, *DRUGS AND RIGHTS* 1–7, 42–50 (1992) (arguing that beyond social cost arguments for drug law reform, drug law prohibitions violate the individual moral rights of adults who wish to use drugs for pleasure).

64. *United States v. Carolene Prods.*, 304 U.S. 144, 152 n.4 (1938). See discussion *supra* text at notes 39–40.

65. On the politics of crime, see, e.g., Chemerinsky, *supra* note 39, at 310; William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 509–12, 529–39 (2001); Stuntz, *supra* note 39, at 2558; Tonry, *supra* note 39, at 100–02.

66. For a discussion, see *supra* text and sources at notes 41–48.

67. See, e.g., Derrick A. Bell, Jr., Comment, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523, 530 (1980) (arguing progress toward racial equality “will be accommodated only when it converges with the interests of whites” and appeals to normative commitments do not suffice); Mary D. Fan, *Post-Racial Proxies: Resurgent State and Local Anti-“Alien” Law and Unity-Rebuilding Frames for Antidiscrimination Values*, 32 CARDOZO L. REV. 905, 908–10, 939–40 (2011) (arguing for alternate frames for antidiscrimination values to make shared interests rather than divergence of interests salient to successfully protect the values); Cynthia Lee, *Cultural Convergence: Interest Convergence Theory Meets the Cultural Defense*, 49 ARIZ. L. REV. 911, 922–38 (2007) (analyzing examples demonstrating the power of interest convergence to drive progress); Vicki Schultz, *Life’s Work*, 100 COLUM. L. REV. 1881, 1937–38 (2000) (arguing for shifting discourse on work-related rights to a focus on rights for all rather than particular marginalized groups to achieve progress).

single most important cause of the trebling of the prison population in the United States since 1980.”⁶⁸ As illustrated in Table 1, drug offenses continue to be the leading basis for state incarceration. The estimated \$47 billion states spent on corrections in fiscal year 2008 is a 303 percent surge in spending over the last twenty years and the second-fastest growing general-fund expenditure.⁶⁹ Housing just *one* of the more than one-third of a million prisoners incarcerated for drug offenses in 2009 cost nearly \$29,000 a year.⁷⁰

The federalization of drug prosecution and subsequent swelling of federal incarceration for drug offenses have only intensified the burden.⁷¹ As of January 2012, nearly half (47.7 percent) of federal incarceration was due to drug offenses.⁷² Drug offenses were also the largest basis of conviction for white and black people in the federal system.⁷³ For the Hispanic community, only immigration offenses exceeded drug offenses in federal convictions.⁷⁴ The human toll of dealing with drugs through incarceration thus cuts across racial groups, in addition to the shared fiscal burdens of incarceration.

The surging monetary and human costs over decades of incarceration since the launch of the drug war have not bought a sense of improved progress in dealing with drugs. As depicted in Charts 1 and 2, in the nearly four decades since President Richard Nixon announced the “all-out, global war on the drug menace” in 1973,⁷⁵ public perception of progress gained have remained generally dim—and even decreased slightly in recent years.

The percentage of people believing much progress has been made was a miniscule three percent in 1972, before the launch of the drug war, and remains so

68. MICHAEL TONRY, *MALIGN NEGLECT—RACE, CRIME, AND PUNISHMENT IN AMERICA* 81 (1995).

69. THE PEW CTR. ON THE STATES, *ONE IN 31*, *supra* note 42, at 11.

70. *Id.* at 12.

71. For a sampling of the critiques of surging federal drug prosecutions, see, e.g., *Considering the Role of Judges Under the Constitution of the United States Before the S. Comm. On the Judiciary*, 112th Cong. 25 (2011) (statement of Justice Antonin Scalia) (testifying: “It was a great mistake to put routine drug offenses into the federal courts”); Sara Sun Beale, *Too Many and Yet Too Few: New Principles to Define the Proper Limits for Federal Criminal Jurisdiction*, 46 HASTINGS L.J. 979, 997–98 (1995) (discussing problems with overcriminalization, including nearly complete overlap in federal jurisdiction with state jurisdiction over drug offenses); Vikrant P. Reddy, *10th Amendment Applies to Criminal Justice, Too*, NAT’L L.J., Feb. 15, 2012, http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202542435200&th_Amendment_applies_to_criminal_justice_too&slreturn=1 (arguing for the federal government to back out of drug enforcement because it should usually be the domain of the states).

72. Federal Bureau of Prisons, *Quick Facts about the Bureau of Prisons: Type of Offenses*, BOP.GOV (last updated Oct. 27, 2012), <http://www.bop.gov/news/quick.jsp>.

73. U.S. SENTENCING COMMISSION, 2010 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.4 (2010), http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2010/Table04.pdf.

74. *Id.*

75. PRESIDENT RICHARD NIXON, MESSAGE FROM THE PRESIDENT OF THE UNITED STATES TRANSMITTING REORGANIZATION PLAN NO. 2 OF 1973 ESTABLISHING A DRUG ENFORCEMENT ADMINISTRATION, H.R. DOC. NO. 93-69, at 3 (1973).

Chart 1: Trends in Positive Responses from Selected Years 1972–2011: Public Perceptions of the National Progress in Coping with Illegal Drugs⁷⁶

The Gallup Poll responses were elicited by the question “Now, how much progress do you feel the nation has made over the last year or two in coping with the problem of illegal drugs—has it made much progress, made some progress, stood still, lost some ground, or lost much ground?”

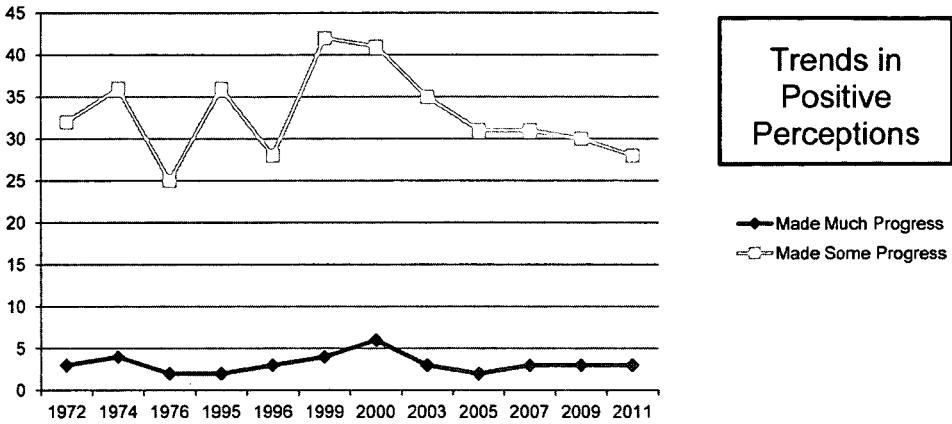
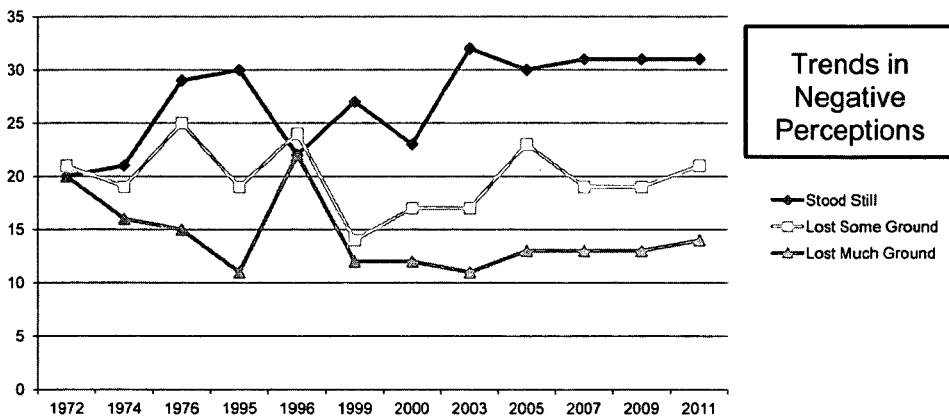


Chart 2: Trends in Negative Responses from Selected Years 1972–2011: Public Perceptions of the National Progress in Coping with Illegal Drugs⁷⁷

The Gallup Poll responses were elicited by the question “Now, how much progress do you feel the nation has made over the last year or two in coping with the problem of illegal drugs—has it made much progress, made some progress, stood still, lost some ground, or lost much ground?”



76. Figures are from Gallup polling data available at *Illegal Drugs*, GALLUP, <http://www.gallup.com/poll/1657/Illegal-drugs.aspx> (last updated May 24, 2012).

in 2011.⁷⁸ The percentage of people believing some progress has been made was actually slightly lower in 2011 than in 1972.⁷⁹ Significantly more people in 2011—31 percent—believe the nation has stood still rather than made progress compared to 20 percent in 1972. The same proportion of respondents answered the nation had lost some ground in coping with illegal drugs. The only slight improvement is on the grimmest perception of whether the nation has lost much ground—20 percent believed so in 1972 compared to 14 percent in 2011. While the nation seemed more optimistic around the year 2000 about progress, the measures are generally trending back to 1972 levels or slightly below. In light of all the costs to buy a sense of scant progress or worse, it makes sense that drug war fatigue and shrinking budgets are fueling a search for changes to drug offender processing as usual.

B. Reimagining Traditional Criminal Justice Roles

The national coming-to-consciousness creates the opportunity to explore how changes to traditional criminal justice actors' roles can further smarter approaches to decarceration that also cut recidivism. Two of the most prevalent efforts to find alternatives to incarceration—drug courts and pretrial diversion programs—have relied on reconfiguring the discretion of two categories of criminal justice professional elites: judges and prosecutors.⁸⁰ The role of the police in rehabilitative efforts has been underutilized, however, despite the important position of police at the threshold of the criminal justice system. This section contrasts the influential reimagining of the traditional role of judges and prosecutors over the decades in dealing with drug offenders with the relative neglect of the important role police can play. The section argues that “street diversion”—what the article dubs the prebooking diversion by police of drug offenders—can save in incarceration and court processing costs and reduce barriers to offender reintegration that heighten the risk of recidivism.

1. Headway Involving Prosecutors and Judges

Drug courts are among the most promising decarceration innovations of the past 15 years. Reconfiguring the roles of judges, prosecutors and defense counsel to better deal with drug offenses, the courts have garnered widespread bipartisan support.⁸¹ The idea of drug courts began as a small-scale, hyper-local innovation in

77. *Id.*

78. *Id.*

79. *Id.*

80. See the discussion *infra* in the text at notes 88–109.

81. See, e.g., JAMES L. NOLAN, JR., REINVENTING JUSTICE: THE AMERICAN DRUG COURT MOVEMENT 5, 40, 191 (2001) (discussing widespread support for drug courts, albeit critiquing unintended consequences and the reconfiguration of the roles of judge, prosecutor and defense attorney); Peggy Fulton Hora et al., *Therapeutic Jurisprudence and the Drug Treatment Court Movement: Revolutionizing the Criminal Justice System's Response*

Dade County, Florida, in hopes of coping with high narcotics caseloads in an overburdened criminal justice system.⁸² The innovation has spread—as of 2010, more than 2,500 drug court programs are operating across the United States.⁸³ Such treatment courts give offenders incentive to succeed in addiction treatment to avoid prison and cast judges in the rehabilitative role, as providers of “tough love” and cheerleaders toward success.⁸⁴ Judges take a more active role in tracking and urging progress while prosecutors and defense counsel occupy a less adversarial and reduced role as part of a team working toward the subject’s recovery.⁸⁵

There is growing evidence of the success of the rehabilitative approach taken by drug courts, measured in terms of recidivism reduction and cost savings.⁸⁶ The recently-concluded and largest evaluation of drug-court efficacy to date— involving twenty-three drug courts across eight states—found that drug partici-

to *Drug Abuse and Crime in America*, 74 NOTRE DAME L. REV. 439, 448–68 (1999) (heralding the import of drug courts to breaking the cycle of reoffending and applying the insights of therapeutic jurisprudence); Claire McCaskill, *COMBAT Drug Court: An Innovative Approach to Dealing With Drug Abusing First Time Offenders*, 66 UMKC L. REV. 493, 498 (1998) (explaining success at reducing recidivism in a drug court program and the central role of the judge); Dina Fine Maron, *Courting Drug-Policy Reform: A Bipartisan Drug Policy 20 Years in the Making?*, NEWSWEEK, Oct. 6, 2009, <http://www.thedailybeast.com/newsweek/2009/10/06/courting-drug-policy-reform.html> (discussing bipartisan support for expanding drug courts, which helps reduce criminal justice processing costs and address high recidivism of offenders); Reddy, *supra* note 71 (discussing the success of Texas with treatment courts as an example for other jurisdictions).

82. See Judge Herbert Klein, Senior Judge, Circuit Court for Miami-Dade County, *The Power of Connection: Fuel for Drug Courts*, Keynote Address at the Florida Drug Court Conference 1–3 (1996) available at <http://www1.spa.american.edu/justice/documents/2195.pdf> (explaining genesis of the approach by the judge oft-credited for first launching it).

83. GOV’T ACCOUNTABILITY OFFICE, ADULT DRUG COURTS: STUDIES SHOW COURTS REDUCE RECIDIVISM, BUT DOJ COULD ENHANCE FUTURE PERFORMANCE MEASURE REVISION EFFORTS 1–2 (2011); see also BUREAU OF JUSTICE ADMIN. DRUG COURT CLEARINGHOUSE PROJECT, SUMMARY OF DRUG COURT ACTIVITY BY STATE AND COUNTY 1–114 (2009) (collecting drug court information across the nation).

84. McCaskill, *supra* note 81, at 498 (explaining the import of the judge, who serves as the offender’s “cheerleader, chastiser and, ultimately, jailer, if necessary”); Dwight Vick & Jennifer Lamb Keating, *Community-Based Drug Courts: Empirical Success*, 52 S.D. L. REV. 288, 291 (2007) (describing the cheerleading and tough-love role of the judge).

85. Judith S. Kaye, *Lawyering for a New Age*, 67 FORDHAM L. REV. 1, 4–5 (1998); see also, e.g., Richard C. Boldt, *Rehabilitative Punishment and the Drug Court Movement*, 76 WASH. U. L.Q. 1205, 1249–60 (1998) (expressing concern over defense attorneys acting as a “team player” in drug courts); Mae C. Quinn, *Whose Team Am I on Anyway? Musings of a Public Defender About Drug Treatment Court Practice*, 26 N.Y.U. REV. L. & SOC. CHANGE 37, 38, 46–47, 50 (2000) (discussing dilemmas of a defense attorney in nonadversarial “team approach” taken in drug court).

86. See, e.g., GOV’T ACCOUNTABILITY OFFICE, ADULT DRUG COURTS, *supra* note 83, at 19–20 (reporting statistically significant reduction of the likelihood of recidivism for 18 out of 32 drug court programs reviewed with re-arrest differences lower by 6 to 26% for program participants and 12 to 58% for program completers); Eric L. Jensen & Clayton Mosher, *Adult Drug Courts: Emergence, Growth, Outcome Evaluations, and the Need for a Continuum of Care*, 42 IDAHO L. REV. 443, 463 (2006) (finding evidence of recidivism reduction); Michael Rempel, Dana-Fox Kralstein & Amanda Cissner, *Drug Courts: An Effective Treatment Alternative*, 19 CRIM. JUST. 34, 35 (2004) (finding evidence of success in lowering the likelihood of reoffending). But see Scott W. Henggeler et. al., *Juvenile Drug Court: Enhancing Outcomes by Incorporating Evidence-Based Treatment*, 74 J. CONSULTING & CLINICAL PSYCH. 42, 53 (2006) (finding the juvenile drug court programs studied did not reduce rearrest rates despite reductions in antisocial behavior).

pants had significantly lower rates of drug relapse and reoffending than comparison group members, committing more than 50 percent fewer criminal acts.⁸⁷ On cost savings, California, home to about 12 percent of the nation's drug courts, calculated the state saved approximately \$9 million a year using drug courts because of the cheaper cost of diverting rather than jailing offenders and recidivism reduction.⁸⁸ To take an East Coast example, New Jersey's Supreme Court praised the cost savings yielded by drug courts and found drug court rehabilitative services—including six months of inpatient treatment—costs nearly half that of housing a prison inmate for a year, at \$17,266 compared to \$34,218 per person.⁸⁹

A qualification to the exuberance: many drug offenders, particularly narcotics possession or use defendants, do not spend a whole year in jail.⁹⁰ In general, the most recent and largest-scale study of adult drug courts across the nation indicates the operating costs of drug courts are more expensive than criminal processing as usual—but return a net benefit of \$2 for every \$1 of cost, for a savings of between \$5,680 to \$6,280 per participant because of crime prevention benefits.⁹¹ Putting judges in a rehabilitative role thus has measurable pay-offs for public safety, human redemption, and perhaps lessens the strain on the public purse.

While treatment courts seem to be paying their way, one of the critiques is that addiction continues to be funneled into the criminal justice system, with treatment perversely conditioned on arrest, rather than addressed as a public health problem.⁹² The institutional actors central in treatment courts, judges, and prosecutors enter the scene after the kick-start of the criminal process by arrest. Moreover, while processes vary, the typical price of entry into treatment courts is the criminal justice system's standard disposition of a guilty plea.⁹³

2. *Why Police Matter Too: Leveraging the Street-Level Gatekeeper's Role*

Unlike judges, police stand at the gateway to criminal processing. They wield

87. SHELLI B. ROSSMAN ET AL., URBAN INST., *THE MULTI-SITE ADULT DRUG COURT EVALUATION: THE IMPACT OF DRUG COURTS* 66, 70, 257–58 (2011).

88. ADMIN. OFFICE OF THE COURTS (CAL.), *CALIFORNIA DRUG COURT COST ANALYSIS STUDY 1–2*, 4 (2006).

89. *State v. Meyer*, 930 A.2d 428, 433 (N.J. 2007).

90. *See, e.g.*, U.S. SENTENCING COMM'N, 2010 SOURCEBOOK, *supra* note 73, at tbl.13 (listing mean and median federal drug possession sentence as around 3 months).

91. ROSSMAN ET AL., *supra* note 87, at 258. Note, the finding is not statistically significant, however, mainly because of the wide variation in outcomes. *Id.* at 247, 258.

92. *See, e.g.*, NAT'L ASSOC'N OF CRIMINAL DEF. LAWYERS, *AMERICA'S PROBLEM-SOLVING COURTS: THE CRIMINAL COSTS OF TREATMENT AND THE CASE FOR REFORM* 10 (2009):

Addiction is an illness. Illnesses should be treated through the public health system—not punished through the criminal justice system. Conditioning treatment on an arrest and entry in the criminal justice system sends a perverse message to the person who is ill and is an enormous waste of scarce public and court resources.

One of the most vocal authors of the critique, the National Association of Criminal Defense Lawyers, argues for drug decriminalization. *Id.* at 20. This article takes no position on the longstanding and fiercely-split debate.

93. *See, e.g.*, NOLAN, JR., *supra* note 81, at 40–41 (describing typical process).

the decision over whether to arrest and therefore represent the earliest juncture for pre-booking diversion into rehabilitation. Giving police the power to divert would avoid the problem and perverse incentive, raised by critics of drug courts, of police arresting minor offenders to get them into treatment.⁹⁴ The potential of using police as adjuncts in rehabilitative efforts, however, is relatively underutilized in America.

To date, American diversion programs, like treatment courts, have largely relied on the decision-making of non-police actors further down the criminal processing timeline—especially prosecutors.⁹⁵ The basic idea behind diversion programs is that defendants who meet eligibility requirements and whose crimes relate to an underlying problem such as addiction undergo supervision and treatment rather than trial and incarceration.⁹⁶ Like drug courts, diversion programs typically kick in after the launch of criminal processing by arrest.⁹⁷

Since the 1967 President's Crime Commission influentially recommended diversion, pretrial diversion programs have spread throughout the nation, with about 298 pretrial diversion programs spread over 45 states, the District of Columbia and the Virgin Islands today.⁹⁸ Like drug courts, pretrial diversion became popular in the 1970s as a way to cut costs and reduce prison rolls, as well as to rehabilitate offenders.⁹⁹ While the original ideal type of pretrial diversion culminated in dismissal of charges on satisfaction of diversion conditions, in recent years, many "diversion" programs are actually much more tightly intertwined with criminal processing, requiring guilty pleas before entry into the program.¹⁰⁰ The explosion of such programs has led to an expansion of the ideal type to include reduction of a sentence or charge rather than dismissal of

94. See, e.g., Morris B. Hoffman, *The Rehabilitative Ideal and the Drug Court Reality*, 14 FED. SENT'G REP. 172, 174 (2002) (contending "the very presence of drug courts is causing police to make arrests in, and prosecutors to file, the kinds of ten- and twenty-dollar hand-to-hand drug cases that the system would not have bothered with before").

95. See, e.g., U.S. ATTORNEY'S MANUAL, § 9.22.100 (2012) (stating diversion may occur in the discretion of the U.S. Attorney); JOHN CLARK, PRETRIAL JUSTICE INST., THE ROLE OF TRADITIONAL PRETRIAL DIVERSION IN THE AGE OF SPECIALTY TREATMENT COURTS: EXPANDING THE RANGE OF PROBLEM-SOLVING OPTIONS AT THE PRETRIAL STAGE 9 (2007) (explaining the prosecutor is the gatekeeper in diversion programs); Debra T. Landis, *Pretrial Diversion: Statute or Court Rule Authorizing Suspension or Dismissal of Criminal Prosecution on Defendant's Consent to Noncriminal Alternative*, 4 A.L.R. 147, at § 2[b] (1981) (detailing process and noting wide discretion of prosecutors, sometimes based on recommendation of administrators such as program directors and coordinators).

96. CLARK, *supra* note 95, at 4; Hung-En Sung, *From Diversion to Reentry: Recidivism Risks Among Graduates of An Alternative to Incarceration Program*, 22 CRIM. JUST. POL'Y REV. 219, 220 (2011).

97. CLARK, *supra* note 95, at 6–13 (noting parallels between drug court and diversion programs).

98. See PRESIDENT'S COMM'N ON LAW ENFORCEMENT & THE ADMIN. OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 133–34 (1967) (recommending pretrial diversion); NAT'L ASS'N OF PRETRIAL SERVS. AGENCIES, PROMISING PRACTICES IN PRETRIAL DIVERSION 4–5, 9 (2009) [hereinafter PROMISING PRACTICES] (discussing definitions and prevalence).

99. See, e.g., MALCOLM FEELEY, COURT REFORM ON TRIAL: WHY SIMPLE SOLUTIONS FAIL 103–05 (1983) (giving history of diversion programs).

100. CLARK, *supra* note 95, at 4–5 (noting shift).

charges—a model much more allied with criminal processing.¹⁰¹ Prosecutors are the central gatekeepers, wielding broad discretion over whether defendants get pretrial diversion, weighing factors such as the nature of the offense, the interest in saving prosecutorial and judicial resources, and crime prevention.¹⁰²

While treatment courts and pretrial diversion programs have influentially reimagined the role of judges and prosecutors, the threshold gatekeepers of the criminal justice system, police, have largely been left out of the rehabilitative reorientation. We can go further, earlier and deeper in realizing the benefits of asking traditional criminal justice professionals to take on rehabilitative responsibilities. Police are important institutional actors wielding power over whether to arrest—a crucial juncture for rehabilitative intervention and lessening the load on courts and the criminal justice system.

Waiting until after arrest to sort people for potential diversion or drug court treatment carries added costs for the public fisc and for the offender. In terms of costs to the public, intensive court monitoring and judicial participation is one of the major reasons why drug courts are more expensive than criminal processing as usual.¹⁰³ Cutting courts out saves money—as does avoiding the need for prosecutors and defense attorneys necessitated by the launch of the criminal process.¹⁰⁴ Moreover, street-level diversion can cut the jail crowding produced by pretrial detention in a system where many offenders cannot afford to make bail and crowd local jails awaiting court processing.¹⁰⁵

In terms of cost reduction from the offender's perspective, even if charges are ultimately dismissed, arrests remain on an individual's criminal history records,

101. NAT'L ASS'N OF PRETRIAL SERVS. AGENCIES, PERFORMANCE STANDARDS AND GOALS FOR PRETRIAL DIVERSION/INTERVENTION 1–2 (2008).

102. See, e.g., U.S. ATTORNEY'S MANUAL, *supra* note 95, at § 9.22.010 (stating diversion occurs before charging in the majority of cases and is based on weighing of factors such as conserving prosecutorial and judicial resources and crime prevention); CLARK, *supra* note 95, at 9–10 (explaining central gatekeeping role of prosecutors).

103. See ROSSMAN ET AL., *supra* note 87, at 258.

104. Cf. Sheryl Pimlott Kubiak et al., *Treatment at the Front End of the Criminal Justice Continuum: The Association Between Arrest and Admission into Specialty Substantive Abuse Treatment*, 1 SUBSTANCE ABUSE TREATMENT, PREVENTION & POL'Y 20, 28 (2006) (arguing that using arrest as a catalyst for treatment would be a wiser and more cost-effective way to keep individuals out of confinement and court processing, multiple arrests, and incarceration cost far more than treatment).

105. See, e.g., JUSTICE POLICY INST., BALTIMORE BEHIND BARS: HOW TO REDUCE THE JAIL POPULATION, SAVE MONEY, AND IMPROVE PUBLIC SAFETY 13 (2010) (discussing how pretrial detention exacerbates prison overcrowding); Marcia Johnson & Lockett Anthony Johnson, *Bail: Reforming Policies to Address Overcrowded Jails, the Impact of Race on Detention, and Community Revival in Harris County, Texas*, 7 NW. J. L. & SOC. POL'Y 42, 47–48 (2012) (discussing how constrictions on pretrial release has exacerbated prison overcrowding); Lise Olsen, *Thousands languish in crowded Harris County Jail*, HOUSTON CHRON. (Aug. 22, 2009), available at <http://www.chron.com/news/houston-texas/article/Thousands-languish-in-crowded-Harris-County-Jail-1722047.php> (discussing how thousands of people—most commonly minor drug offenders—are packed into jail awaiting court processing).

which can be publicly accessible.¹⁰⁶ Even without conviction, arrests carry heavy collateral consequences that impede successful societal reintegration, for example constituting a basis for denial of employment, housing assistance, and educational opportunities.¹⁰⁷ Except in “ban the box” jurisdictions such as Connecticut and Massachusetts, employers often use arrest history as a screen-out basis for job applicants.¹⁰⁸ The reduction in barriers to societal reintegration for offenders can translate into public safety benefits for society by lowering the pressures that enhance the risk of recidivism. Because police wield the discretion to determine whether or not to arrest, they can powerfully leverage their vantage at the gateway and on the streets to direct people into rehabilitation rather than criminal processing with its manifold human, systemic, and societal costs.

II. A PRACTICABLE MODEL OF EVERYDAY REHABILITATIVE POLICING

The notion of police exercising discretion to help manage public health concerns and divert away from arrest is not altogether foreign to U.S. criminal justice. The mass deinstitutionalization of mental health hospitals that sent hundreds of thousands inmates out between 1955 and 1980 forced police into managing people with mental illness.¹⁰⁹ Many of the mentally ill were re-institutionalized—in jail—then released to reoffend and restart the cycle of incarceration without addressing the root mental illness driving recidivism.¹¹⁰ For police and communities, the revolving door of arresting, incarcerating, and releasing the mentally ill—often repeatedly arrested for low-level offenses linked to mental illness such as trespassing, loitering, and disorderly conduct—has been immensely frustrat-

106. See, e.g., CAL. GOV'T CODE § 6254(f) (West 2012) (providing that arrest records are public information); MINN. STAT. ANN. § 13.82 (West 2012) (providing that arrest data is public information); Mary De Ming Fan, *Reforming the Criminal Rap Sheet: Federal Timidity and the Traditional State Functions Doctrine*, 33 AM. J. CRIM. L. 31, 54–58 (2005) (explaining rap sheets and their use).

107. K. Babe Howell, *From Page to Practice and Back Again: Broken Windows Policing and the Real Costs to Law-Abiding New Yorkers of Color*, 34 N.Y.U. REV. L. & SOC. CHANGE 439, 443 (2010) (describing the potential costs of arrest).

108. See, e.g., Michelle Natividad Rodriguez & Maurice Emsellem, *65 Million Need Not Apply: The Case for Reforming Criminal Background Checks for Employment*, NAT'L EMP'T LAW PROJECT, March 2011, at 4–5, available at http://www.facesandvoicesofrecovery.org/pdf/eNews/65_Million_Need_Not_Apply.pdf. (discussing widespread employer screens using arrest and/or conviction information).

109. See, e.g., MELISSA REULAND, A GUIDE TO IMPLEMENTING POLICE-BASED DIVERSION PROGRAMS FOR PEOPLE WITH MENTAL ILLNESS 1–2 (Substance Abuse & Mental Health Services Admin. 2004) (giving history of mental illness deinstitutionalization). For histories of deinstitutionalization in the United States, see, for example, E. FULLER, TORREY, NOWHERE TO GO: THE TRAGIC ODYSSEY OF THE HOMELESS MENTALLY ILL 4–12 (1984); Bernard E. Harcourt, *Reducing Mass Incarceration: Lessons from the Deinstitutionalization of Mental Hospitals in the 1960s*, at 2, 5–11 (John M. Olin Law & Econ. Working Paper No. 542, 2011).

110. See, e.g., RISDON N. SLATE & W. WESLEY JOHNSON, THE CRIMINALIZATION OF MENTAL ILLNESS: CRISIS & OPPORTUNITY FOR THE JUSTICE SYSTEM 59–60 (2008) (arguing the criminal justice system has become a substitute for closed mental institutions); M.J. Stephey, *De-Criminalizing Mental Illness*, TIME, Aug. 8, 2007 (describing cycle of reoffending among the incarcerated mentally ill and the growing desire in jurisdictions to find a better way).

ing.¹¹¹ Searching for a more cost-effective way to deal with the needs of the mentally ill, police in some jurisdictions have innovated and interfaced with public health providers to take people to treatment rather than jail.¹¹² Three major models of police-based diversion have emerged that can be adapted to wider use in dealing with drug offenders.

A. *Insights from Mental Health Diversion for A Police-Sorting Model*

Among jurisdictions that have taken a public health management rather than arrest approach to dealing with the mentally ill, three primary models have emerged that can be classified based on the nature of police involvement:

- (1) Using Trained Police Officers As Responders;
- (2) Using Police-Mental Health Provider Partnerships As Responders;
- (3) Using Mental Health Providers Offering Direct Care.¹¹³

These mental health pre-booking diversion models vary in terms of who wields the discretion to decide whether to send someone to mental health treatment rather than jail. Some programs deploy personnel trained in behavioral health or social work to steer diversion discretion while others entrust police officers to make the judgment call after training in mental health issues.¹¹⁴ Which model has proved the most popular has changed over time in a manner that offers insights about what is most sustainable—a crucial factor beyond what is merely ideal for practicability in the real world. A 1996 survey of seventy-eight departments with specialized programs for the mentally ill indicated that the use of mental health providers was the most prevalent approach.¹¹⁵ By 2003, however, the most common approach was a trained police response, sometimes supplemented with a police-mental health provider partnership.¹¹⁶ The shift to primarily police responders is not surprising. Having specialized mental health providers in mobile crisis units is expensive. In tight times, criminal law enforcers are less likely to be a casualty of budget cuts as mental health providers.¹¹⁷

One of the earliest and most influential approaches to police-based diversion is an example of the first form, using trained police responders. After Memphis police shot a schizophrenic man,¹¹⁸ the city started the Crisis Intervention Team

111. U.S. DEP'T OF HEALTH & HUMAN SERVICES, JAIL DIVERSION: STRATEGIES FOR PERSONS WITH SERIOUS MENTAL ILLNESS 4–5 (2006).

112. See REULAND, *supra* note 109, at 3–4.

113. MELISSA REULAND & JASON CHENEY, ENHANCING SUCCESS OF POLICE-BASED DIVERSION PROGRAMS FOR PEOPLE WITH MENTAL ILLNESS 2–3 (Police Executive Research Forum May 2005).

114. Kathleen Hartford, Robert Carey & James Mendonca, *Pre-Arrest Diversion of People with Mental Illness: Literature Review and International Survey*, 23 BEHAV. SCI. & L. 845, 852 (2006).

115. REULAND & CHENEY *supra* note 113, at 2–3.

116. *Id.*

117. *Id.* at 11–12.

118. M.J. Stephey, *De-Criminalizing the Mentally Ill*, TIME, Aug. 8, 2007.

(CIT), a pre-booking diversion program that puts discretion to divert in the hands of officers with 40 hours of training on psychiatric disorders, substance abuse issues, and relevant laws.¹¹⁹ Officers have the power to refer or transport the mentally ill to emergency services providers, which have a no-refusal policy in cases referred by police.¹²⁰ The Memphis crisis intervention model has been adopted in hundreds of U.S. jurisdictions.¹²¹ The nascent foray into prebooking diversion for narcotics offenders discussed at the article's outset, the LEAD program also adopts the model of police officers as sorter.¹²²

The second most popular form involves partnerships between police and mental health providers.¹²³ For example, in responding to calls involving persons with mental illness, San Diego police deploy Psychiatric Emergency Response Teams (PERT) composed of police officers and county-employed mental health professionals.¹²⁴ The officers receive eighty hours of training on how to assess persons with mental illness and finding treatment resources.¹²⁵ To take another example, in Santa Fe, New Mexico, officers consult with behavioral health experts to determine how to handle mentally ill offenders.¹²⁶ For safety reasons, the police-mental health provider partnership model is preferable to the third and less prevalent model of mental health teams working independently of police because of the dangers of encountering potentially violent individuals.¹²⁷

Because of the relatively new nature of prebooking diversion programs, there are few systematic empirical studies of efficacy to date.¹²⁸ The early findings, however, are encouraging. A study of three specialized police programs for handling mental illness found relatively low arrest rates when trained teams were deployed.¹²⁹ A study of six diversion programs for the mentally ill, including three prebooking programs, found the diversion reduced time spent in jail and increased time lived in the community without increasing public safety risk.¹³⁰ The finding

119. Hartford, Carey & Mendonca, *supra* note 114, at 850.

120. *Id.*

121. *Id.*

122. See LEAD Protocol, *supra* note 1, at 1 (“[T]he primary decision maker initially will be Seattle Police Department officers on the street, pursuant to clear criteria on which officers have been trained by command staff.”).

123. REULAND & CHENEY, *supra* note 113, at 2–3.

124. Hartford, Carey & Mendonca, *supra* note 114, at 850.

125. *Id.*

126. *Id.*

127. H. Richard Lamb et al., *Outcome for Psychiatric Emergency Patients Seen by an Outreach Police-Mental Health Team*, in DEINSTITUTIONALIZATION: PROMISE AND PROBLEMS 73–74 (Richard H. Lamb & Linda E. Weinberger, eds. 2001).

128. Hartford, Carey & Mendonca, *supra* note 114, at 849; Henry J. Steadman & Michelle Naples, *Assessing the Effectiveness of Jail Diversion Programs for Persons with Serious Mental Illness and Co-Occurring Substance Use Disorders*, 23 BEHAV. SCI. & L. 163, 164–65 (2005).

129. Henry J. Steadman et al., *Comparing Outcomes of Major Models of Police Responses to Mental Health Emergencies*, 51 PSYCHIATRIC SERVS. 645, 648 (2000).

130. Steadman & Naples, *supra* note 128, at 168.

that diversion was achieved without increasing risk to public safety is particularly striking in light of study findings that patients taken by police to psychiatric emergency rooms tend to be more dangerous and more psychiatrically disturbed.¹³¹

Overall, diversion programs appear to lower criminal justice costs but carry increased treatment costs, which in the short-term may seem like a higher overall cost.¹³² But this does not quantify long-term savings from improving mental health. One study found the Memphis program, which has become a model for so many others, resulted in improved Colorado Symptom Inventory mental health scores, at a cost of \$1,236 per point of improvement.¹³³ Moreover, Memphis crisis intervention officers have reported positive impressions, including increased confidence in dealing with the mentally ill, lower officer injury rates, and a very low arrest rate of two percent for the mentally ill because of diversion to mental health services.¹³⁴ A study found the Memphis team was the most active among three models studied in treatment referrals in addition to having the lowest arrest rate—75 percent of mental disturbance calls resulted in treatment.¹³⁵

The most practicable model for a broadening rehabilitative policing to include narcotics offenders is the most prevalent approach for dealing with the mentally ill—the Memphis crisis intervention model. While mental health professionals working alongside police officers may seem desirable, it is hard to implement in everyday policing. It is one thing to deploy a team of specially trained police and county mental health professionals on select calls where there is reason to believe a mentally ill person is in need of crisis intervention, as San Diego does.¹³⁶ It is not practicable to fund a huge cadre of special behavioral health professionals to address drug offenders, a main staple of everyday policing on the street. In 2009, alone, police arrested more than 1.6 million drug offenders.¹³⁷ An estimated 40 percent of arrestees—a group numbering 13.689 million people in 2009¹³⁸—have drug dependency issues.¹³⁹ Research has indicated crisis intervention teams are profoundly overstretched even in simply responding to mental health calls.¹⁴⁰ If police diversion is to be a regular practice rather than a rarity in dealing with the vast sea of narcotics offenders, then the most practicable approach is to train police in sorting rather than fantasizing about funding a huge force of mental health

131. Lamb et al., *supra* note 127, at 68.

132. Steadman & Naples, *supra* note 128, at 168.

133. *Id.*

134. U.S. DEP'T OF HEALTH & HUMAN SERVS., *supra* note 111, at 12–13; Steadman et al., *supra* note 129, at 648.

135. Steadman et al., *supra* note 129, at 648.

136. See discussion in the text *supra*, at notes 123–25.

137. U.S. DEP'T OF JUSTICE, ARREST IN THE UNITED STATES, 1980–2009, at 2 tbl.1 (Sept. 2011).

138. *Id.*

139. Kubiak et al., *supra* note 104, at 21–22.

140. REULAND & CHENEY, *supra* note 113, at 12; Steadman et al., *supra* note 129, at 646–47.

providers to do so alongside police.¹⁴¹

B. The Virtues and Dilemmas of Police Discretion in Therapeutic Sorting

Empirical work on the police force abounds with portrayals of officers as authoritarian, adversarial, suspicious, and status quo-oriented, with an “us-versus-them” orientation toward the community.¹⁴² This portrait hardly inspires hope that police will blithely wear the warm and fuzzy hat of rehabilitation. Yet police officers do much more than ordinary criminal law enforcement—indeed 70 percent to 80 percent of an officer’s time is spent on community assistance rather than criminal law enforcement.¹⁴³ Adding therapeutic discretion to the broad and low-visibility discretion that police already hold to arrest or to release people has practical virtues—but may also rouse fears. The following section discusses major virtues and potential concerns.

1. Virtues: Cost Savings, Buy-In Cultivation, Role Internalization

The first major benefit of relying on police to take on the front-line rehabilitative sorting role is that it is cheaper, and thus more likely to become a regular practice than an irregular exception. Police are on the streets anyway. The main costs for casting police in a rehabilitative diversion sorting role thus mainly stem from training and monitoring. Extrapolating from the length of training programs in police-based mental health diversion programs, training likely will range from a week (40 hours) to two weeks (80 hours).¹⁴⁴ In contrast, deployment of mental health professionals will deter the takeoff of street diversion programs in two ways: (1) in a time of acute budgetary strain, states are unlikely to supplement police forces with a phalanx of public health professionals, and (2) if police need to consult with a public health professional to determine diversion eligibility, this will

141. See, e.g., REULAND & CHENEY, *supra* note 113, at 11–12 (discussing the challenges of dealing with the costs of diversion personnel).

142. See, e.g., JEROME H. SCOLNICK & JAMES F. FYFE, ABOVE THE LAW: POLICE AND THE EXCESSIVE USE OF FORCE 25–33, 90–94 (1993) (discussing officers’ subculture of mistrust, violence, and sense that they hold the line between order and chaos); WESLEY G. SKOGAN ET AL., ON THE BEAT: POLICE AND COMMUNITY PROBLEM SOLVING 29 (1999) (reporting findings that many Chicago officers had a negative view of the community they policed and viewed the public—and the police organization—as hostile to their interests); WESLEY G. SKOGAN & SUSAN M. HARTNETT, COMMUNITY POLICING, CHICAGO STYLE 79 (1997) (presenting interview findings that police officers believed the public lacked understanding about their needs); RONALD WEITER & STEVEN A. TUCH, RACE AND POLICING IN AMERICA: CONFLICT AND REFORM 4–5 (2006) (collecting studies); Christine Gardiner, “An Absolute Revolving Door”: An Evaluation of Police Perception and Response to Proposition 36, 20 CRIM. JUST. POL’Y REV. 1, 3–4 (2011) (collecting studies).

143. See, e.g., SAMUEL WALKER & CHARLES M. KATZ, THE POLICE IN AMERICA: AN INTRODUCTION 5 (2005) (reporting criminal law enforcement constitutes only about one-third of a patrol officer’s daily work); Michael R. Dimino, Sr., *Police Paternalism: Community Caretaking, Assistance Searches, and Fourth Amendment Reasonableness*, 66 WASH. & LEE L. REV. 1485, 1486 & n.3 (2009) (collecting estimates).

144. See Hartford, Carey & Mendonca, *supra* note 114, at 850 (listing Memphis training as entailing 40 hours and San Diego training as entailing 80 hours).

increase response and encounter times, deterring officers from considering diversion to avoid the consultation.¹⁴⁵

A second more subtle virtue of conferring discretion and training on police is the cultivation of police buy-in, which is critical to prevent subversion of rehabilitative goals. The literature is filled with cautionary tales about the need to secure police buy-in. Police occupy low-visibility high-power roles that determine whether reforms on the books get translated into reality.¹⁴⁶ Studies have found when police are resistant to changes in law and legal paradigms, they can subvert the reforms or change them in implementation away from the original ideas.¹⁴⁷ Consider, for example, the implementation of California's Proposition 36, which attempted to shift the criminal justice system's response to drug offenders by mandating treatment rather than incarceration for certain drug offenses.¹⁴⁸ Recent research found officers opposing the reform disqualified offenders from diversion by tacking on non-narcotics charges in arrests for otherwise diversion-mandatory narcotics offenses.¹⁴⁹

The lesson is that even when law enforcement discretion seems formally removed it is still powerfully in play. The wiser course is to cultivate police buy-in. Now is an opportune time to get police buy-in because police departments are increasingly sensitive to the need for a makeover and improving community relations.¹⁵⁰ In a networked and cell phone camera age, police are under an

145. See, e.g., REULAND & CHENEY, *supra* note 113, at 11–12 (explaining legislatures are more likely to fund law enforcement than mental health professionals); Steadman et al., *supra* note 129, at 648–49 (noting longer response times because of the scarcity of specially trained teams).

146. See, e.g., Joseph Goldstein, *Police Discretion Not to Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Criminal Justice*, 69 YALE L.J. 543, 552–80 (1960) (discussing concerns over low visibility and broad police discretion not to fully enforce the criminal laws).

147. See, e.g., Christine Gardiner, "An Absolute Revolving Door": *An Evaluation of Police Perception and Response to Proposition 36*, 23 CRIM. JUST. POL'Y REV. 277, 283–94 (2011) (collecting studies on subversion of law and policy reforms such as community policing and hot-spot policing and presenting data on police subversion of reforms wrought by California's Proposition 36); see also, e.g., Jeffrey Fagan & Garth Davies, *Street Stops and Broken Windows: Terry, Race, and Disorder in New York City*, 28 FORDHAM URB. L.J. 457, 496 (2000) (finding that in practice, police implementation of broken windows theory in New York departed from the idea's nuanced rationale of focusing on indicia of physical disorder and instead relied on race and socioeconomic status as markers of disorder).

148. See SUBSTANCE ABUSE AND CRIME PREVENTION ACT OF 2000, 2000 Cal. Legis. Serv. Prop. 36 § 3 (West) (passed Nov. 7, 2000) (eff. July 1, 2001):

The People of the State of California hereby declare their purpose and intent . . . : (a) To divert from incarceration into community-based substance abuse treatment programs nonviolent defendants, probationers and parolees charged with simple drug possession or drug use offenses; (b) To halt the wasteful expenditure of hundreds of millions of dollars each year on the incarceration—and reincarceration—of nonviolent drug users who would be better served by community-based treatment

149. Gardiner, *supra* note 147, at 287–90.

150. See, e.g., STEVEN L. FRAZIER, *THE LOSS OF PUBLIC TRUST IN LAW ENFORCEMENT* 3–4 (Command College Class 40, May 2007) (discussing concerns with deteriorating law enforcement reputation in community perceptions); Catherine Gallagher et al., *The Public Image of Police* at ch.2, § VIII, International Ass'n of Chiefs

increasingly Panoptic¹⁵¹ public eye and acutely aware that mistrust can go viral, amplified online to create cascades of mistrust and tighter scrutiny.¹⁵² Moreover, if community relations become inflamed, investigation is a more credible threat since the advent of 42 U.S.C. § 14141, which authorizes the Justice Department to investigate police based on reasonable cause to believe the department has engaged in a pattern or practice of violating civil rights.¹⁵³ Indeed, it is paradoxical—but also understandable—that the innovative LEAD police diversion program discussed at the article’s outset arose from the Seattle police, a department under Justice Department investigation for excessive force after several incidents caught on videotape.¹⁵⁴ The program arose in close collaboration with community organizations, including police adversaries such as the public defender association, in an effort to rebuild community confidence.¹⁵⁵

A third virtue is role expansion and internalization of a rehabilitative role in new generations of an increasingly professionalized police force. Conferring therapeutic discretion—coupled with expert training—can be palatably pitched as developing what Justice Scalia has called the “increasing professionalism of police forces.”¹⁵⁶ To appeal to the status quo orientation of people attracted to policing, the role expansion can be tied to deepening and developing the traditional community caretaking role of Officer Friendly on the corner who got to know people and wisely wielded discretion when they stumbled.¹⁵⁷ Changing the law

of Police Global Leadership in Policing, (Oct. 2, 2001) (noting that though public opinion polls show generally high levels of satisfaction with police, the “image of police appears to have been declining since the mid-to-late 1960s” and police should be wary of disappointing the high expectations Americans have for police because of the dangers of dissatisfied groups organizing); *see also, e.g.*, TOM R. TYLER & YUEN J. HUO, TRUST IN THE LAW: ENCOURAGING PUBLIC COOPERATION WITH POLICE AND THE COURTS 175–82 (2002) (collecting studies and presenting data based on surveys of people in Oakland and Los Angeles).

151. The idea of the Panopticon famously originated by Jeremy Bentham is that subjects in a state of perfect transparency arrayed around a watchtower will self-police because they internalize the external gaze. Miran Božovič, *Introduction to JEREMY BENTHAM, THE PANOPTICON WRITINGS* 13–17 (Miran Božovič ed., 1995). Originally Bentham’s plan for a smarter prison, the idea of the Panopticon has become a metaphor for modern surveillance society. *See, e.g.*, THEORIZING SURVEILLANCE: THE PANOPTICON AND BEYOND 4–8, 14–17 (David Lyon ed., 2006) (extending metaphor to management of modern society); MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 200–01 (Alan Sheridan trans., 1977) (extending Panopticon metaphor to one of management of modern society). Controversy over police practices have led to structural reforms that put police under the Panoptic gaze. Mary D. Fan, *Panopticism for Police: Structural Reform Bargaining and Police Regulation by Data-Driven Surveillance*, 87 WASH. L. REV. 93, 102, 130–131 (2012).

152. *See, e.g.*, FRAZIER, *supra* note 150, at 4 (discussing online circulation of critiques and complaints).

153. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 210401, 108 Stat. 1796, 2071 (1994) (codified at 42 U.S.C. § 14141(b) (2006)).

154. U.S. DEP’T OF JUSTICE, CIVIL RIGHTS DIV., & U.S. ATTORNEY’S OFFICE, W. DIST. OF WASH., INVESTIGATION OF THE SEATTLE POLICE DEPARTMENT 26 (Dec. 16, 2011); Mike Carter, *Justice Department to Investigate Seattle Police Civil Rights Practices*, SEATTLE TIMES, Mar. 31, 2011, at A1.

155. For background see LEAD Plan, *supra* note 2, at 2.

156. *Hudson v. Mich.*, 547 U.S. 586, 598 (2006).

157. *See, e.g.*, Robert C. Trojanowicz & Bonnie Bucqueroux, *Police and Community as Partners*, CHRISTIAN SCI. MONITOR, June 8, 1992, at 1 (hearkening back to “the old-fashioned beat cop . . . who acts as a neighborhood organizer and problem-solver, not just as a visible deterrent to crime”).

and legal paradigm on the books is not enough to secure change on the streets without an interest convergence with those wielding power on the streets—the police.¹⁵⁸ Real change in role orientation is better achieved when couched in terms of police interests in enhancing community relations, improving professional status, and deepening a traditional role of acting in the community’s best interests.

2. Concerns: Therapeutic Discretion, Checks, Information Deficits

The three central concerns of giving police therapeutic discretion boil down to discretion, discretion, and discretion—albeit different aspects of concerns roused when police rather than prosecutors and judges wield therapeutic discretion. Constitutional criminal procedure, the main body of law regulating the police, entrusts officers with more power when engaged in community caretaking such as rescuing the injured or serving other special needs or administrative purposes.¹⁵⁹ The relaxation of regulation suggests that when officers are not engaged in the “competitive enterprise of ferreting out crime”—an oft-recurring image in the case law¹⁶⁰—we need not be as worried about an excess of zeal and related dangers.¹⁶¹ Nonetheless, there is a long scholarly tradition of distrust in police as an institutional actor, particularly in decisions on the street about whether to arrest or exercise leniency.¹⁶² Scholars have expressed concern over the lack of guidelines standardizing police discretion, the propriety of police making complex policy judgments, and the opacity of police decision-making, which can mask inequities

158. Cf. Bell, Jr., *supra* note 67, at 523 (interest-convergence theory); Gardiner, *supra* note 147, at 3–4 (on police subversion if change is imposed without internalization and agreement).

159. See, e.g., *Brigham City v. Stuart*, 547 U.S. 398, 406 (2006) (holding police may make a warrantless entry into a home if there is an objectively reasonable basis to believe there is an injured person inside needing help because “[t]he role of a peace officer includes preventing violence and restoring order, not simply rendering first aid to casualties”); *Colorado v. Bertine*, 479 U.S. 367, 381 (1987) (explaining inventory searches are exempt from the Fourth Amendment’s default warrant requirement “because they are conducted by the government as part of a ‘community caretaking’ function”); see also, e.g., *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2080–81 (2011) (noting special needs and administrative searches are two exceptions to the general Fourth Amendment rule that law enforcement motives do not matter); *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646, 653 (1995) (giving authorities greater latitude in schoolhouse searches that serve “special needs beyond the normal need for law enforcement”); *New York v. Burger*, 482 U.S. 691, 702 (1987) (applying general reasonableness requirement for administrative searches of closely regulated businesses).

160. E.g., *Arizona v. Evans*, 514 U.S. 1, 15 (1995); *Illinois v. Krull*, 480 U.S. 340, 351 (1987); *Johnson v. United States*, 333 U.S. 10, 14 (1948).

161. Cf. David Alan Sklansky, *Police and Democracy*, 103 MICH. L. REV. 1699, 1734 (2005) (noting wryly that the imagery of police engaged in the “competitive enterprise of ferreting out crime” recurs so often that one wonders if it is “a diplomatic way to address worries beyond an excess of zeal”).

162. See, e.g., DAVIS, *supra* note 23, at 38–40, 52, 139, 144 (1975) (expressing concern over low-level patrolman *de facto* forging varying enforcement policies through decisions whether or not to enforce the law); *id.*, at 83 (expressing concern over unconstrained police policy judgments in decisions not to enforce); WAYNE R. LAFAVE, *ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY* 75–82 (Frank J. Remington ed. 1965) (expressing concern over lack of guidelines for police discretion); SAMUEL WALKER, *TAMING THE SYSTEM: THE CONTROL OF DISCRETION IN CRIMINAL JUSTICE 1950–1990* 21, 39–41 (Oxford University Press ed. 1993) (describing the problem of low-level opacity in police discretion).

in the exercise of judgment.¹⁶³

Street diversion programs implemented by police have an important advantage over traditional police decisions on whether or not to fully enforce the law—explicit guidelines. Two key characteristics of diversion programs distinguish them from traditional discretionary decisions about whether to arrest or prosecute. First are uniform eligibility criteria to select candidates for structured services delivery and supervision. Second are the benefits of case dismissal or mitigation upon successful completion.¹⁶⁴ For example, the LEAD Protocol specifies adults suspected of violations of the Uniform Controlled Substances Act or prostitution are eligible for prebooking diversion and presumptively should be referred except if:

- The amount of drugs involved exceeds 3 grams (except where an individual has been arrested for delivery of or possession with intent to deliver marijuana, or . . . prescription controlled substances (pills) . . .);
- The individual does not appear amenable to diversion;
- The suspected drug activity involves delivery or possession with intent to deliver (PWI), and there is reason to believe the suspect is dealing for profit above a subsistence income;
- The individual appears to exploit minors or others in a drug dealing enterprise;
- The individual is suspected of promoting prostitution; and/or
- The individual has disqualifying criminal history as follows:
 Without time limitation: Any conviction for murder 1 or 2, arson 1 or 2, Robbery 1, Assault 1, kidnapping, VUFA [violation of the Uniform Firearms Act] 1, or any sex offense (or attempt of any crime listed here).
 Within the past 10 years: Any conviction for a domestic violence offense, Robbery 2, Assault 2 or 3, Burglary 1 or 2, or VUFA 2.¹⁶⁵

The prescribing of guidelines to steer police judgment responds to the concerns expressed by scholars such as Kenneth Culp Davis and Wayne LaFave regarding amorphous discretion and *de facto* police policy-making.¹⁶⁶ Community stakeholders have made the policy judgments as to who should qualify for prebooking diversion in prescribing the guidelines.

163. See, e.g., DAVIS, *supra* note 23, at 83 (expressing concern that police are entrusted with enforcement discretion that commits “to personnel with average education of 12.4 years” policy judgments that “call for the best talents and specializations that the society can muster”); LAFAVE, *supra* note 162, at 75–82, 162–63 (lack of guidelines and potential inequities); WALKER, *supra* note 162, at 21, 39–41 (expressing concern over opacity and inequity); RONALD WEITZER & STEVEN A. TUCH, *Race and Policing in America: Conflict and Reform* 96–110 (Cambridge University Press ed. 2006) (discussing minority perceptions of inequities in police exercises of discretion).

164. PROMISING PRACTICES, *supra* note 98, at 5.

165. LEAD Protocol, *supra* note 1, at 3.

166. See, e.g., DAVIS, *supra* note 23, at 83 (expressing concern over police policy judgments); LAFAVE, *supra* note 162, at 75–82, 162–63 (expressing concern regarding lack of guidelines).

No police officer is an automaton or computer, however, and the guidelines are not a precise programming code. For example, the criterion of whether an individual appears amenable to diversion calls for the officer on the street to exercise a form of therapeutic judgment. Herein lays a major dilemma of discretion. On the one hand, even the most prominent proponents of cabining police discretion, such as Kenneth Culp Davis, acknowledge the crucial need for police discretion: “Police discretion is absolutely essential. It cannot be eliminated Police work without discretion would be something like a torso without legs, arms, or head.”¹⁶⁷ Police discretion gives the law eyes to see and a brain to perceive the reality on the ground.

But human judgment also has blind spots in empathy and compassion for individuals of other racial groups.¹⁶⁸ A rich body of literature has documented how implicit biases—negative perceptions of minorities that may unconsciously lurk despite best intentions—impact the judgment of an array of actors, such as police, prosecutors, and jurors.¹⁶⁹ Implicit bias is not just a problem in everyday criminal justice—an increasingly vast body of medical literature has found implicit biases may impact the therapeutic discretion of physicians as well.¹⁷⁰ There is a substantial body of findings that doctors exercise therapeutic discretion differently

167. DAVIS, *supra* note 23, at 140.

168. See, e.g., Jennifer N. Gutsell & Michael Inzlicht, *Intergroup Differences in the Sharing of Emotive States: Neural Evidence of An Empathy Gap*, SOC. COGNITIVE & AFFECTIVE NEUROSCI. ADVANCE ACCESS, June 23, 2011, at 1–2, 5–6 (collecting studies and more evidence finding reduced empathetic capacity for individuals of other racial groups).

169. E.g., Gary Blasi, *Advocacy Against the Stereotype: Lessons from Cognitive Social Psychology*, 49 UCLA L. REV. 1241; Joshua Correll et al., *The Police Officer’s Dilemma: Using Ethnicity to Disambiguate Potentially Threatening Individuals*, 83 J. PERSONALITY & SOC. PSYCHOL. 1314 (2002); Anthony G. Greenwald et al., *Targets of Discrimination: Effects of Race on Responses to Weapons Holders*, 39 J. EXPERIMENTAL SOC. PSYCHOL. 399 (2003); Scott W. Howe, *The Futile Quest for Racial Neutrality in Capital Selection and the Eighth Amendment Argument for Abolition Based on Unconscious Racial Discrimination*, 45 WM. & MARY L. REV. 2083 (2004); Sheri Lynn Johnson, *Unconscious Racism and the Criminal Law*, 73 CORNELL L. REV. 1016 (1988); Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489 (2005); Cynthia Lee, *The Gay Panic Defense*, 42 U.C. DAVIS L. REV. 471 (2008); Rory K. Little, *What Federal Prosecutors Really Think: The Puzzle of Statistical Race Disparity Versus Specific Guilt, and the Specter of Timothy McVeigh*, 53 DEPAUL L. REV. 1591 (2004); Jeffrey J. Pokorak, *Probing the Capital Prosecutor’s Perspective: Race of the Discretionary Actors*, 83 CORNELL L. REV. 1811 (1998); L. Song Richardson, *Arrest Efficiency and the Fourth Amendment*, 95 MINN. L. REV. 2035 (2011); Yoav Sapir, *Neither Intent nor Impact: A Critique of the Racially Based Selective Prosecution Jurisprudence and a Reform Proposal*, 19 HARV. BLACKLETTER L.J. 127 (2003).

170. See, e.g., John F. Dovidio et al., *Disparities and Distrust: The Implication of Psychological Processes for Understanding Racial Disparities in Health and Healthcare*, 67 SOC. SCI. & MED. 478, 480–87 (2008) (collecting studies and findings on the impact of implicit biases on disparities in care and treatment decisions for minorities); Alexander R. Green et al., *supra* note 25, at 1237 (detecting implicit bias in doctors’ decisions regarding whether to prescribe thrombolysis for patients); Michael S. Shin, Comment, *Redressing Wounds: Finding A Legal Framework to Remedy Racial Discrimination in Medical Care*, 90 CAL. L. REV. 2047, 2097 (2002) (discussing the difficulties in dislodging implicit bias from discretion in medicine); Michelle van Ryn & Somnath Saha, Editorial, *Exploring Unconscious Bias in Disparities Research and Medical Education*, 306 J. AM. MED. ASS’N 995, 996 (2011) (discussing how conscious focus can disrupt the adverse impact of implicit bias but how implicit biases may impact patient experiences); Shankar Vedantam, *The Color of Health Care: Diagnosing Bias in Doctors*, WASH. POST, Aug. 13, 2007, at A03 (discussing implicit bias concerns).

depending on race in making myriad treatment judgment calls, from whether to prescribe opioids to manage pain to whether to order procedures such as cardiac catheterization to treat cardiovascular disease.¹⁷¹ Thus, while conferring therapeutic discretion on police has powerful potential virtues, it also poses the prominent potential risk of inequity in who benefits from rehabilitative policing.

The low-visibility nature of police decision-making on the streets also poses a risk in police-led diversion programs.¹⁷² In courts—even drug courts—there are defense attorneys to guard a defendant’s interests.¹⁷³ The nature of the American adversarial judicial process supplies checks and balances on decision-making. In contrast, the defendant has no representative to advocate his case for diversion to treatment rather than booking for criminal processing in a police encounter. Second, when prosecutors or judges decide whether to divert defendants to treatment, they make decisions with a file on the defendant.¹⁷⁴

In contrast, officers face a comparative information deficit when making decisions on the streets during an encounter with an offender. The officer can run the defendant’s information to see his or her criminal history but lack the (sometimes) fuller file that is supplied to courts. These problems of conferring therapeutic discretion on police should be taken into account in deciding how to guide therapeutic discretion. They are not insurmountable and can be ameliorated. The next section draws on insights from medicine and treatment courts in exploring ways to mitigate the concerns.

III. ADDRESSING CONCERNS OVER AUTHORIZING POLICE TO ENGAGE IN STREET DIVERSION

Discretion is not going away any time soon—nor should it—because despite its potential dangers it is a necessary adjunct to a system that depends on human judgment to dispense equitable context-tailored solutions.¹⁷⁵ Humans, not comput-

171. E.g., Mark J. Pletcher et al., *Trends in Opioid Prescribing by Race/Ethnicity for Patients Seeking Care in US Emergency Care Departments*, 299 J. AM. MED. ASS’N 70, 70, 74–77 (2008) (discussing opioid prescribing by emergency-room doctors); Kevin A. Schulman et al., *The Effect of Race and Sex on Physicians’ Recommendations for Cardiac Catheterization*, 340 NEW ENGLAND J. MED. 618, 623–24 (1999) (finding patient race and gender affect doctors’ decisions on whether to order cardiac catheterization). For more studies, see sources at footnotes and 25, 170.

172. See Goldstein, *supra* note 146, at 572–80 (discussing the low-visibility nature of police decision-making and difficulties in monitoring).

173. See, e.g., Boldt, *supra* note 85, 1249–60 (discussing dilemmas of defense attorney’s role in drug courts); Quinn, *supra* note 85, at 38, 46–47, 50 (discussing interactions between defense attorney, prosecutors and judges in drug courts).

174. See, e.g., Hora et al., *supra* note 81, at 450–68 (discussing judicial decision-making in drug courts and the referral process).

175. See, e.g., Ellen S. Podgor, *Race-ing Prosecutor’s Ethics Codes*, 44 HARV. CIV. RTS-CIV. LIB. L. REV. 461, 474 (2009) (discussing how prosecutorial discretion can be wielded to exercise compassion and correct injustices); William J. Stuntz, *Unequal Justice*, 121 HARV. L. REV. 1969, 2037–39 (2008) (discussing the virtues of open-textured standards in conferring discretion on juries to deliver contextualized mercy); cf. Dan Markel,

ers, police the street. There is still a market for the nuance and complexity of human judgment—even with its imperfections—in responding to the huge factual variation that human needs and social order present in the everyday work of policing the streets and responding to calls.¹⁷⁶ The question is how best to guide discretion to mitigate the risks of potential skews in therapeutic judgment and how to maximize the cost benefits of rehabilitative policing.

This section addresses three major concerns and how to ameliorate them. First, the section addresses concerns about the lack of protections such as attorney representation and judicial supervision in pre-arrest street encounters. Second, the section draws insights from medicine, social psychology, and treatment courts about how to address concerns over skews in therapeutic discretion. The medical and social psychology literature offer lessons on how to detect and mitigate the risks of implicit bias, use data-driven monitoring in low-visibility contexts, and improve decision-making based on self-reports and brief initial observations through communication education. Third, recent data on drug court performance offer counterintuitive insights about how we should expand the typical screening eligibility criteria to help steer discretion and maximize the cost-benefits of street diversion.

A. *The Different Stakes in Street Diversion from Post-Arrest Diversion*

As discussed in Part II.B.2, one of the concerns about police diversion is likely to be that the protections and best practices in prosecutorial or judicial diversion programs may be missing—and simply not tenable—in the street diversion context. In the more familiar post-arrest diversion programs initiated by prosecutorial or judicial decisionmakers, defendants frequently enjoy more protections. To take a major example, after the commencement of formal proceedings, indigent defendants have the Sixth Amendment right to consult with counsel at all critical stages of the proceeding, including during post-arraignment police questioning.¹⁷⁷ *Before* the commencement of formal proceedings, however, the Sixth Amendment does *not* attach.¹⁷⁸ Moreover, the right to counsel during custodial police interrogation carved from the Fifth Amendment's prohibition against self-incrimination in *Miranda v. Arizona*¹⁷⁹ does not apply during investigative stops on the street by

Against Mercy, 88 MINN. L. REV. 1421, 1437, 1441 (2004) (distinguishing from a retributivist's perspective between equitable discretion and mercy animated by compassion).

176. *Cf.*, e.g., *Atwater v. City of Lago Vista*, 532 U.S. 318, 346–47 (2001) (explaining officers must respond to a vast array of situations in “the spur (and in the heat) of the moment”); *New York v. Quarles*, 467 U.S. 649, 656 (1984) (“In a kaleidoscopic situation such as the one confronting these officers . . . spontaneity rather than adherence to a police manual is necessarily the order of the day.”).

177. *E.g.*, *Rothgery v. Gillespie County*, 554 U.S. 191, 211–12 (2008) (holding the Sixth Amendment attaches after the initiation of formal adversarial proceedings and applies at critical stages thereafter); *Patterson v. Illinois*, 487 U.S. 285, 290 (1988) (post-arraignment police interview).

178. *McNeil v. Wisconsin*, 501 U.S. 171, 175 (1991).

179. 384 U.S. 436, 470 (1966).

police short of arrest.¹⁸⁰ Thus, there is no right to counsel—and certainly unlikely to be counsel at hand—to advise suspects on the street whether to agree to diversion in lieu of arrest.

On the other hand, there is less need in the street diversion context for advice of counsel *precisely* because there is no arrest. The choice in street diversion is whether to cut someone a break and keep her out of criminal processing rather than arrest. In contrast, a major concern surrounding post-arrest diversion programs is that defendants—past the gateway of arrest and squarely in the criminal justice system—who flunk out of diversion may be subject to more severe sanctions as they are prosecuted and sentenced.¹⁸¹ The concern is important because frequently the price of entry into post-arrest diversion programs such as drug courts are admission of the elements of the crime and even guilty pleas—all involving significant waiver of constitutional rights requiring the aid of counsel.¹⁸² Indeed nearly half of drug courts, for example, require diversion participants to stipulate to the entry of a sentence if they flunk out.¹⁸³ Because the price of entry is expedited conviction in the event of drop-out, critics argue the impact of diversion programs is to widen the net and catch more low-level offenders against whom prosecutors might otherwise decline to pursue charges.¹⁸⁴

In light of these concerns, the proposed revision to the American Law Institute's influential Model Penal Code contains two new provisions on diversion programs and safeguards.¹⁸⁵ The proposed safeguards govern pre-charge prosecutor-initiated diversion programs (“deferred prosecutions”) and court-granted diversion (“deferred adjudication”).¹⁸⁶ The commentary to the proposed new provisions specifically reference the controversies over net-widening and requiring relinquishment of rights surrounding pre-charge prosecutorial diversion.¹⁸⁷ Currently, most of the safeguards against these concerns are inserted in the draft provision on prosecutorial pre-charge diversion—the earliest juncture at which most diversion programs operate. The proposed provision requires consultation with counsel

180. *Berkemer v. McCarty*, 468 U.S. 420, 436–37 (1984).

181. *See, e.g.*, Josh Bowers, *Contraindicated Drug Courts*, 55 UCLA L. REV. 783, 790–94 (summarizing studies indicating drug court drop-outs end up with more severe sentences).

182. *See e.g.*, Janine M. Zweig et al., *The Multi-Site Adult Drug Court Evaluation: What's Happening with Drug Courts? A Portrait of Adult Drug Courts in 2004*, URBAN INSTITUTE JUSTICE POLICY CENTER 40–42 (Nov. 2011), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/237110.pdf> (reporting around two-thirds of drug courts required waiver of constitutional rights).

183. *Id.* at 40–41.

184. *E.g.*, Timothy Edwards, *The Theory and Practice of Compulsory Drug Treatment in the Criminal Justice System*, 2000 WIS. L. REV. 283, 334–36; Morris B. Hoffman, *The Drug Court Scandal*, 78 N.C. L. REV. 1437, 1503–04 (2000); Michael M. O'Hear, *Rethinking Drug Courts: Restorative Justice as a Response to Racial Injustice*, 20 STAN. L. & POL'Y REV. 463, 483–84 (2009).

185. Model Penal Code: Sentencing, Discussion Draft No. 4, THE AMERICAN LAW INSTITUTE, §§ 6.02A, 6.02B, 6–27 (Apr. 16, 2012) (unpublished draft) (on file with the author).

186. *Id.*

187. *Id.* § 6.02A(4), (5) & cmt. c.

before entering into a deferred prosecution agreement and provides that “[d]eferred prosecution agreements shall not be used in cases that the prosecutor would otherwise not pursue for reasons of factual or legal insufficiency.”¹⁸⁸ The provision also limits deferred prosecution to cases where “there is probable cause to support felony or misdemeanor charges and sufficient admissible evidence to support conviction” to avoid net-widening to leverage admissions.¹⁸⁹

In the street diversion context, having defense attorneys follow police is neither practicable nor desirable because the cost and intrusion would shut down the willingness to grant people who otherwise could be arrested the choice of non-arrest and diversion to rehabilitation. Having defense attorneys present also is less crucial—as long as diversion is not conditioned on a waiver of constitutional rights such as the privilege against compelled self-incrimination by the requirement of admission to an offense. As for net-widening, some may be concerned that police may use the hammer of arrest to coerce people into treatment, thus widening the net of social control. This fear can be blunted by similarly specifying that street diversion is limited to cases where there is probable cause to arrest and prohibiting targeting in cases police otherwise would not pursue because of factual or legal insufficiency. Also crucially, in street diversion without arrest, the price of flunking out is ineligibility for future grants of grace from arrest—or at worst, arrest for the offense that could have occurred anyway. Because the stakes are different in street diversion so are the safeguards that are practicable and desirable for adaptation.

B. Ameliorating Skews in Therapeutic Judgment: Lessons from Medicine

Another looming fear is potential disparities in which groups get the benefit of street diversion—an oft-raised concern in the drug court beneficiary context.¹⁹⁰ Essentially, the fear is of skews and potential implicit biases in discretion. On this important issue, insights from the medicine literature are illuminating.

While an analogy between the discretion of doctors and police may seem unusual, it is worth exploring because the factors that influence differences in doctors’ treatment of patients also pose risks for officers’ assessments about whether someone on the street is amenable to diversion to treatment. For example, studies have indicated skews in therapeutic judgment among doctors are influenced by implicit biases and the perception that minorities are less likely to be cooperative and comply with treatment terms.¹⁹¹ Such factors may also

188. *Id.*

189. *Id.* § 6.02(2) & cmt. c.

190. *See, e.g., id.* § 6.02B cmt. 1 (noting the “oft-stated concern” that the benefits of drug courts and other therapeutic courts “may be distributed in disparate or discriminatory ways” and “[m]ore general programs of deferred adjudication may be vulnerable to the same suspicions”).

191. *See, e.g.,* Alexander R. Green et al., *supra* note 25, at 1235–36 (2007) (reporting findings on physician implicit bias, including strong association of black patients as being “less cooperative” and skews in treatment recommendations); Janie A. Sabin et al., *Physician Implicit Attitudes and Stereotypes About Race and Quality of Medical Care*, 46 *MED. CARE* 678, 683 (2008) (finding among pediatricians less implicit bias than other kinds of

impact officers' judgments about whether outgroup members are amenable to diversion for treatment rather than jail—an important issue because amenability for diversion is likely to be a criterion for selection, as it is in the LEAD protocol, for example.¹⁹²

Medical researchers have been intensively searching for solutions to improve therapeutic judgment, especially since the Institute of Medicine reported differences in how doctors treat patients—health *care* in addition to health *status*—contribute to racial disparities in health and mortality.¹⁹³ Though cognitive dissonance regarding the belief one is providing evenhanded service may lead to discounting of information to the contrary, among scientists, it has prompted the desire to understand why and find interventions.¹⁹⁴ Insights from growing medical and social psychology literature on how to improve judgment can inform approaches to educating and guiding police discretion in rehabilitative selection mode. Three important insights are discussed here: (1) strategies for detecting and counteracting personally-held unconscious biases; (2) quality-control monitoring to offer checks on judgment; and (3) communication education to improve the ability to make decisions based on brief observations and encounters.

1. *Detecting and Defusing Implicit Bias*

Insights from medical and social psychology studies are illuminating that traditional antidiscrimination training, which aims to change conscious attitudes, may be missing the point.¹⁹⁵ Disparities in therapeutic judgment may occur even when professionals earnestly believe they are acting in an evenhanded fashion because of unconscious outgroup bias.¹⁹⁶ People may resist participating in traditional anti-prejudice training because they genuinely believe they do not need it and resent the implication they are biased despite their genuine belief they are not.¹⁹⁷ Rather than blame, the first step is to diagnose unconscious attitudes, preferably in as confidential a context as possible to avoid resistance from fear of exposure, then educate on strategies to counteract implicit biases. We can draw lessons from medicine on the detection and defusing of implicit bias in therapeutic decision-making.

Medical researchers have designed a way to assess the impact of implicit bias on individual physicians' treatment judgment calls using the Implicit Association Test

doctors but still a moderate implicit association of European Americans rather than African Americans with patient compliance).

192. See LEAD Protocol, *supra* note 1, at 3 (providing low-level drug offenders should presumptively be referred for diversion unless in the officer's judgment the subject "does not appear amenable to diversion").

193. SMEDLEY ET AL., *supra* note 25, at 160–79.

194. See van Ryn & Saha, *supra* note 170, at, 995–96 (collecting studies).

195. See Dovidio et al., *supra* note 170, at 483.

196. *Id.*

197. Gordon Hodson, John F. Dovidio & Samuel L. Gaertner, *The Aversive Form of Racism, in THE PSYCHOLOGY OF PREJUDICE AND DISCRIMINATION: RACISM IN AMERICA* 126–27 (Jean Lau Chin ed., 2004).

(IAT).¹⁹⁸ Designed and popularized by Anthony Greenwald and colleagues and Mahzarin Banaji, the IAT has become an influential and widespread way to detect unconscious negative perceptions of out-groups.¹⁹⁹ In the racial attitudes IAT, unconscious biases are measured by assessing in a timed test the ease or difficulty one has in matching raced faces with positive and negative words.²⁰⁰

At Harvard Medical School's Disparities Solutions Center, Alexander Green and collaborators presented emergency room residents with a vignette in which a 50-year-old male comes to the emergency room with chest pain and an electrocardiogram suggesting a heart attack.²⁰¹ Each vignette varies only in the picture of the patient presented to the medical resident—drawn from two black and two white images closely matched on attractiveness ratings and apparent age.²⁰² The researchers found a strong association between the participants' implicit bias, as measured by the IAT, and the likelihood of giving black patients a clot-busting treatment called thrombolysis.²⁰³ As the degree of implicit anti-black bias increased, the likelihood of giving black patients thrombolysis decreased.²⁰⁴ The study was the first to find evidence directly supporting the oft-proposed hypothesis that implicit bias influences therapeutic judgment, making physicians less likely to grant black patients treatment.²⁰⁵

The study also provided intriguing insights on counteracting the impact of implicit bias on therapeutic judgment. Among a smaller pool of participants reporting some awareness of the nature of the study, physicians with higher implicit bias were *more* rather than *less* likely to order thrombolysis for black patients than physicians with low bias.²⁰⁶ The researchers inferred from this data that "implicit bias can be recognized and modulated to counteract its effect on treatment decisions" and that the IAT is a valuable tool toward this goal.²⁰⁷ An approach to improving judgment and disparities could, for example, involve confidentially administering IATs to decision makers to alert them to the risk of

198. Carmen R. Green et al., *supra* note 25, at 1237.

199. See, e.g., Anthony G. Greenwald & Mahzarin Banaji, *Implicit Social Cognition: Attitudes, Self-Esteem, and Stereotypes*, 102 PSYCHOL. REV. 4, 19–20 (1995) (calling for a method to detect unconscious stereotyping and exploring potential methods); Anthony G. Greenwald et al., *Measuring Individual Differences in Implicit Cognition: The Implicit Association Test*, 74 J. PERSONALITY & SOC. PSYCHOL. 1464, 1472, 1476–77 (1998) (presenting IAT); Janice A. Sabin et al., *Physicians' Implicit and Explicit Attitudes About Race by MD Race, Ethnicity, and Gender*, 20 J. HEALTH CARE FOR THE POOR & UNDERSERVED 896, 899 (2009) (reporting that IAT is "widely accepted as a measure of implicit social cognition because it achieves good reliability in comparison [to] other implicit measures" and "has been the subject of over 450 peer-reviewed publications").

200. E.g., Greenwald et al., *supra* note 199, at 1465–66; Sabin et al., *supra* note 191, at 899.

201. Alexander R. Green et al., *supra* note 25, at 1233.

202. *Id.*

203. *Id.* at 1235.

204. *Id.*

205. See *id.* at 1237 ("Whereas several studies have pointed to unconscious biases as one potential root cause for racial and ethnic disparities in health care, this is the first evidence directly supporting this link.").

206. *Id.* at 1235, 1237.

207. *Id.* at 1237.

bias so they can counteract it.²⁰⁸

Social psychology studies indicate people alerted to their potential implicit bias in a nonthreatening way—and motivated to control it—can counteract the impact of implicit bias on judgment.²⁰⁹ Just warning people to control stereotype bias may be insufficient—and counterproductive.²¹⁰ Studies are mixed: some have found backfire effects from alerting people to bias and the need to consciously control it whereas others have found debiasing effects.²¹¹ The better approach is to combine information about the need to counteract one's bias with training and assistance on debiasing strategies.

Some de-biasing strategies that appear promising in the literature include picturing counter-stereotypical outgroup members, asking decision makers to reflect on whether their determination would be the same if the subject's race were switched, or working with positive group representatives such as a cross-racial partner or boss.²¹² For example, Brandon Stewart and Keith Payne found that making subjects aware of bias and asking them to plan in advance to counteract the bias—for example, commit to thinking the word “safe” when seeing a black face in judging whether someone was reaching for a weapon—was an effective combined strategy to decrease bias in decision-making.²¹³ Moreover, there is some evidence that officers can be trained *out* of the tendency for race to influence the judgment of an attribute.²¹⁴ For example, officers asked to repeatedly perform simulations on

208. *Id.*

209. See, e.g., Irene V. Blair, *The Malleability of Automatic Stereotypes and Prejudice*, 6 PERSONALITY & SOC. PSYCH. REV. 242, 240–55 (2002) (reviewing myriad studies on factors influencing the malleability of stereotypes, including strategies of conscious suppression); Patricia G. Devine & Margo J. Monteith, *Automaticity and Control in Stereotyping*, in DUAL PROCESS THEORIES OF SOCIAL PSYCHOLOGY 340–41, 346–47 (Shelly Chaiken & Yaacov Trope eds., 1999) (collecting studies on how automatically-activated stereotypes may be overridden in motivated individuals exerting control by replacing stereotypes with individuated judgments); Susan T. Fiske, *Stereotyping, Prejudice, and Discrimination*, in THE HANDBOOK OF SOCIAL PSYCHOLOGY 357, 364 (Daniel T. Gilbert et al. eds., 4th ed. 1998) (discussing how individuals may control prejudice if alerted to the problem and motivated to do so); Kristin A. Lane et al., *Implicit Social Cognition and Law*, 3 ANN. REV. L. & SOC. SCI. 427, 437–38 (2007) (collecting studies where implicit bias has been shown to be malleable and suppressible).

210. See Brandon D. Stewart & B. Keith Payne, *Bringing Automatic Stereotyping Under Control: Implementation Intentions as Efficient Means of Thought Control*, 34 PERSONALITY & SOC. PSYCHOL. BULL. 1332, 1333–43 (2008) (collecting and reviewing studies); Blair, *supra* note 209, at 248 (collecting mixed studies).

211. See Blair, *supra* note 209, at 248 (reviewing studies); Stewart & Payne, *supra* note 210, at 1343 (collecting studies).

212. See CYNTHIA LEE, MURDER AND THE REASONABLE MAN: PASSION AND FEAR IN THE COURTROOM 224 (2003) (recommending race-switching jury instructions in cases where there is a risk race may influence jurors' perceptions of reasonableness); Lane et al., *supra* note 209, at 438 (collecting studies on the power of interaction and counter-stereotypical exposure and thinking); B. Michelle Peruche & E. Ashby Plant, *The Correlates of Law Enforcement Officers' Automatic and Controlled Race-Based Responses to Criminal Suspects*, 28 BASIC & APPLIED SOC. PSYCHOL. 193, 194, 197–98 (2006) (discussing findings on how positive encounters with outgroup members on the job and in the community decrease implicit bias); Stewart & Payne, *supra* note 210, at 1333 (collecting studies on efficacies de-biasing strategies).

213. Stewart & Payne, *supra* note 210, at 1336, 1343.

214. See, e.g., Joshua Correll et al., *The Police Officer's Dilemma: Using Ethnicity to Disambiguate Potentially Threatening Individuals*, 83 J. PERSONALITY & SOC. PSYCHOL. 1314, 1326 (2002) (finding officers with

judging whether someone is holding a weapon using a program where race is not related to the presence of a weapon reduced their initial race-influenced mistaken judgment calls.²¹⁵ Moreover, researchers have found trained officers show significantly less bias than members of the general public in deciding whether to shoot or not shoot suspects in a computer simulation.²¹⁶

Drawing from the insights of medical and social psychology researchers, a strategy for educating officers in how to wield their rehabilitative sorting power could apply a combination of confidential implicit bias testing coupled with post-test education. Police are at once high-stakes and low-visibility decision makers for whom implicit bias testing and follow-up training would be salutary, bringing to light potential judgment skews about which the officer herself may not be consciously aware.²¹⁷

Currently, administration of the IAT in police training has not been enthusiastically embraced.²¹⁸ It is easy to see why officers would be wary. First, no one (particularly in a profession under siege by accusations of racial bias) is particularly eager to learn one is biased, even if it is unconscious. Second, it would be tough to maintain total confidentiality of test results because under *Giglio v. United States*,²¹⁹ the prosecution has a duty to disclose relevant impeachment information for testifying witnesses—which might be construed to include high implicit bias scores where a defense relates to a testifying officer's alleged bias, for example. Recently, however, police departments are beginning to signal potential willingness to be tested to improve police-community relations.²²⁰ Such training could be a standardized part of the education in preparation for officers to wield rehabilitative sorting power on the streets.²²¹

firearms training showed the least bias among officers and civilians in simulations determining whether someone is armed and whether to shoot); B. Keith Payne, *Weapon Bias: Split-Second Decisions and Unintended Stereotyping*, 15 CURR. DIRECTIONS PSYCHOL. SCI. 287, 290 (2006) (collecting studies); E. Ashby Plant & B. Michelle Peruche, *The Consequences of Race for Police Officers' Responses to Criminal Suspects*, 16 PSYCHOL. SCI. 180, 290 (2005) (finding repeated computer simulations in which race was unrelated to whether a subject was holding a weapon can help disassociate race from dangerousness).

215. Plant & Peruche, *supra* note 214, at 182.

216. Joshua Correll et al., *Across the Thin Blue Line: Police Officers and Racial Bias in the Decision to Shoot*, 92 J. PERSONALITY & SOC. PSYCHOL. 1006, 1015, 1020 (2007).

217. Cf. Paul Butler, *Rehnquist, Racism and Race Jurisprudence*, 74 GEO. WASH. L. REV. 1019, 1042 (2006) (arguing for the virtues of implicit bias testing of high-stakes criminal justice decision makers such as judges).

218. E.g., Jessie Magaliman, *New Programs Tested to Find Hidden Bias in Police Work*, SAN JOSE MERCURY NEWS, (Nov. 17, 2008), <http://www.policene.com/chiefs-sheriffs/articles/1757629-New-programs-tested-to-find-hidden-bias-in-police-work/>.

219. 405 U.S. 150, 154 (1971).

220. Magaliman, *supra* note 218; see also Tracey G. Gove, *Implicit Bias and Law Enforcement*, 78 POLICE CHIEF MAG., 44, 44–55 (2011) (detailing recent inroads of general training on the influence of implicit bias among police officers).

221. See *supra* Part II.A. on the model of police selection power.

2. A Check on Low-Visibility Discretion: Data-Driven Monitoring

Medicine, like policing, is a zone of low-visibility discretion, often without counterbalancing actors in the room to check judgment. M. Gregg Bloche captured the vast opaque discretion in American medicine: “Most of the time, physicians exercise their broad discretion invisibly, making no record apart from clinical progress notes and submission to utilization reviewers.”²²² Many physicians’ offices have, however, begun deploying formal quality improvement programs that collect and aggregate data to permit monitoring as a check on judgment.²²³ Medical researchers studying a group of physicians selected based on greater interest and success in improving care for minority patients remarked on the fact that more than half worked at practices with a formal quality improvement program.²²⁴ Among physicians in practices with quality improvement programs, more than half specifically collected and examined data on patient race and ethnicity to monitor the quality of care and detect areas in need of improvement.²²⁵

A cognate to this approach in the rehabilitative policing context would be to collect and regularly examine data regarding rehabilitative decision-making as a check on judgment. Data collected could include the races and ethnicities of people diverted by police compared to those sent to jail for drug-related offenses and reasons for excluding certain drug offenders from treatment. Monitoring has the triple benefit of (1) providing a data-driven check in a context where other counterbalancing actors are not present; (2) serving as an early-warning system shedding light in the opaque areas of street-level police sorting discretion; and (3) giving officers additional motivation to self-scrutinize and suppress implicit biases in judgments about whether to divert. A host of studies have illuminated the import of motivation—whether stemming from internal belief systems, legal mandates or professional incentives—in successfully suppressing the effects of implicit bias.²²⁶

222. M. Gregg Bloche, *Race and Discretion in American Medicine*, 1 YALE J. HEALTH POL’Y L. & ETHICS 95, 102 (2001).

223. See, e.g., J. Randall Curtis et al., *Intensive Care Unit Quality Improvement: A “How-to” Guide for the Interdisciplinary Team*, 34 CRITICAL CARE MED. 211, 214–15 (2006) (discussing data collection and strategies for changing behavior); Paul Glasziou, Greg Ogrinc & Steve Goodman, *Can Evidence-Based Medicine and Clinical Quality Improvement Learn from Each Other?*, 20 BMJ QUALITY & SAFETY 13, 16 (2011) (arguing for teaching future generations of medical clinicians evidence-based and quality-improvement practices).

224. Jared W. Klein et al., *Physicians’ Experiences and Opinions Regarding Strategies to Improve Care for Minority Patients*, 2 J. HEALTH DISPARITIES RES. & PRAC. 75, 83–84 (2008).

225. *Id.* at 84.

226. See, e.g., Jack Glaser & Eric D. Knowles, *Implicit Motivation to Control Prejudice*, 44 J. EXPERIMENTAL SOC. PSYCHOL. 164, 164–65, 168, 171 (2008) (collecting studies indicating that nonconscious motivation to control prejudice, for example “chronic egalitarianism,” can inhibit implicit bias); Hodson, Dovidio & Gaertner, *supra* note 197, at 127–29 (collecting studies on how to activate motivations to suppress biases); Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CALIF. L. REV. 969, 986–91 (2006) (examining how the law can motivate debiasing); cf. Leslie R. M. Hausmann & Carey S. Ryan, *Effects of External and Internal Motivation to Control Prejudice and Implicit Prejudice: The Mediating Role of Efforts to Control Prejudiced Responses*, 26 BASIC & APPLIED PSYCH. 215, 216–17, 223 (2004) (finding the internal motivations to suppress implicit bias are

Disparities in who is diverted to treatment rather than jail do not necessarily conclusively demonstrate implicit bias at play. As Richard Banks has argued, skews by subject's race may be based on factors other than bias.²²⁷ For example, outside of the controlled conditions of studies, on the street, officers may have reason to react based on race in a harsh reality where data indicates that blacks are five times as likely to shoot officers and four times as likely to be shot by officers.²²⁸ Disproportionalities in beneficiaries of rehabilitative policing might be due to implicit bias—but might also be due to criteria for selection of eligible people for diversion. As discussed in Part III.B., prevalent screening criteria by type of eligible offense and criminal history may generate racial skews in eligibility. Nonetheless, monitoring would alert police departments and the community to assess the reasons why there are disparities in beneficiaries.

Such data-driven surveillance of police practices is practicable—and indeed increasingly becoming prevalent.²²⁹ Many states have introduced legislation requiring data collection on people stopped and searched in traffic.²³⁰ Moreover, a common remedy to settle Justice Department investigations of police departments for civil rights violations is data collection regarding races of suspects stopped and searched and automated monitoring of officer behavior.²³¹ Even absent suit or legislation, some police departments have begun voluntarily collecting data in efforts to self-monitor.²³² Thus, quality-control systems that track data such as the apparent race, ethnicity or national origin of drug offenders diverted—and not diverted—by police are feasible and consistent with the contemporary trend in police regulation.

more effective than external motivations, which may backfire through ironic processing and lead to greater manifestation of attention to stereotypes on implicit association tests).

227. R. Richard Banks, Jennifer L. Eberhardt & Lee Ross, *Discrimination and Implicit Bias in a Racially Unequal Society*, 94 CALIF. L. REV. 1169, 1180 (2006).

228. *Id.* (citing data from JODI M. BROWN & PATRICK A. LANGAN, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, *Policing and Homicide, 1976–98: Justifiable Homicide by Police, Police Officers Murdered by Felons* 26 (2001)).

229. Mary D. Fan, *Panopticism for Police: Structural Reform Bargaining and Police Regulation by Data-Driven Surveillance*, 87 WASH. L. REV. 93, 136 (2012).

230. Michael E. Buerger & Amy Farrell, *The Evidence of Racial Profiling: Interpreting Documented and Unofficial Sources*, 5 POLICE Q. 272, 273–74 (2002).

231. *See, e.g.*, *United States v. City of Detroit*, No. 03-72258, Consent Judgment, Use of Force and Arrest and Witness Detention, ¶¶ 78–90, 124–30, (E.D. Mich. June 12, 2003) (requiring police department to establish a risk-management database tracking officer conduct with the capacity to raise red flags at certain data thresholds); *United States v. City of Los Angeles*, No. Civil 00-11769, Consent Decree, ¶¶ 55–69, 104–05 (C.D. Cal. June 15, 2001) (requiring officers to fill out a written or electronic report for each use of force incident; documentation of the apparent race, ethnicity or national origin of people stopped and searched and audits of reports for canned language); *United States v. New Jersey*, No. Civil 99-5970, Consent Decree, ¶¶ 29, 32, 36–37 (D.N.J. Dec. 30, 1999) (requiring reporting of races of people stopped and searched and review of videotapes of stops on random-selection basis).

232. Buerger & Farrell, *supra* note 230, at 273.

3. *Improving Information Deficits: Cultivating Communicative Input*

Police on the street sorting people for rehabilitation rather than arrest will have to rely on their observations in a brief encounter, criminal records checks, and the individual's statements. Such an approach bases decision-making on different inputs than that before judges and prosecutors because the officer lacks a case file on the defendant. Whether this distinction amounts to a difference is arguable because files before courts and prosecutors sometimes amount to little more than a rap sheet. On the other hand, the officer gets arguably more information in the sense that the offender is observed in a communicative context whereas once the criminal process starts, defendants are typically silent and sanitized, providing less contextual information.²³³ Moreover, in communities where officers know repeat offenders with drug problems, such as Belltown, the beat cops may know the subject a lot better than any judge or prosecutor ever will.²³⁴

Insights from medicine can inform the practice of making judgments about amenability to treatment based on observations and questioning in a brief encounter. Doctors also have to make therapeutic judgments in brief encounters—an average of about seventeen minutes long—often based on little more than observations and patient self-reports and responses to questions.²³⁵ Communication is crucial to getting the best inputs for judgment in such decision-making contexts.²³⁶ Where communication is complicated by cross-group misunderstandings and mistrust, the difficulties can contribute to disparities in selection for treatment.²³⁷

Studies in medicine have indicated that assessments of characteristics such as potential cooperativeness and amenability for treatment may be impacted by the

233. See, e.g., Alexandra Natapoff, *Speechless: The Silencing of Criminal Defendants*, 80 N.Y.U. L. REV. 1449, 1459–72 (2005) (describing how defendants are systematically silenced in the criminal justice system).

234. See, e.g., Pulkkinen *supra* note 2, at A1 (discussing repeat encounters).

235. See, e.g., DEBRA L. ROTER & JUDITH A. HALL, DOCTORS TALKING WITH PATIENTS/PATIENTS TALKING WITH DOCTORS 112 (2006) (discussing import of communication in physician decision-making and average appointment times); see also, e.g., Benjamin H. Natelson, *Lost in a System Where Doctors Don't Want to Listen*, WASH. POST, Aug. 3, 2008, at B03 (discussing the challenges of physician decision-making).

236. See, e.g., Gregory Makoul & Theo Schofield, *Communication Teaching and Assessment in Medical Education: An International Consensus Statement*, 37 PATIENT EDUC. & COUNSELING 191, 192–94 (1999), <http://www.sciencedirect.com/science/article/pii/S0738399199000233> - AFF1 (discussing consensus statement on the import of communication and communication education to the quality of medical decision-making).

237. See e.g., AGENCY FOR HEALTHCARE RESEARCH AND QUALITY, NATIONAL HEALTH DISPARITIES REPORT, 2007, at 85–86 (Feb. 2008) (reporting on minority patients' concerns with provider communication styles and impact on treatment); Mary K. Askim-Lovseth & Adriana Aldana, *Looking Beyond "Affordable" Health Care: Cultural Understanding and Sensitivity—Necessities in Addressing the Health Care Disparities of the U.S. Hispanic Population*, 27 HEALTH MARKETING Q. 354, 365–66, 377–78 (2010) (arguing cultural factors beyond language barriers impact communication with Hispanic patients and that physician education regarding cross-cultural ways of establishing rapport would contribute to improving disparities); Rachel L. Johnson et al., *Racial and Ethnic Differences in Patient Perceptions of Bias and Cultural Competence in Health Care*, J. GEN. INTERNAL MED. 101, 101–02, 108 (2004) (discussing how perceptions of minority patients that they are treated unfairly and disrespectfully by doctors undermine the quality of care).

authoritarian communication styles that doctors deploy with minority group members and resulting mistrust and miscommunication.²³⁸ For example, Rachel Johnson and colleagues coded interactions between white doctors and black patients and found physicians were 23 percent more verbally dominant, 33 percent less patient-centered in communication, and demonstrated less positive demeanor in encounters with black patients.²³⁹ Minority patients who believe they are being treated with discrimination or disrespect may respond with mistrust and seeming noncooperation.²⁴⁰ Moreover, even if minorities are merely asking questions they may be perceived as challenging authority.²⁴¹ For example, Diana Burgess and collaborators found a tendency for doctors to perceive minorities who ask questions about treatment recommendations as challenging their medical expertise, whereas whites who ask questions were viewed as legitimately trying to better understand the recommendation.²⁴²

These insights may inform the training and education of police in assessing minorities for suitability for referral to treatment. Empirical studies of police behavior have found that officers are more likely to arrest when they perceive their authority is being challenged.²⁴³ In training officers in communicating to suspects about the option of street diversion, it is important to inculcate the understanding that confusion and questioning about options is not a challenge to authority. Officers should also be trained to guard against aggravating mistrust among minority communities by adopting more authoritarian communication styles with people of color. The literature is replete with findings of minority group mistrust of police.²⁴⁴ This mistrust further complicates communication and aggravates disparities in the perception of a subject's risk level and likelihood of being amenable and cooperative in treatment.²⁴⁵ Outgroup members who mistrust police "may engage in more belligerent behavior, including 'talking back' to police officers, and—in a

238. *E.g.*, Johnson et al., *supra* note 237, at 102, 107–08.

239. Rachel L. Johnson et al., *Patient Race/Ethnicity and Quality of Patient-Physician Communication During Medical Visits*, 94 AM. J. PUB. HEALTH 2084, 2087–89 (2004).

240. *See* Janet K. Shim, *Cultural Health Capital: A Theoretical Approach to Understanding Health Care Interactions and the Dynamics of Unequal Treatment*, 51 J. HEALTH & SOC. BEHAV. 1, 10 (2010) (collecting studies).

241. *Id.*

242. Diana J. Burgess et al., *Understanding the Provider Contribution to Race/Ethnicity Disparities in Pain Treatment: Insights from Dual Process Models of Stereotyping*, 7 PAIN MED. 119, 119–20, 128 (2006).

243. *E.g.*, Douglas A. Smith & Christy A. Visher, *Street-Level Justice: Situational Determinants of Police Arrest Decisions*, 29 SOC. PROBS. 167, 175 (1981).

244. *See, e.g.*, Terry v. Ohio, 392 U.S. 1, 14 n.11, 30, 35 (1968) (noting friction between police and minority communities); Ronald Weitzer & Steven A. Tuch, *Race and Perceptions of Police Misconduct*, 51 SOC. PROBS. 305, 305–07, 323–24 (2004) (collecting studies documenting that minorities are more likely to have negative views of police than whites and exploring how police-minority interactions, among other factors, fuel the negative perceptions).

245. *See, e.g.*, Michael D. Reisig et al., *Suspect Disrespect Toward the Police*, 21 JUSTICE Q. 241, 241–43, 264–67 (2004) (describing how mistrust and feelings of police racism fuels communication complications that lead to escalation of encounters).

vicious cycle—this belligerence may prompt more severe use of force by police.”²⁴⁶ Mitigating these communication and cultural barriers are important to accurately gauging whether someone is amenable to diversion to treatment.

Reconfiguring officers’ powers to include offering drug offenders the option to go to treatment rather than jail puts officers in a communicative role where effective communication matters more than in the past. The law governing traditional policing evinces little care that the offender on the street understands his rights or options.²⁴⁷ A prime example comes in the law of consent searches: constitutional criminal procedure does not require one to understand there is an alternative besides assenting to police to find valid consent.²⁴⁸ Indeed, in criminal investigations there is an incentive to be obscure to better acquire consent.²⁴⁹ In contrast, when officers are given the power to offer drug offenders the option to choose treatment rather than arrest, effective communication skills become much more important.

To improve the ability of officers in establishing cross-cultural rapport, insights from proposed improvements to the training and communication styles of physician can be instructive.²⁵⁰ For example, officers, like doctors, would be more effective cross-cultural communicators if educated about cultural norms in body language, such as prolonged eye contact being perceived as a challenge, and that certain body language, such as eye contact avoidance, does not necessarily mean disrespect, dissembling, or avoidance.²⁵¹ The goal is to better inform the therapeutic judgment that will steer rehabilitative policing and street diversion away from the criminal justice system.

C. Including More Serious Offenders in Rehab: Lessons from Drug Courts

Ultimately, the most important tools for steering discretion that lawmakers can control directly are the guidelines for choosing who is eligible for street diversion.

246. Joshua Correll et al., *Across the Thin Blue Line, Police Officers and Racial Bias in the Decision to Shoot*, 92 J. PERSONALITY & SOC. PSYCH. 1006, 1006–07 (2007).

247. See, e.g., *Florida v. Jimeno*, 500 U.S. 248, 256 (1991) (Marshall J., dissenting) (explaining the Supreme Court’s criminal procedure doctrine permits “the police to capitalize on the ignorance of citizens so as to accomplish by subterfuge what they could not achieve by relying only on the knowing relinquishment of constitutional rights”); Mary D. Fan, *The Police Gamesmanship Dilemma in Criminal Procedure*, 44 UC DAVIS L. REV. 1407, 1423 (2011) (discussing how the court’s doctrines permit police plenty of latitude to game the public’s lack of familiarity with the full scope of their rights).

248. E.g., *United States v. Drayton*, 536 U.S. 194, 206–07 (2002), *Ohio v. Robinette*, 519 U.S. 33, 39 (1996); *Schneckloth v. Bustamonte*, 412 U.S. 218, 243 (1973).

249. *Jimeno*, 500 U.S. at 256 (Marshall, J., dissenting); Fan, *supra* note 247, at 1423.

250. Studies in medicine on improving communication and compliance have, for example, explored techniques such as ensuring understanding by asking people in a nonthreatening way to “teach back” what they have been told. E.g., Anita D. Misra-Hebert & J. Harry Isaacson, *Overcoming Health Disparities Via Better Cross-Cultural Communication and Health Literacy*, 79 CLEVEL. CLINIC J. MED. 127, 131 (2012).

251. See, e.g., Johnson et al., *supra* note 239, at 2087–89 (advocating for education about cultural patterns of communication such as eye contact avoidance and the meaning of prolonged eye contact).

The lessons from more than two decades of experience with drug courts offers a counterintuitive insight about eligibility criteria—letting in more serious offenders would have greater public safety and cost savings pay-offs.²⁵²

A prevalent approach among drug courts and diversion programs is to select for minor offenders and screen out those with prior violent felony convictions or who are facing drug distribution rather than possession charges.²⁵³ A problem with this approach is that those most in need of addiction treatment may be screened out, while “chippers”—casual users blessed with the brain chemistry to better withstand addiction—play the role of addict to get the sentencing benefit.²⁵⁴ Expensive treatment dollars are thus not maximized and may be wasted on those who do not need the program. Indeed, Sheryl Kubiak and colleagues found many admitted into specialty substance abuse treatment programs post-arrest do not meet the diagnostic criteria for having a substance abuse disorder.²⁵⁵ There is a great need among arrestees for treatment; 44.8 percent of arrestees met the criteria for having a substance abuse disorder.²⁵⁶ But only a small fraction of offenders who actually have a substance abuse disorder get it.²⁵⁷ Screening criteria create the unintended consequence of spending expensive treatment dollars on the wrong people.

Moreover, the largest and just recently completed study of drug courts to date found the greatest cost savings and public safety benefits come from drug court participation by offenders who commit more serious socially costly crimes.²⁵⁸ The multiyear study of twenty-three programs explained while drug courts prevent a substantial amount of future reoffending, most crimes—particularly “victimless” crimes such as drug use or possession—have small social costs and thus smaller payoffs when prevented.²⁵⁹ The study’s finding that on average, the drug court programs returned a net benefit of \$5,680 to \$6,208 per participant was driven by success with relatively few individuals who commit the most serious crimes, particularly violent crimes.²⁶⁰ In light of findings that “drug court programs work equally well for clients with varying criminal histories and may even work better

252. See, e.g., ROSSMAN ET AL., *supra* note 87, at 258–61 (finding that the greatest public safety and cost savings gains from drug courts come from reducing reoffending among people with a history of violent offenses).

253. O’Hear, *supra* note 184, at 478. There are exceptions—some treatment courts have begun to take a wider range of people with more serious criminal histories. Allegra M. McLeod, *Decarceration Courts: Possibilities and Perils of a Shifting Criminal Law*, 100 GEO. L.J. 1587, 1606–1608 (2012).

254. Josh Bowers, *Contraindicated Drug Courts*, 55 UCLA L. REV. 783, 785, 801–02 (2008); Morris B. Hoffman, *Therapeutic Jurisprudence, Neo-Rehabilitationism, and Judicial Collectivism: The Least Dangerous Branch Becomes Most Dangerous*, 29 FORDHAM URB. L.J. 2063, 2069 n.25 (2002); Eric J. Miller, *Embracing Addiction: Drug Courts and the False Promise of Judicial Interventionism*, 65 OHIO ST. L.J. 1479, 1568–69 (2004).

255. See Kubiak et al., *supra* note 104, at 21–22.

256. *Id.* at 18.

257. *Id.* at 21–22.

258. See ROSSMAN ET AL., *supra* note 87, at 257, 265.

259. *Id.* at 258.

260. *Id.*

in terms of preventing crime for those with violent offense histories” the study recommended:

Federal funders and more local policymakers may want to encourage drug courts to expand eligibility to include more serious offenders. The most efficient use of resources is to keep people with the potential for committing the more serious crimes from doing so. Drug courts can help those with more serious offenders, and funders will see a greater net benefit from their funding.²⁶¹

There is a convergence of majority and minority interests in modifying the screening criteria. The eligibility criteria based on criminal history and the nature of the drug offense operates to the disadvantage of minorities, particularly African-Americans, in two ways.²⁶² First, African-Americans drug offenders have a higher probability of having a disqualifying prior conviction because of the general disproportionality in arrests, investigations and convictions.²⁶³ Second, African-Americans have a greater likelihood of being disqualified based on the nature of the drug offense as sale or manufacturing rather than use or possession. While disproportionality in arrests of African-Americans is substantial for drug offenses overall, the disproportionality is particularly great—at four times the white rate—when it comes to arrests for drug sale or manufacture.²⁶⁴ Yet many screening rules, including the LEAD protocol, for example, screen out manufacturing or sale drug offenders to limit diversion to lesser drug offenders.²⁶⁵ Maintaining this seemingly race-neutral criterion may aggravate disparities in who gets to benefit from street diversion and who is left out.

Thus there is a convergence between majority interests in spending money more wisely to maximize long-term benefits and minority interests in ameliorating the disproportionate impact of screening criteria. A good idea in principle is not enough of course. Political realities must always be considered in criminal justice reform. If a diverted offender commits a salient violent crime, police and

261. *Id.* at 265.

262. It would be desirable to assess disproportionality for Hispanics—the largest and fastest-growing minority group in the United States. See U.S. CENSUS BUREAU, OVERVIEW OF RACE AND HISPANIC ORIGIN: 2010, at 4 tbl.1 (Mar. 2011) (on size of the Hispanic population). Unfortunately, the task is impeded by variations in data collection and the failure to disaggregate Hispanics from non-Hispanic whites. See, e.g., U.S. DEP’T OF JUSTICE, ARRESTS IN THE UNITED STATES, 1980–2009, at 2 tbl.1 (Sept. 2011) (presenting state and federal arrest data and subsuming Hispanics in the general White category).

263. See O’HEAR, *supra* note 184, at 479–80 (analyzing raced consequences of drug courts); cf., e.g., Equal Employment Opp’y Comm’n, *EEOC Policy Statement on the Issue of Conviction Records under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq. (1982)* (Feb. 4, 1987) (explaining “an employer’s policy or practice of excluding individuals from employment on the basis of their conviction records has an adverse impact on Blacks and Hispanics in light of statistics showing that they are convicted at a rate disproportionately greater than their representation in the population”).

264. See U.S. DEP’T OF JUSTICE, ARRESTS IN THE UNITED STATES, *supra* note 262, at 13. In contrast, the disproportionality level of the black arrest rate for possession or use offenses is three times the white rate. *Id.*

265. LEAD Protocol, *supra* note 1, at 3.

policymakers risk suffering backlash for “going easy” on the individual and “setting him loose on society.”²⁶⁶ Allowing more serious offenders into street diversion programs will take political courage—and perhaps encouragement through federal grant funding bonuses for jurisdictions brave enough to take the risk. Not only would incentives in federal grant programs help offset fears of backlash, it would also dilute the risk to local lawmakers and policymakers, who can point the finger at the federal government’s funding incentives.²⁶⁷ Law and regulations can change the social meaning and context of practices to make them more widespread.²⁶⁸ Now is a good time for the dawning of political courage, made all the more palatable by empirical support for the proposition that expanding eligibility can realize greater cost and public safety benefits in the long run.²⁶⁹

CONCLUSION

The approach of rehabilitative policing gives police a third option besides the all-or-nothing choice of formal criminal processing or release without constraints against reoffending. Rather than just serving as the muscular arm of the incarcerative state, officers can be part of the solution as states engage in decarceration and drug criminalization reform efforts. Major reform efforts have largely focused on adjusting sentences and reimagining the role of prosecutors and judges. While these innovations have been salutary, they typically operate after arrest and booking, when the criminal process—with its costs to the system and the offender—has kicked in. In contrast, police are the crucial gatekeepers at the entryway to the criminal justice system, deciding whether to book someone into criminal processing at all.

The crucial role of police in diversion to alternatives to incarceration has been underutilized in the fomentation of reforms reimagining traditional criminal justice roles. Part of this is a hangover from the longstanding scholarly mistrust of police and conferring discretion on police. Yet even some of the most influential scholars in portraying police as adversarial combatants intensely resistant to

266. Myriad examples come from the early release and clemency contexts. See, e.g., Vincent Carroll, *Realities of Early Release*, DENVER POST, Dec. 6, 2009, at 3D (explaining that policymakers face political dangers if a prisoner released early “goes berserk” and commits horrific crimes, such as those committed by prisoners to whom Arkansas Governor Mike Huckabee granted clemency); Manny Fernandez & Alison Leigh Cowan, *When Horror Came to a Connecticut Family*, N.Y. TIMES, Aug. 7, 2007, at A1 (chronicling horror and backlash when two ‘career criminals’ released early raped, robbed and then murdered a family); Editorial, *Prison Chief Is Victim of Political Games*, CHI. SUN-TIMES, Sept. 3, 2010 (describing allegations and backlash surrounding an early release program that led to firing of an official who instituted early release program); see also CASS R. SUNSTEIN, *THE LAWS OF FEAR* 69 (2005) (explaining how highly salient and emotionally-charged events can steer policy despite low probability).

267. Compare this to Cass Sunstein’s example of two hockey players who can say they are wearing helmets not because they are wimps but because the government is making them do it (even though secretly they want to protect their brains too). Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 948 (1996).

268. *Id.*

269. See *supra* Part I. A.

change acknowledge that innovation can happen—if hard experience drives home to police forces the need for change.²⁷⁰ A confluence of conditions—overstrained budgets, criminogenic consequences of high incarceration and drug war fatigue—is driving home the need for change to stakeholders across traditional divides. Now is an opportune time to develop a model of public health policing for drug offenders and safeguards to govern police discretion in choosing the beneficiaries of such a treatment-based approach.

270. See, e.g., JEROME SKOLNICK & DAVID H. BAYLEY, *THE NEW BLUE LINE: POLICE INNOVATION IN SIX AMERICAN CITIES* 211–12 (1986) (explaining that though police are insular, fiercely resistant to change, and possessed of a *we-they* mentality that hardly makes them suitable to be community organizers, a gut realization that traditional policing is not working to reduce crime is leading police to innovate toward community policing).

