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LEAD Us Not into Temptation: A Response to Barbara Fedders's "Opioid Policing"

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INTRODUCTION

In "Opioid Policing,"[1] Barbara Fedders contributes to the law review literature the first joint scholarly analysis of two drug policing innovations: Seattle's Law Enforcement Assisted Diversion (LEAD) program and the Angel Initiative, which originated in Gloucester, Massachusetts. Even while welcoming the innovation and inspiration of these programs, she remains clear-eyed about the need to scrutinize their potential downsides. Her work is crucially timed. While still just a few years old, LEAD has been replicated many times[2] and appears likely to be replicated still further—and to be written about much more. Inspired by Fedders's call for a balanced take, this Response examines a variety of sources that have described the LEAD program, investigating what they tell us about the ability of commentators to examine (and contribute to) the list of the program's costs and benefits. Part I examines the way in which the positive potential of this program is described, and possible tendencies to paint a picture that may be unnecessarily rosy. Part II turns to the other side of the equation and highlights potential risks that commentators may downplay, or even compound.

I. DO SOME DESCRIPTIONS OF LEAD OVERSTATE THE POSITIVES?

There are many very positive stories that can be told about LEAD. After prolonged litigation in Seattle alleging racial discrimination in law enforcement,[3] then Narcotics Captain Steve Brown is said to have turned to lead litigator Lisa Daugaard, the head of the Defender Association's Racial Disparity Project, and asked, "What if we all agreed to do something different in regards to drug enforcement—what would that be?"[4] The swords were beaten into plowshares,[5] and

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* My thanks to the *Indiana Law Journal* for the invitation to respond to Barbara Fedders's important work and for excellent editorial work.

1. Barbara Fedders, *Opioid Policing*, 94 IND. L.J. 389 (2019).

2. *About the Bureau*, LEAD NATIONAL SUPPORT BUREAU, https://www.leadbureau.org/about-the-bureau [https://perma.cc/SV9W-QA48] ("A number of jurisdictions across the country have followed Seattle by replicating the transformative LEAD initiative. To date these jurisdictions include; Santa Fe, NM, Albany, NY, Fayetteville, NC, Portland, OR, Huntingdon, WV, Charleston, WV and Baltimore, MD. Recently, California and Colorado included funding in their state budgets to support the implementation of LEAD. Dozens of other jurisdictions are exploring and developing LEAD programs . . . .").

3. *See* Caroline Preston, *Don't Lock 'Em Up. Give 'Em a Chance to Quit Drugs*, N.Y. TIMES (Oct. 25, 2016), http://www.nytimes.com/2016/10/25/opinion/dont-lock-em-up-give-em-a-chance-to-quit-drugs.html?_r=0 [https://perma.cc/5EDQ-57GM] ("Lisa Daugaard, now the director of the nonprofit Public Defender Association, spent years waging a legal battle against the city's police force over racially discriminatory patterns in drug arrests.").

4. KATHERINE BECKETT, SEATTLE'S LAW ENFORCEMENT ASSISTED DIVERSION PROGRAM: LESSONS LEARNED FROM THE FIRST TWO YEARS 5 (2014), https://www.fordfoundation.org/media/2543/2014-lead-process-evaluation.pdf [https://perma.cc/EE3F-VMM4].

5. *See* Katherine Beckett, *The Uses and Abuses of Police Discretion: Toward Harm Reduction Policing*, 10 HARV. L. & POL'Y REV. 77, 94 (2016) ("For stakeholders, one of the most meaningful of [LEAD's

an unprecedented coalition of diverse groups signed off on the resulting initiative:[6] the "first known pre-booking diversion program for people arrested on narcotics and prostitution charges in the United States."[7] The program permits police officers to hold off on booking people who meet certain program criteria,[8] even if they believe that probable cause exists, and to refer them instead to "social support services."[9] Even though a record of the arrest is sent to the prosecutor's office, if all goes well no prosecution is supposed to occur:[10] and thus no jail or prison, and no crippling and stigmatizing consequences of conviction.

What's not to like about fewer people of color—and fewer people generally—in jail or prison,[11] about a more rehabilitative and less punitive approach,[12] about an effort to avoid the stigma of convictions and incarceration, about early intervention and diversion before charges are filed, about services to meet the needs of marginalized populations, about approaches that "incorporate public-health perspectives on drug use and addiction,"[13] and about approaches that are "less costly and more humane than War on Drugs policing"?[14] What's not to like about methods that reject an abstinence demand (a demand whose downsides Fedders ably describes)? LEAD is said to offer "[a] compassionate option and a hopeful option for people who have lost their way"[15] and who among us hasn't needed one or two of

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positive effects] was the process of coming together, despite diverse motivations and lingering, litigation-induced resentment, to find common ground.").

6. *Id.* at 86–87 ("LEAD is the result of a collaborative effort between an unusually broad coalition of organizations, including the Defender Association's Racial Disparity Project, the Seattle Police Department, the ACLU of Washington, the King County Prosecutor's Office, the Seattle City Attorney's office, the King County Sheriff's Office, Evergreen Treatment Services, the King County Executive, the Washington State Department of Corrections, neighborhood leaders and advisory boards, and other organizations.").

7. BECKETT, *supra* note 4, at 1, 7 ("Although LEAD was originally conceived as a pre-arrest diversion program for low-level drug offenders, stakeholders expanded the potential client population to include sex workers in order to ensure significant participation by women who suffer from addiction and/or extreme poverty.").

8. *See About LEAD*, LEAD, http://leadkingcounty.org/about/ [https://perma.cc/U3U2-CQFB] (mentioning that those arrested for "low-level drug offenses, and engaging in prostitution" are eligible for diversion into LEAD).

9. *See* Mary Fan, *Street Diversion and Decarceration*, 50 AM. CRIM. L. REV. 165, 166 (2013). Indeed, referrals can occur even absent an assertion of probable cause to arrest. Beckett, *supra* note 5, at 90 ("Early on, LEAD stakeholders elected to also allow officers to refer people to LEAD via a 'social contact' rather than an arrest. A social contact referral occurs when officers identify someone who, based on past experience, they believe to be engaged in drug or prostitution activity, and offer that person a chance to participate in LEAD. Absent authorization of these social contact referrals, officers would have had to wait until they had sufficient evidence to arrest such individuals in order to refer them to the program.").

10. *See* Fedders, *supra* note 1, at 431.

11. *See* KingCountyTV, *Prosecutor's Partners - Evergreen Treatment Services*, YOUTUBE 4:17 (July 22, 2014), https://youtu.be/Rxo8qPgQq_M [https://perma.cc/KC8Q-WL8U] ("The officer gives that person a choice. Do you want to go to jail or do you want to go to LEAD?").

12. *See* Fedders, *supra* note 1, at 411 (mentioning, in the drug-court context, that "liberals support the notion of rehabilitation").

13. *See id.* at 395 (LEAD "incorporates public-health perspectives on drug use and addiction").

14. *Id.* at 396.

15. Dan Satterberg, a King County prosecutor, indicated that police officers will still patrol drug markets. Catherine L. Fisk & L. Song Richardson, *Police Unions*, 85 GEO. WASH. L. REV. 712, 771 n.375 (2017); Millionair Club Charity, *Law Enforcement Assisted Diversion (LEAD) Program News Conference 10/13/2001*, YOUTUBE 2:04 (Dec. 9, 2011), https://youtu.be/FLs4B4V5-1U [https://perma.cc/VV5F-

those options? There may be a great deal to like, but as we hold the benefits up against the potential costs, it is important, as Fedders suggests, that we do that in as clear-eyed a way as possible. To start with the benefits, one may wonder whether some of them are at times overstated.

A. "No Arrest"; "No Criminal Justice System Involvement"

In descriptions of LEAD, one can often detect a hunger to find a way out of the criminal justice system. Behold this program, we are told: no arrest![16] No criminal justice system involvement! The program is said to "circumvent[] the criminal justice system entirely,"[17] to "cut[] out the criminal justice system,"[18] and indeed to involve "de facto decriminalization."[19] Participants are said to be funneled straight to "rehabilitative and social support services rather than criminal processing."[20] But while there is no booking for those accepted into the program, there is an arrest.[21] An arrest is not without consequences.[22] If all goes smoothly there will be no charge, but there is criminal justice system involvement. According to Brendan Conner, if a participant "does not complete initial assessments or return for follow-up appointments, then the treatment program is required to report the person to the police, who may then arrest the individual."[23] In addition, as Fedders points out, the officer who conducts the arrest that leads to a LEAD referral "sends the arrest record to the misdemeanor or felony prosecutor—these offices maintain the records and the

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16. Preston, *supra* note 3 ("Participants not only avoid sentencing and prison; they aren't even arrested or charged.").

17. Lauren Gallagher, *Should the United States Move Toward Portugal's Decriminalization of Drugs?*, 22 U. MIAMI INT'L & COMP. L. REV. 207, 229 (2015).

18. Sara Jean Green, *LEAD Program Turns Drug Bust into Help, not Jail*, SEATTLE TIMES (Jan. 2, 2013, 8:00 PM), https://www.seattletimes.com/seattle-news/lead-program-turns-drug-bust-into-help-not-jail/ [https://perma.cc/TMP9-D4DU].

19. James G. Hodge, Jr., Danielle Chronister, Alexandra Hess, Madeline Morcelle, Jennifer Piatt & Sarah A. Wetter, *Public Health Preemption Plus+: Constitutional Affronts to Public Health Innovations*, 79 OHIO ST. L.J. 685, 690 (2018) ("In 2011, Seattle introduced de facto decriminalization of certain drug possession violations through its "Law Enforcement Assisted Diversion" (LEAD) program.")

20. Fan, *supra* note 9, at 166.

21. *See About LEAD*, *supra* note 8 ("Individuals who are arrested for eligible offenses within specified boundaries for Belltown or Skyway may be diverted into LEAD.").

22. *See* Fedders, *supra* note 1, at 436 ("[T]he threat of arrest works to push illicit drug users and people engaged in sex work underground in ways that can exacerbate risk."); Jonathan Giftos & Lello Tesema, *When Less Is More: Reforming the Criminal Justice Response to the Opioid Epidemic*, 57 JUDGES J. 28, 30 (2018) ("Despite less criminal justice system exposure, and more direct connection to services tailored specifically to patients' needs, pre-arraignment diversion still involves an initial arrest event. The fear of arrest is known to drive people who use drugs into the shadows, where the risks of adverse events like overdose and infectious diseases loom large, and access to treatment or harm reduction services is limited. One way to minimize these risks is to decriminalize certain types of possession or use.").

23. Brendan M. Conner, *In Loco Aequitatis: The Dangers of "Safe Harbor" Laws for Youth in the Sex Trades*, 12 STAN. J. CIV. RTS. & CIV. LIBERTIES 43, 90 (2016); *see also* BECKETT, *supra* note 4, at 11–12. ("If the referred person does not return to complete the intake assessment within 30 days, the relevant prosecuting attorney's office may elect to file charges associated [with] the arrest that triggered diversion.").

authority to charge the arrested person."[24] The court may be "completely taken out of the equation,"[25] but it will happily add itself to the equation if the prosecution asks it to.[26] Some commentators describe LEAD as a "bridge" to a new way of thinking about addiction,[27] or a "step in the direction of decriminalization,"[28] or an "'important transitional vehicle' toward a public-health-oriented response to drug abuse,"[29] but one needs to be cautious about asserting that we are in any of those new worlds yet. As Fedders points out, this form of policing remains "firmly within the contours of the contemporary carceral state."[30]

B. "No Stigma"

We also seem to hunger for an escape from the crippling stigma that attaches to those branded by the criminal justice system. From some enthusiastic descriptions of LEAD, one might assume that this program does the trick. According to one article, the program "saves people from stigmatization and discrimination."[31] More broadly, "avoidance of negative labeling" is said to be one of the five primary goals of diversion programs such as LEAD.[32]

If the program does indeed make the difference in whether someone does or does not receive a criminal conviction, that is very significant. In Washington State, the best available estimate of the number of formal "collateral consequences" of conviction for a felony is 320;[33] for a misdemeanor or lesser offense, it is 242.[34] And

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24. Fedders, *supra* note 1, at 431.

25. DRUG POLICY ALL., LAW ENFORCEMENT ASSISTED DIVERSION (LEAD): REDUCING THE ROLE OF CRIMINALIZATION IN LOCAL DRUG CONTROL 2 (2016), http://www.drugpolicy.org/sites/default/files/DPA%20Fact%20sheet_Law%20Enforcement%20Assisted%20Diversion%20%28LEAD%29%20_%28Feb.%202016%29.pdf [https://perma.cc/9NRM-NKR4].

26. *See* Beckett, *supra* note 5, at 90 ("Although the arrested individual has been referred to LEAD rather than booked into jail, the arresting officer nonetheless sends the arrest record to the Seattle City Attorney's office (which is responsible for prosecuting misdemeanor crimes) or to the King County Prosecutor (responsible for prosecuting felony offenses). These offices maintain the authority to charge the arrested person. However, the presumption is that charges will *not* be filed as long as the individual completes both an initial screening and a full intake assessment with LEAD case managers within thirty days of the referral.").

27. Preston, *supra* note 3 ("LEAD could be an important bridge, helping to habituate the public to a new way of thinking about addiction.").

28. Gallagher, *supra* note 17, at 229 (2015).

29. Preston, *supra* note 3 (quoting Gabriel Sayegh, "whose organization . . . is helping to expand the use of LEAD").

30. Fedders, *supra* note 1, at 439.

31. Preston, *supra* note 3.

32. *See* Fedders, *supra* note 1, at 430, n. 292 ("Diversion from formal criminal justice system processing typically involves five goals: avoidance of negative labeling; reduction of unnecessary social control; reduction of recidivism; reduction of justice system costs; and provision of service.").

33. *See* National Inventory of the Collateral Consequences of Conviction, https://niccc.csgjusticecenter [https://perma.cc/QBM8-EZEV] (select "More Search Options," then filter Jurisdiction to Washington and Offense Type to "Any Felony").

34. *Id.* Of course, we must not neglect the informal consequences of conviction, which are not included within this database. *E.g.*, Benjamin Levin, *Criminal Employment Law*, 39 CARDOZO L. REV. 2265, 2273–74 (2018).

yet, in our eagerness to applaud a reduction in this form of restriction, it is important not to brush over the stigma that can still be imposed, whether by arrest or by the way in which we think and talk about this sort of program and those who enter it.

In an article praising LEAD, the Seattle Times used the headline "LEAD Program for Low-Level Drug Criminals Sees Success."[35] While there is a special stigma in the word "criminal," there is stigma too in its synonym "offender," and that is the standard term for someone who goes through this program. Maybe you're called a "low-level offender[],"[36] or "drug offender,"[37] or "low-level street drug offender,"[38] or "low-level . . . prostitution offender[]."[39] The exact phrasing differs, but the word "offender" is the term used by the program and by commentators who echo it.[40] As will be discussed below,[41] that terminology embeds the stigma of assumed guilt within a program lauded for whisking you entirely out of our system for adjudicating guilt. It is hard to believe that the stigma has gone away when those participating in the program are referred to as "addicts and low-level dealers,"[42] as "recidivists" if they get rearrested (see below),[43] as "drug and prostitution offenders—among the main staples of the criminal justice mill,"[44] and as "poor, chronically homeless, low-level drug dealers, users and prostituted people . . . ."[45]

C. Community-Based Services

It sounds really good to replace jail and prison with "community-based services."[46] The program is said to "funnel[] people immediately into treatment and

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35. Sara Jean Green, *LEAD Program for Low-Level Drug Criminals Sees Success*, SEATTLE TIMES (Apr. 9, 2015, 12:00 PM), http://www.seattletimes.com/seattle-news/crime/lead-program-for-low-level-drug-criminals-sees-success/ [https://perma.cc/XXD7-7WDK]; *see also* David Nelson, *55 Drug Offenders and Prostitutes Chose Treatment Over Jail Through Belltown's LEAD Program*, INSIDE BELLTOWN: SEATTLE PI (Aug. 29, 2012, 2:24 PM), https://blog.seattlepi.com/insidebelltown/2012/08/29/55-drug-offenders-and-prostitutes-chose-treatment-over-jail-through-belltowns-lead-program/ [https://perma.cc/S74R-PUFT].

36. *About LEAD*, *supra* note 8.

37. *Id*.

38. David Boerner, *Prosecution in Washington State*, 41 CRIME & JUST. 167, 206 (2012) (stating that "Seattle police officers are authorized to directly divert low-level street drug offenders to treatment without formal arrest and booking in jail").

39. *About LEAD*, *supra* note 8 ("LEAD will divert low-level drug and prostitution offenders into community-based treatment and support services—including housing, healthcare, job training, treatment and mental health support—instead of processing them through traditional criminal justice system avenues.").

40. *See infra* notes 62–63 and accompanying text.

41. *See* discussion *infra* Section II.A.

42. Green, *supra* note 18.

43. *See* discussion *infra* Section II.B.

44. Fan, *supra* note 9, at 166.

45. Green, *supra* note 35.

46. *About LEAD*, *supra* note 8.

support."[47] Those in the program are given "immediate access to services."[48] But even while celebrating and searching for ways to end our nation's reliance on jail and prison, it is important to ensure—as Fedders does—that terms that sound good aren't viewed as a panacea and are interrogated. Fedders reminds us to scrutinize the resources devoted to, and the quality of, "services" and "programs."[49] She reminds us that the resources and quality are likely to be substandard when marginalized populations are the ones being invited/nudged/coerced into them.[50] She reminds us that programs relying on services, or treatment, or housing assistance operate in a country where budgets for such things—federal and state—are shrinking and inadequate.[51] She reminds us that sitting down with a social worker to talk about housing options—with a view of achieving "personal stability"[52]—does not translate to a stable housing situation and certainly not in Seattle where there is no affordable housing stock.[53] "Community-based" beats "jail-based," but communities can of course be hostile environments, most of all to services needed by the most vulnerable. Methadone clinics in downtown Seattle neighborhoods are "about as popular as nuclear waste dumps."[54]

D. "Racially unbiased"

Understandably one longs for a sign that the racial bias that so permeates our criminal justice system can in some way be cleansed. It is a little surprising, however, that concerns about racial bias operating within LEAD are sometimes given short shrift. LEAD contains obvious gateways to racial bias,[55] such as its requirement that participants not have certain criminal convictions,[56] its exclusion of certain alleged

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47. Alex Kreit, *Drug Truce*, 77 OHIO ST. L.J. 1323, 1372 (2016); *About LEAD*, *supra* note 8 ("LEAD participants begin working immediately with case managers to access services.").

48. DRUG POLICY ALL., *supra* note 25, at 2.

49. *See* Fedders, *supra* note 1, at 419 ("[T]here is no corresponding mechanism to hold courts accountable when they are providing substandard treatment and services. And a significant recent body of evidence suggests that many drug courts are indeed substandard.").

50. *See* Conner, *supra* note 23, at 90–91 ("Pre-booking diversion programs . . . may be coercive in that they act as an equivalent to custodial placement without the benefit of counsel or due process of law, under circumstances in which a detainee is impaired and there is no opportunity for a court to evaluate whether the arresting officer even had probable cause to stop, search, or arrest the person for a prostitution-related offense.").

51. *See* Fedders, *supra* note 1, at 449 ("[B]oth LEAD and the Angel Initiative are heavily dependent on grants from foundations and individuals. This financial situation is a microcosm of the fact, as public health and addiction experts note, that the federal government has committed but a fraction of the funding that is needed to address the widespread and growing harms from opioid misuse."); *id.* at 409 ("The high rates of incarceration that have resulted from the War on Drugs have placed significant strain on the budgets of states, which have cut critical spending on education and social services as a result.")

52. *See* Fedders, *supra* note 1, at 434 (mentioning "the practical benefits of LEAD's harm-reduction framework—specifically, enabling alleged drug offenders to stay out of the criminal system and attain personal stability").

53. *See* BECKETT, *supra* note 4 (noting the unavailability of adequate housing, treatment, and mental health services).

54. *Id.* at 48 (quoting Ron Jackson, Executive Director of Evergreen Treatment Services).

55. *See* Fedders, *supra* note 1, at 445 (stating that features of LEAD "re-entrench rather than disrupt the distributive inequities of race and class that came to define War on Drugs policing").

56. *About LEAD*, *supra* note 8 ("Individuals who have certain violent offenses in their criminal history

offenses as grounds for referral,[57] and its requirement that before referral an officer determines whether a potential participant is "amenable to diversion and social service intervention."[58] When the possibility of racial bias in admittance is raised, it sometimes seems to be quickly dismissed.[59] Yet the program operates within a series of racially-disparate parameters: For example, the question of who is able to consume drugs in a private space and thus avoid the roving eyes of the Seattle police is a question that has an answer with both socio-economic and racial implications.[60] The fact, discussed further below, that those arrested (or merely referred to treatment) by the police are deemed "offenders" in need of "rehabilitation" ties vulnerability and visibility and appearance to judgments of guilt and inadequacy in a way that has stark racial dimensions. As someone committed to making compromises necessary to the program's creation, Lisa Daugaard agreed not to talk too much about the program's racial justice objectives,[61] but as commentators we need to keep talking about the racial justice implications of the program.

II. DO DESCRIPTIONS OF LEAD OMIT OR REINFORCE SOME NEGATIVES?

Part I suggested that an important part of evaluating the positives of LEAD is ensuring that they are not overstated, or under-complicated, and as part of that work,

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are ineligible for diversion."); *see also* Fan, *supra* note 9, at 207 ("African-Americans [*sic*] drug offenders have a higher probability of having a disqualifying prior conviction because of the general disproportionality in arrests, investigations and convictions."). For a fuller list of the kinds of factors that can make one ineligible, including allegations about one's current conduct, convictions in one's past, and existing involvement in diversion or mental health court, see SEEMA L. CLIFASEFI & SUSAN E. COLLINS, UNIV. OF WASH.–HARBORVIEW MED. CTR., LEAD PROGRAM EVALUATION: DESCRIBING LEAD CASE MANAGEMENT IN PARTICIPANTS' OWN WORDS 4–5 (2016), https://www.sfdph.org /dph/ files/leadSF/Reports/Specific-Aim-4-FINAL_UW-LEAD-Evaluation-Qualitative-Report-11.1.16_updated.pdf [https://perma.cc/L4QX-ZVV5].

57. Fan, *supra* note 9, at 207 ("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.").

58. BECKETT, *supra* note 4, at 9; Fedders, *supra* note 1, at 445–45 ("[T]he capacious category of 'amenability to diversion' leaves room for the operation of a tremendous amount of bias—against people of color and against people with mental illness, among other variables.").

59. *See, e.g.*, Preston, *supra* note 3 ("Could LEAD result . . . in 'net widening,' by which the police inadvertently introduce a broader array of cases into the criminal justice system? . . . Or might the police divert more white, middle-class individuals, while minorities are still tracked into jails and prisons? This hasn't happened in Seattle. About 57 percent of LEAD participants are black, and the number of overall drug arrests has dropped significantly, says [Lisa] Daugaard."); Beckett, *supra* note 5, at 89–90 ("Early on, some stakeholders expressed concern that officers might be more inclined to refer white people to LEAD. To ensure that this is not the case, data regarding the racial and ethnic composition of LEAD clients are collected and monitored. The evidence to date shows that sixty percent of all LEAD clients are black and roughly one-fourth are white."); Fedders, *supra* note 1, at 445 ("[I]nitial evaluations seem to suggest that the selection of individuals for inclusion has not been racially biased"); *id.* at n. 412 ("LEAD evaluation suggests that at least with respect to race, the operation thus far has been unbiased.")

60. *See* Fedders, *supra* note 1, at 425-26 ("Many people using opioids purchase and use them in their own homes or cars; they escape the police surveillance that would occur if they needed to purchase drugs in public spaces.").

61. BECKETT, *supra* note 4, at 17 (quoting Lisa Daugaard as saying, "The [stated] goal was not more justice or more humanity or reduced racial disparity, but that was okay . . . we had to really let go of a style of engaging racial equality that requires that you say the word race constantly and that you constantly foreground that that is the goal."); *see also id.* (describing, as an example of the compromises involved, "the Racial Disparity Project's willingness to recognize that reducing racial disproportionality may not be publicly identified as the main purpose of LEAD").

interrogating potential impulses to find some hope: to find a better way. This Part turns to the other side of the scale and suggests that some descriptions of LEAD fail to apprehend potential downsides, perhaps running the risk of further entrenching problematic assumptions.

A. "Helping Low-Level Offenders"

LEAD's website describes the program as helping low-level "offenders" and as targeting certain "crimes." "Offenders" the program calls them,[62] and "offenders" we echo.[63] But of course those whose criminal processing ends at the arrest stage are not "offenders" as the law sees it. They have committed no crime as the law sees it. If one wants a label for these people, then they are, as Bob Boruchowitz puts it, "suspects."[64] They are, as Fedders puts it, "suspected offenders,"[65] or "alleged drug offenders."[66] Unless we can persuade others to follow the lead of these scholars, one trade-off inherent in this program will be a reinforcement of the notion that to be arrested is to be guilty.[67] This of course has implications for a central part of our criminal justice system: adjudication. It has implications for racial justice, given racial disproportionality in arrest.[68] It has implications for the relevance of defenses (which do not have to be factored into a determination about probable cause[69] but do

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62. LEAD, http://leadkingcounty.org/ [https://perma.cc/M3YM-4VU8] ("The program allows law enforcement officers to redirect low-level offenders engaged in drug or prostitution activity to community-based services, instead of jail and prosecution. By diverting eligible individuals to services, LEAD is committed to improving public safety and public order, and reducing the criminal behavior of people who participate in the program.").

63. *See, e.g.*, Conner, *supra* note 23, at 90 ("LEAD allows law enforcement officers to use 'social contact referrals' to redirect low-level offenders engaged in drug or prostitution activity to community-based services instead of jail or prosecution."); Preston, *supra* note 3 ("The initiative, which started in Seattle's Belltown neighborhood in 2011, empowers officers to divert low-level offenders from the criminal justice system into drug treatment and other social services."); Kreit, *supra* note 47, at 1372 ("LEAD is a pilot program in which police officers divert certain low-level drug and prostitution offenders into treatment and services instead of arresting them.").

64. Robert Boruchowitz, *Fifty Years After* Gideon*: It Is Long Past Time to Provide Lawyers for Misdemeanor Defendants Who Cannot Afford to Hire Their Own*, 11 SEATTLE J. FOR SOC. JUST. 891, 924 (2013) (LEAD "diverts drug and prostitution suspects directly to a social service intervention program in the community in lieu of jail booking and prosecution.").

65. Fedders, *supra* note 1, at 428.

66. *Id.* at 434. Note that Fedders also flags in the drug court context an analogous way in which, given the difficulty of determining their actual success rates, "drug-court proponents' claims come to be accepted as true." *Id.* at 419.

67. *See* Anna Roberts, *Arrests as Guilt*, 70 ALA. L. REV. 987 (2019).

68. *See, e.g.*, Michael Tonry, *Legal And Ethical Issues In The Prediction Of Recidivism*, 26 FED. SENTENCING REP. 167, 173 (2014) ("Black men are arrested at younger ages and more often than white men for reasons that have as much to do with racially differentiated exercises of police discretion as with racial differences in offending behavior. Racial profiling by the police targets blacks and Hispanics and exposes them proportionately more often than whites to arrest. Police drug enforcement policies target substances that black drug dealers sell and places where they sell them, resulting in rates of arrests for drug offenses that have been four to six times higher for blacks than for whites since the mid-1980s.").

69. Finigan v. Marshall, 574 F.3d 57, 63 (2d Cir. 2009) (rejecting idea that "an officer must have proof of each element of a crime and negate any defense before an arrest"); *see also* Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1349 (2012) (probable cause "demands less than a preponderance of the evidence, and . . . 'means less than evidence which would justify condemnation'").

however exist in our law) and for defense representation. It has implications for the claims of law enforcement narratives and characterizations to represent the truth. It also has implications for our baselines. As discussed below, LEAD and analogous programs are often presented as "lenien[t]" or a "break."[70] This kind of move can involve strange steps. For example, in one description of LEAD, it is said that "[o]nce individuals choose this [program], they are no longer offenders, but instead considered 'clients.'"[71] Under the law, however, they never were offenders, and thus are offered the "break" of avoiding a situation that they were never in.

If we endorse a situation in which someone is termed an "offender" because law enforcement has (at most) made an arrest,[72] we reframe what was a (perhaps flawed, certainly discretionary) law enforcement decision as a fact about the person arrested.[73] We thus risk contributing to a broader tendency to focus more attention on alleged wrongdoing by those subject to law enforcement than on the decision-making by those within law enforcement.[74] In discussions of LEAD and its goals, one sees this pattern again and again: the program is said to be aimed at doing something different about those who "cycle" or "churn" through the system[75] or who are—in a mixed metaphor offensive in both a literary and a moral sense—"frequent fliers who repeatedly cycle through the criminal-justice system."[76] Metaphors of cycling and churning and flying erase the role of the law enforcement agents who make the decision, again and again, to send the people in question to jail. Our focus in discussions of the criminal justice system must include those decisions.

B. "Reducing Recidivism"

One of the stated goals of LEAD is to reduce recidivism.[77] And indeed one of the stated goals of the "diversion" programs of which LEAD is one example is to reduce recidivism.[78] LEAD's results thus far have been lauded: "recidivism" is reduced by

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70. *See* discussion *infra* Section II.D.

71. Gallagher, *supra* note 17, at 229.

72. *See About LEAD*, *supra* note 8. Note that "offender" seems to be applied to all LEAD participants, even those who may have been referred via "social contact" rather than arrest.

73. *See* Natapoff, *supra* note 69, at 1317 (commenting on "the waning authority of law and evidence—and the correlatively heightened influence of law-enforcement discretion—as offenses get pettier and defendants grow poorer").

74. Alice Ristroph, *The Thin Blue Line from Crime to Punishment*, 108 J. CRIM. L. & CRIMINOLOGY 305, 330–31 (2018)

75. Fan, *supra* note 9, at 167 ("The addicts, pushers, and prostitutes churn through the criminal justice system, from the streets, to arrest, to jail, in seemingly futile repetition."); Green, *supra* note 35 ("The plan's architects hoped a new approach to dealing with low-level drug crimes would slow the number of people who repeatedly cycle through the criminal-justice system.").

76. Green, *supra* note 35 ("LEAD's architects were hopeful a new approach to dealing with low-level drug crimes would slow the number of frequent fliers who repeatedly cycle through the criminal-justice system.").

77. *About LEAD*, *supra* note 8 (answering "How will we know if LEAD works?" with the following answer: "The evaluation will consider, among other factors, whether LEAD has resulted in reductions in drug use and recidivism, whether LEAD is more cost-effective than traditional criminal justice processing, and whether LEAD has had a positive impact on a community's quality of life.").

78. *See* Fedders, *supra* note 1, at 430, n. 292 ("Diversion from formal criminal justice system processing typically involves five goals: avoidance of negative labeling; reduction of unnecessary social control;

nearly sixty percent.[79] But to use these figures without addressing their complexities again risks reinforcing the notion that an arrest (or probable cause) equates to guilt.[80] For "recidivism" means a return to criminal wrongdoing,[81] and yet in the recidivism analysis of LEAD that has thus far been conducted, the measure of the second wrongdoing is arrests and charges.[82] The measure of the first wrongdoing is at *most* an arrest: LEAD participants include those for whom probable cause, or even reasonable suspicion,[83] is not alleged to have existed, but who were referred for treatment by police officers in the absence of arrest. Thus, as with benevolently terming "clients" those who were never "offenders,"[84] we report reduced recidivism in this context after creating it as a concept. And, as with talk of "churning" and "cycling" and "flying," we obscure the role of law enforcement, so even while relying on law enforcement acts of arrest and charge, we adopt and reinforce the label "recidivist."

C. "Rehabilitative Policing"

Mary Fan describes the LEAD program as a form of "rehabilitative policing"[85] and lauds the move from a "punitive" approach to a "rehabilitative" approach.[86] Fan mentions that despite the "warm and fuzzy" associations that rehabilitation may have,[87] people have been slow to recommend it as part of the work of police officers.[88] But, she says, they are perfectly positioned to do this work, given their ability to step in early: "[w]e can go further, earlier and deeper in realizing the benefits of asking traditional criminal justice professionals to take on rehabilitative responsibilities."[89] "The role of the police in rehabilitative efforts has been

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reduction of recidivism; reduction of justice system costs; and provision of service.").

79. Beckett, *supra* note 5, at 93 ("LEAD clients were nearly sixty percent less likely to be re-arrested than their non-LEAD counterparts.").

80. *See* Roberts, *supra* note 67.

81. *Id.*

82. SUSAN E. COLLINS, HEATHER S. LONCZAK & SEEMA L. CLIFASEFI, UNIV. OF WASH.–HARBORVIEW MED. CTR., LEAD PROGRAM EVALUATION: RECIDIVISM REPORT 6 (2015) (The Recidivism Report "test[s] the relative effectiveness of the LEAD program compared to a 'system-as-usual' control condition in reducing criminal recidivism (i.e., arrests and charges) . . . .").

83. *See* Fedders, *supra* note 1, at 440–41 ("Police officers who seek out and accost people whom they believe to be drug users without the constitutionally required reasonable suspicion that crime is afoot are no longer engaged in an exclusively diversionary enterprise. However well-intentioned their motivations in initiating a 'social contact,' these officers have begun a process that could result in criminal justice entanglement, whether for a drug offense or something else.").

84. *See id*. at 418.

85. Fan, *supra* note 9, at 168 ("Converging conditions have created an opportune time to develop a rehabilitative role for policing.").

86. *Id*. at 167 ("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.").

87. *Id.* at 187.

88. *See id.* at 173 (arguing 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").

89. *Id.* at 182.

underutilized,"[90] she writes, "despite the important position of police at the threshold of the criminal justice system."[91] But there is, of course, a good reason why one might underutilize such a role, namely that such a role does not exist. Within the criminal law, rehabilitation is associated primarily with punishment. Police operate within a different realm: investigation. Between the realms of investigation and punishment lies the determination of guilt, and thus one can understand why they might involve differences of approach. Of course, if the police determine who is an "offender,"[92] then, given that guilt has been declared, the police might as well proceed to "rehabilitation." If an anti-punitive program relies on a new, expansionist view of punishment, then so be it.[93] But we shouldn't endorse this arrangement without explicitly acknowledging it.

The earlier you intervene, the more oppressive consequences you avoid,[94] but the fewer protections against oppression there are.[95] What may sound relatively "warm and fuzzy" when you contrast it with other punishment theories, such as retributivism,[96] sounds less warm and fuzzy when it involves the declaration that we need to fix legally innocent people. They say, "if it ain't broke, don't fix it," and it is at the very least problematic to declare that those vulnerable to the LEAD officer's gaze—those who are poor, perhaps homeless, and often people of color—are broken. It's problematic to assume that all who have been *convicted* are in need of rehabilitation,[97] given, for example, pressures to take a plea that may supplant one's desire to establish one's innocence,[98] but it is still more problematic in the arrest context.

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90. *Id.* at 178.

91. *Id*.

92. *See id.* at 183 ("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 . . . .").

93. *See* Alexandra Natapoff, Gideon*'s Servants and the Criminalization of Poverty*, 12 OHIO ST. J. CRIM. L. 445, 459 (2015) ("[T]he expansion of the police's welfarist role does not necessarily lessen or eliminate their law enforcement commitments. Indeed, police penetration into the welfare state often increases their punitive reach.").

94. *See About LEAD*, *supra* note 8 (answering the question "How does LEAD differ from other drug programs?" by mentioning the reductions in "costs and time entailed in booking, charging, and requiring court appearances of an individual.").

95. *See* Conner, *supra* note 23, at 90–91 ("Pre-booking diversion programs . . . may be coercive in that they act as an equivalent to custodial placement without the benefit of counsel or due process of law, under circumstances in which a detainee is impaired and there is no opportunity for a court to evaluate whether the arresting officer even had probable cause to stop, search, or arrest the person for a prostitution-related offense.").

96. *See* Fan, *supra* note 9, at 187 ("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. This portrait hardly inspires hope that police will blithely wear the warm and fuzzy hat of rehabilitation.").

97. *See* Anna Roberts, *Convictions as Guilt*, 88 FORDHAM L. REV. (forthcoming 2020).

98. Fedders mentions such pressures in the context of drug courts. Fedders, *supra* note 1, at 411, 418.

D. "Grants of Grace"

Many of the descriptions of LEAD reveal the paltry state of our baselines. Care should be taken to make sure that an embrace of developments that improve upon the baseline doesn't spill over into acceptance—or even endorsement—of the baseline. As Fedders points out, this innovation looks good in comparison to a pretty lousy pair of baselines: first, the War on Drugs and then, the highly problematic regime of drug courts.[99] Yet when characterizations of LEAD describe what the police can offer as "lenience,"[100] or "cutting someone a break,"[101] or "grants of grace,"[102] they run the risk of endorsing the notion that the mainstream criminal justice system, and/or the broader social structure that surrounds it, is normal and fair. Is there a way to view poverty, homelessness, and/or drug addiction, in a city that fails to provide sufficient housing or treatment options for its residents, that doesn't conclude that something other than jail is a "grant of grace"?

To describe LEAD—which, again, moves people into services on the basis of, at most, an arrest—as offering what it offers "instead of jail or prosecution"[103] risks suggesting that jail or prosecution is the norm for those who are arrestable. As Fedders points out, there are, to the contrary, things that the police can do in these circumstances rather than arrest.[104] More broadly, to talk about programs such as LEAD as "alternatives to incarceration" is perhaps to risk reinforcing the notion that arrest means guilt,[105] and guilt demands jail or prison, unless this or some other form of "diversion" from the norm occurs. Fedders wisely points out that the opioid policing that she discusses "remains firmly within the contours of the contemporary carceral state."[106] Do we too?

CONCLUSION

Reform efforts in the area of the opioid crisis are urgent, as Fedders powerfully describes,[107] and reform efforts can be destroyed by a desire for perfection.[108] LEAD

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99. *See* Fedders, *supra* note 1, at 418–19.

100. Fan, *supra* note 9, at 168–69 ("The policing literature is filled with concerns and cautions regarding police discretion, including the discretion to be lenient.").

101. *Id.* at 195 ("The choice in street diversion is whether to cut someone a break and keep her out of criminal processing rather than arrest.").

102. *Id.* at 196 ("[C]rucially, 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.").

103. Conner, *supra* note 23, at 90.

104. *See* Fedders, *supra* note 1, at 408-09 (mentioning "the issuance of criminal citations or even warnings.")

105. Fan, *supra* note 9, at 208 ("The crucial role of police in diversion to alternatives to incarceration has been underutilized in the fomentation of reforms reimagining traditional criminal justice roles.").

106. *See* Fedders, *supra* note 1, at 439.

107. *See generally* Fedders, *supra* note 1.

108. *See* BECKETT, *supra* note 4, at 42 (quoting a case manager affiliated with LEAD: "[N]othing's perfect, but everybody's still here."); *id.* at 49 ("[T]he first two years of LEAD's operations provide compelling evidence that collaborative reform efforts that were unimaginable just a few years ago are, in fact, in the realm of possibility.").

has imagined and achieved significant things. And the vision underlying the program is an important one: that even those in opposition may share goals of peace and safety and sustainable lives, and that there may be ways to reconstruct our society to meet them.[109]

Those who will write about LEAD's future development need, as Fedders has done, to scrutinize its positives and its risks. This scrutiny needs to occur in a way that does not overstate the positives and that factors in as full a range of negatives as possible, including the potential harms resulting from the ways in which the program is described. Uncomfortable tradeoffs and embedded assumptions must be unearthed. While we may long for a path to freedom, we must neither assume that programs such as LEAD get us there nor compound the obstacles that remain.

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109. *See* Beckett, *supra* note 5, at 94 ("As one [Seattle Police Department] Lieutenant put it, 'Traditionally, we have definitely been on opposite side[s] of most issues . . . . In the process of talking to people we realized we have the same goals and desires in what we wanted to accomplish.").