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Making Deflection the New Diversion for Drug Offenders

Kay L. Levine,* Joshua C. Hinkle,** Elizabeth Griffiths***

ABSTRACT

In this paper we argue that prosecutors ought to embrace deflection programs as an option for substance users who commit low-level offenses. Deflection programs provide services to substance users and other vulnerable populations before, or outside of, the point of arrest. They offer participants voluntary admission and wrap-around services to help them get back on their feet—out from under the threat of incarceration if they relapse. Innovators have embraced the term “deflection” because the goal is to keep the substance user out of the legal system entirely and to provide a warm handoff to service providers instead of a cold transport to county jail.

The benefits of prosecutor involvement are numerous. County-level prosecutors can, for example, positively influence police and community buy-in, coordinate programming across a much larger terrain than cities alone can handle, run interference for offenders in court, and open access to new funding streams. Moreover, their involvement in deflection partnerships would reflect a deep commitment to disentangling substance abuse treatment from criminal justice control, thereby enhancing perceptions of procedural justice in disadvantaged communities.

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INTRODUCTION

Many recently elected progressive prosecutors support revised drug prosecution policies as a way to reverse the patterns of racialized injustice, mass incarceration, and runaway spending that characterized the criminal legal system in prior decades. Reform-minded prosecutors have promised to decline petty marijuana possession charges¹ and/or to offer diversion programs to low-level offenders.² Both promises aim to keep minor offenders out of our prisons and jails and free from collateral consequences that have long strangled re-entry efforts. Guided by a convergence of compassion, fiscal responsibility, and proportionality,³ these prosecutors affirmatively reject the war imagery and “no-holds-barred” approach to drug policy that dominated at the end of the twentieth century.⁴ Instead, they adopt a “less-is-

¹ See Memorandum from Larry Krasner, Philadelphia District Attorney, to Assistant Dist. Atty’s, Phila. Dist. Attorney’s Office (March 13, 2018) (cited in EMILY BAZELON, CHARGED: THE NEW MOVEMENT TO TRANSFORM AMERICAN PROSECUTION AND END MASS INCARCERATION 368 n. 165 (2019)). Nueces County, Texas prosecutor Mark Gonzalez similarly instructed his attorneys not to file low level marijuana possession cases. Lauren-Brooke Eisen & Miriam Krinsky, *The Necessity of Performance Measures for Prosecutors*, in OXFORD HANDBOOK ON PROSECUTORS AND PROSECUTION 227, 236 (Ronald F. Wright, Kay L. Levine & Russell Gold. eds., 2021). And Marilyn Mosby, the State’s Attorney of Baltimore, implemented a no-prosecution policy for marijuana possession in January of 2020. Tim Prudente, *Baltimore Will Stop Prosecuting Marijuana Possession*, *Mosby Announces*, BALT. SUN (Jan. 30, 2019), <https://www.baltimoresun.com/news/crime/bs-md-mosby-marijuana-prosecution-policy-20190129-story.html> [perma.cc/9LLF-BARY].

² See FAIR AND JUST PROSECUTION, THE BRENNAN CTR. FOR JUSTICE, 21 PRINCIPLES FOR THE 21ST CENTURY PROSECUTOR (2018) (providing a series of guiding principles and recommendations to reduce incarceration and promote fairness; list includes increased use of diversion programs); Maurice Chammah, *These Prosecutors Campaigned for Less Jail Time – and Won*, THE MARSHALL PROJECT (Nov. 9, 2016), <https://www.themarshallproject.org/2016/11/09/these-prosecutors-campaigned-for-less-jail-time-and-won> [https://perma.cc/RBK4-Q564].

³ FAIR AND JUST PROSECUTION, *supra* note 2; Justin Miller, *The New Reformer DAs*, AM. PROSPECT (Jan. 2, 2018), <https://prospect.org/health/new-reformer-das/> [perma.cc/C6Z3-WTR8] (reformers “share the view that we need a justice system based on smart approaches, equity and compassion”); Winifred Agnew-Pauley, *Diversion in the Criminal Legal System: Examining Interventions for Drug-Involved Offenders*, in RETHINKING DRUG COURTS: INTERNATIONAL EXPERIENCES OF A US POLICY EXPORT 123, 124 (Joan Collins, Winifred Agnew-Pauley & Alexander Soderholm, eds., 2019) (“The motivations for implementing diversion programmes are varied and wide-ranging, including, for example, introducing a greater emphasis on public health outcomes; addressing the stigma associated with, and the criminogenic influence of, formal contact with the CLS; lessening the burden on criminal justice resources, such as overcrowded prisons; and improving the cost-effectiveness of the CLS[.]”) (internal citations omitted).

⁴ Daniela Barberi & Faye S. Taxman, *Diversion and Alternatives to Arrest: A Qualitative Understanding of Police and Substance Users’ Perspective*, 49(4) J. DRUG ISSUES 703, 704 (2019) (noting that after the “war on drugs” was implemented, law enforcement agencies adopted a “war mentality” that included the creation of drug courier profiles, reckless stop and frisk policies, rampant traffic stops, and excessive use of drug-sniffing dogs) (internal citations omitted); John Pfaff, *Boston’s New DA Pushes Back Against Prosecutors’ Punishment-Centric Point of View*, THE APPEAL (Nov. 14,

more” perspective on how to respond to minor law violations, and diversion features prominently on this reform landscape.

While diversion programs have likely helped thousands of offenders and may have saved thousands of dollars,⁵ they do not go far enough. Instead of merely promising not to indict or convict low-level arrestees on drug or drug-related charges, elected prosecutors in pursuit of a minimalist strategy must strive to keep persons afflicted with substance abuse disorders out of the legal system at the earliest possible intercept point—the point of arrest.⁶ Funneling a person out of the system post-arrest and post-booking, even with a promise of non-prosecution, is simply too late because the arrest and booking process itself imposes a form of punishment and stigma that can be hard to undo. Indeed, the collateral consequences of arrest are enhanced by the digital footprint that is created via internet mugshot websites. These sites can permanently stigmatize even those arrestees who are never charged, and they are nearly impossible to scrub.⁷ The arrest and booking process also imposes costs on the system, costs that grow with each night in jail and every court appearance until the diversion offer is made and accepted. In other words, to achieve real gains in compassion, fiscal responsibility, and proportionality, elected prosecutors ought to consider implementing pre-arrest *deflection networks* as a supplement to their existing approaches to reduce harm to low-level offenders.

As of the time of this writing, hundreds of deflection programs exist throughout the United States.⁸ They have largely sprung up in the past 5 years, and many of

2018), <https://theappeal.org/bostons-new-da-pushes-back-against-the-punishment-centric-point-of-view-of-prosecutors/> [perma.cc/PRQ8-Q9PZ].

⁵ For a review of the literature assessing the effectiveness of prosecutor-led diversion programs, see Ronald F. Wright & Kay L. Levine, *Models of Prosecutor-Led Diversion in the US and Beyond*, 4 ANN. REV. OF CRIMINOLOGY 331–51 (2021).

⁶ See Maximo Langer, *Penal Abolitionism and Criminal Law Minimalism: Here and There, Now and Then*, 134 HARV. L. REV. 1, 27 (2020). Minimalism requires that “criminal law should only be used as a last resort, only when no other social responses or public measures would suffice to adequately advance a legitimate goal.” *Id.* It is related to the *ultima ratio* principle, which insists that “less harmful responses or measures, including noncriminal ones, be adopted if these responses or measures would adequately advance a legitimate goal[.]” *Id.* at 27–28. Langer contends that this principle “could be a mandate” for law enforcement and prosecutors to avoid using arrest, prosecution, or any other tool of the criminal legal system if a non-criminal tool would suffice to address a problem. *Id.* at 29 (citing Russell M. Gold, *Beyond the Judicial Fourth Amendment: The Prosecutor’s Role*, 45 UC DAVIS L. REV. 1591 (2014) (arguing in support of underenforcement of law by prosecutors)).

⁷ SARAH ESTHER LAGESON, *DIGITAL PUNISHMENT: PRIVACY, STIGMA, AND THE HARMS OF DATA-DRIVEN CRIMINAL JUSTICE* (2020).

⁸ Barberi & Taxman, *supra* note 4 (noting that by mid-2018, the Police Assisted Addiction Recovery Initiative (PAARI), an organization that supports the development of voluntary police-led addiction referral programs, had approximately 260 law enforcement partners). This was up from 20 departments just a few years earlier. Davida M. Schiff et al., *A Police-Led Addiction Treatment Referral Program in Gloucester, MA: Implementation and Participants’ Experiences*, 82 J. SUBSTANCE ABUSE TREATMENT 41, 42 (2017) (noting that more than 20 police departments in 29 states have affiliated with PAARI); see also Jennifer D. Wood, *Regulating Through Enrolment: Emerging Conceptions of Police as Public Health Interventionists*, in CRIMINAL JUSTICE AND REGULATION

them are based on a model developed first in Seattle—colloquially known as LEAD (Law Enforcement Assisted Diversion).⁹ While they take different forms, deflection programs stem from two common beliefs: (1) to get better, substance users need treatment, not criminal justice intervention or the stigma of an arrest, and (2) police as first responders can be integral to facilitating entry into treatment.

Departments that embrace deflection encourage their officers to re-conceptualize the role of the police, enlarging the “protect and serve” mission to include public health intervention for vulnerable populations in addition to law enforcement and other service duties.¹⁰ The premise goes like this: if, rather than making an arrest, a police officer helps a substance user get treatment, then she can keep that person out of the legal system in the short term and better his or her chances of remaining out of the system in the long term. The officer does not provide the treatment herself—she calls a case worker, who in turn assesses the user’s needs and finds a rehab facility or program to meet those needs. Participation in the program is entirely up to the user, and users can participate more than once. Moreover, because participation is not court-mandated, persons with substance abuse disorders are not under threat of criminal sanction if they relapse.

Given the co-occurrence of crime and substance abuse in many instances, as well as the bi-directional causal arrow we can often draw between these two behaviors,¹¹ reducing the level of substance abuse in the population is a positive not

REVISITED: ESSAYS IN HONOUR OF PETER GRABOSKY 51, 56 (Lennon Y.C. Chang & Russell Brewer, eds., 2018) (observing that, as of 2015, 220 police departments in the United States alone are training officers to administer naloxone on site to reverse opioid overdose).

⁹ LAW ENFORCEMENT ASSISTED DIVERSION (LEAD), KING COUNTY, *Diversion and Reentry Services*, <https://kingcounty.gov/depts/community-human-services/mental-health-substance-abuse/diversion-reentry-services/lead.aspx> [perma.cc/XH5H-NXDN] (last updated 2021).

¹⁰ Wood, *supra* note 8. This approach is consistent with larger calls for the police to “re-imagine themselves as ‘guardians’ rather than ‘warriors’” and to adopt “health and welfare-oriented values” when dealing with order maintenance duties or vulnerable and mentally ill populations. Jennifer D. Wood & Amy C. Watson, *Improving Police Interventions During Mental Health-Related Encounters: Past, Present and Future*, 27(3) POLICING & SOC’Y. 289, 289 (2017).

¹¹ Lynne Roberts & David Indermaur, *Timely Intervention or Trapping Minnows? The Potential for a Range of Net-Widening Effects in Australian Drug Diversion Initiatives*, 13(2) PSYCHIATRY, PSYCHOL. & L. 220, 221 (2006) (“The first pathway posits a causal pathway from substance abuse to crime. ... The second pathway posits a causal pathway from crime to substance use. ... The third pathway posits that both illicit drug use and offending share common roots.”). See also Andrea Yatsco, et al., *Alternatives to Arrest for Illicit Opioid Use: A Joint Criminal Justice and Healthcare Treatment Collaboration*, 14 SUBSTANCE ABUSE: RES. & TREATMENT 1, 1 (2020). But see Agnew-Pauley, *supra* note 3, at 126 (noting that the relationship between crime and substance abuse is complex, rather than linear; recreational users, for example, do not resemble drug dependent people in terms of the likelihood that they will violate the law).

The connection between crime and substance abuse has also been noted by prosecutors for more than a decade. For example, in 2009, the Pennsylvania District Attorney’s Association filed an amicus brief in a state supreme court case involving insurance coverage for alcohol and drug abuse treatment; its brief warned that “all too often, untreated addicts commit crime and pose other threats to public safety,” and then urged the court to require insurance coverage for treatment because “public safety, and the maintenance of law and order in our communities, is directly at stake.” Brief of Amicus Curiae

just for public health reasons, but also for rates of crime and disorder in communities. Warm responses from police officers in times of crisis also help improve police-community relationships and build trust that might generate payoffs in criminal investigations down the road. Trust and respect form the foundation of procedural justice, which research has shown deeply influences how people feel about their interactions with authority figures, particularly in the criminal justice space.¹²

To the extent they have been evaluated, deflection programs post impressive results in terms of reduced recidivism rates.¹³ Persons with substance abuse disorders generally report positive feelings about their experiences and express deep appreciation for having been given the opportunity to heal outside of a carceral environment.¹⁴ These programs do have significant start-up costs in terms of developing community partnerships and training police officers, but they are sometimes supported by grant funds at the state and federal level and tend to gain traction over time—both with police and substance user populations.¹⁵ In short, they appear to be quite successful at achieving their objectives, and police chiefs around the country are speaking out more and more about their advantages.¹⁶

With a few notable exceptions,¹⁷ prosecutors are largely absent from the

Pa. Dist. Atty's Ass'n at 1, *Ins. Fed'n of Pa., Inc. v. Commonwealth*, 970 A.2d 1108 (Pa. 2009).

¹² TOM R. TYLER, WHY PEOPLE OBEY THE LAW (1990); Tom R. Tyler, *Enhancing Police Legitimacy*, 593(1) AM. ACAD. OF POL. & SOC. SCI. 84 (2004); *see generally* Rick Trinkner & Ellen S. Cohn, *Putting the 'Social' Back in Legal Socialization: Procedural Justice, Legitimacy and Cynicism in Legal and Nonlegal Authorities*, 38(6) L. & HUM. BEHAV. 602 (2014); Tracey Meares, *Policing and Procedural Justice: Shaping Citizens' Identities to Increase Democratic Participation*, 111(6) NW. L. REV. 1525 (2017). On the importance of procedural justice for reducing the risk of recidivism, *see* Erica Penner et al., *Procedural Justice Versus Risk Factors for Offending: Predicting Recidivism in Youth*, 38(3) L. & HUM. BEHAV. 225 (2014).

¹³ *See infra* Part IB; *see infra* notes 63–66 (describing evaluations of currently operating deflection programs in Seattle, Washington, Gloucester, Massachusetts, and other cities).

¹⁴ *See infra* Part IB; *see infra* notes 63–66 (describing evaluations of currently operating deflection programs in Seattle, Washington, Gloucester, Massachusetts, and other cities).

¹⁵ Barberi & Taxman, *supra* note 4 (describing results of a qualitative study with both police and substance users to gauge perceptions of deflection programs). The authors note that 70% of the departments in their study reported “no issues with funding, and 40% received donations from the community.” *Id.* at 709.

¹⁶ *See* Lars Paul, *Meeting Opioid Users Where They Are: A Service Referral Approach to Law Enforcement*, 79(3) N.C. MED. J. 172 (2018) (written by the police captain of Fayetteville, North Carolina, describing his program that provided services to twenty-two people during its first year of operation); Michael Botieri, Sara Cloud & Peter Smulowitz, *Guide Patients into Treatment Through Outreach Visits*, RELIAS MEDIA (Oct. 1, 2016), www.reliamedia.com/articles/138639 [<https://perma.cc/3S23-7CBR>] (includes description by the police chief of Plymouth, Massachusetts of his program called Project Outreach). Research indicates that “active involvement of police leaders”—promoting both the program and a change in mind-set—is essential for program success. Barberi & Taxman, *supra* note 4, at 709.

¹⁷ One important exception is the Seattle LEAD program, described in Part IB of this paper, as Dan Satterberg (Prosecuting Attorney of King County, Washington) was one of the originators of the

conversation about deflection. They appear to be watching from the sidelines while continuing to invest in their own office diversion programs, participating in accountability courts run by judges or, more recently, just refusing to prosecute those arrested for low-level drug offenses. Academic commentary about deflection has been missing as well. There are scores of articles written about diversion programs¹⁸ as well as significant interest in widespread declination approaches,¹⁹ but rigorous study of deflection programs is in its infancy,²⁰ and law review commentary is non-existent. This innovation appears to be the best-kept secret in criminal justice policy.

The time has come for academics to pay attention to deflection and—more importantly—for prosecutors to get involved in these programs. Both groups need to recognize deflection as an additional, valuable response to low-level offending and to promote the idea that forward-thinking drug policy means creating alternatives other than arrest-but-don't-prosecute when dealing with drug offenders who commit minor crimes.²¹ More broadly, embracing deflection requires us to prioritize regulatory approaches to criminal justice, not just punitive ones.

In this essay, we urge reform-minded prosecutors to become partners and community leaders in the deflection effort. Rather than ceding the initiative to police agencies or simply declining to prosecute low-level drug cases, prosecutors should

program. Also notable is the prosecutor's office in Burlington, New Jersey, which has spearheaded this effort for its population. That office will be profiled in Part III of this paper.

¹⁸ For a capsule of the academic writing about diversion programs, see Wright & Levine, *supra* note 5.

¹⁹ David Greenwald, *Study Finds Declining to Prosecute Low Level Offenses Reduces Crime*, THE DAVIS VANGUARD (March 30, 2021) <https://www.davisvanguard.org/2021/03/study-findings-declining-to-prosecute-low-level-offenses-reduces-crime/> [perma.cc/4Y34-GX86] (describing a recent study of the Suffolk County DA conducted by Amanda Agan, Jennifer Doleac and Anna Harvey). See also Jenny Roberts, *Crashing the Misdemeanor System*, 70 WASH. & LEE L. REV. 1089, 1100 (2013) (suggesting that vigorous defense of misdemeanors, instead of quick guilty pleas, would force prosecutors to “decline prosecution in more cases[.]” which would, in turn, discourage police from arresting people for these crimes).

²⁰ Andrea J. Yatsco et al., *Developing Interagency Collaboration to Address the Opioid Epidemic: A Scoping Review of Joint Criminal Justice and Healthcare Initiatives*, 83 INT'L. J. DRUG POL'Y 1 (2020) (after reviewing studies conducted over the previous ten years, the authors conclude that there are only six rigorous evaluation studies of opioid pre-arrest collaborations between criminal justice and healthcare partners; most had small samples and none were conducted on programs in the southern states).

²¹ Some scholars have suggested other alternatives to diversion and non-prosecution, such as creating pre-arrest prosecutorial review of cases, see Adam Gershowitz, *Justice on the Line: Prosecutorial Screening Before Arrest*, 2019 U. ILL. L. REV. 833 (2019), and authorizing Fourth Amendment challenges to arrests when the government never had any intention to follow through with a prosecution. See Surell Brady, *Arrests Without Prosecution and the Fourth Amendment*, 59 MD. L. REV. 1 (2000). See also Roberts, *supra* note 19, at 1095 (suggesting a number of institutional responses to overwhelming misdemeanor caseload, with a particular focus on improved and sustainable defense advocacy). Assessment of these other models as tools for harm reduction is beyond the scope of this paper.

add deflection programs to the menu of options available for three principal reasons. First, simply refraining from prosecution reduces the size of the criminal legal system footprint, but it does not do enough to help the population of users who have been stepped on for far too long. Second, while deflection consumes more resources than declination, proactive investment in recovery services will save jurisdictions money in the long run by reducing the likelihood of overdoses and future criminal acts by substance users. Third, because deflection is less radical than non-prosecution and does not trigger separation of power concerns, it might be more politically acceptable to a wider set of constituencies.

There are multiple advantages to having prosecutors involved in these programs along with local law enforcement.

First, only county prosecutors can manage case-level interventions for substance users. Getting arrest warrants dismissed, preventing the filing of probation or parole violations for substance use, and convincing the court not to issue a failure to appear on a pending case during the time the user is in treatment all fall within a prosecutor's purview.

Second, prosecutors can coordinate a consistent response among multiple, fragmented police agencies and county-level health care providers operating within county borders. Vocal advocacy at the prosecutorial level signals full commitment by the whole county to keeping minor drug offenders out of the legal system. Police agencies are the means of direct contact with the populations affected, but the county prosecutor sets the overall tone for what needs to be done. Enhancing collaboration between police and prosecutors should help to ensure a shared commitment to common goals toward harm reduction.

Third, while deflection programs have generally been successful in reducing recidivism, police response to such programs has been mixed, as officers have complained about the additional work and having to fulfill a "social worker" role.²² Including prosecutors in the partnership can increase police buy-in and provide a concentrated, committed voice heading deflection efforts.

Lastly, studies have shown that vulnerable populations in high-crime, low-income communities are often distrustful of police and unwilling to cooperate with them—participants cited negative interactions, ineffectiveness, excessive force, and brutality as contributing factors.²³ Prosecutors serving as leading voices in deflection

²² See Rebecca Neusteter & Mawia Khogali, *Emerging Issues in American Policing*, VERA (Sept. 2018), <https://www.vera.org/publications/emerging-issues-in-american-policing-digest/volume-5/digest-5> [perma.cc/858L-3K6U]. Thomas Breen, *Pilot Effort Fails. Who's to Blame?*, NEW HAVEN INDEP. (Jan. 28, 2020), https://www.newhavenindependent.org/index.php/archives/entry/lead_report/ [perma.cc/8VHS-V88R]. See also *infra* Part IIB discussing Atlanta's PAD program.

²³ See Nancy La Vigne et al., *How Do People in High-Crime, Low-Income Communities View the Police?*, JUST. POL'Y CTR. (Feb. 2017), http://www.urban.org/sites/default/files/publication/88476/how_do_people_in_high-crime_view_the_police.pdf [perma.cc/5B4V-7F9P]; Patrick J. Carr et al., *We Never Call the Cops and Here is Why: A Qualitative Examination of Legal Cynicism in Three Philadelphia Neighborhoods*, 45

programs can ensure that this distrust is not a barrier to substance users getting necessary treatment.

The argument unfolds as follows. In Part I, we describe the origins and operation of deflection programs that currently exist in the United States and present the published empirical evidence about their effect on recidivism rates, as well as police and user population responses to them. We specifically discuss the LEAD template from Seattle, in addition to other models in Massachusetts and Texas. In Part II, we take a closer look at how conventional policing differs from the pre-arrest diversion program that was recently instituted in Atlanta. Using data from an original dataset of all 2012 felony drug arrests in Atlanta, we contrast the conventional approach to handling drug possession cases to the pre-arrest diversion approach and speculate about the savings that might have accrued had pre-arrest diversion been implemented years earlier. In Part III, we argue that prosecutors ought to become participants in and champions of county-wide deflection partnerships. As New Jersey's Burlington County Prosecutor's Office is the national leader in this effort, features of the Burlington program appear prominently in this discussion. We conclude on a comparative note, assessing how deflection measures up against conventional prosecution, diversion, and non-prosecution of substance users.

I. UNDERSTANDING DEFLECTION PROGRAMS NATIONWIDE

An unhealthy relationship between the criminal legal system and persons with substance abuse disorders dominated U.S. drug policy for much of the past 50 years. For decades, federal and state governments relied principally on the legal system to respond aggressively and punitively to substance abuse, embracing a War on Drugs mentality that began with the Nixon Administration²⁴ and continued unabated into

CRIMINOLOGY 445, 457–58 (2007); Breen, *supra* note 22; *see also infra* Part IIB discussing Atlanta's PAD program.

For very recent data from Los Angeles, *see Police and Community Relations Survey*, STUDY LA report at 16-17 (collecting survey data from residents in fall 2020 concerning their attitudes about police), <https://academics.lmu.edu/study1a/studies/policeandcommunityrelationsurvey/perma.cc/JHL3-VX7H>].

²⁴ Ronald Reagan's War on Drugs in the mid-1980s, which built upon Richard Nixon's War on Drugs that began in 1971, linked race to behavior that leaders sought to pathologize, thus intertwining criminal justice impacts with the devastation of black and brown communities. *See* Cigdem Sirin, *From Nixon's War on Drugs to Obama's Drug Policies Today: Presidential Progress in Addressing Racial Injustices and Disparities*, 18 RACE, GENDER & CLASS 82 (2011); Craig Reinerman & Harry G. Levine, *The Crack Attack: Politics and Media in the Crack Scare*, in CRACK IN AMERICA: DEMON DRUGS AND SOCIAL JUSTICE 18 (Craig Reinerman & Harry G. Levine, eds., 1997); Troy Duster, *Pattern, Purpose, and Race in the Drug War: The Crisis of Credibility in Criminal Justice*, in CRACK IN AMERICA: DEMON DRUGS AND SOCIAL JUSTICE 18 (Craig Reinerman & Harry G. Levine, eds., 1997).

The construction of perceived links between substance use, fear and minority populations in the United States did not, of course, begin in the Vietnam Era. Various minority populations have been targeted when they have posed threats to labor opportunities for poor white communities. For example, Chinese immigrants were stigmatized as dangerous opium smokers in the late 19th century in order to denigrate the Chinese labor supply in the American West. Sirin, *supra*, at 84; Kathleen Auerhahn, *The*

the early 21st century. With increasing recognition that criminal legal system approaches carry exorbitant costs but inevitably lead to disastrous results—such as mass incarceration, the decimation of inner-city populations, and the erosion of public trust in the police in many communities—and utterly fail to reduce levels of substance abuse, jurisdictions in recent years have turned to milder, more fiscally sound alternatives.

These milder alternatives include accountability courts run by judges and diversion programs run by prosecutor's offices. Both aim to keep persons with substance abuse disorders out of the full court press of the criminal legal system and to provide treatment rather than punishment. Yet despite their ostensible treatment goals, both accountability courts and prosecutor-led diversion programs remain firmly embedded in the legal system. They are designed and controlled by criminal justice actors whose interests are—or might be perceived as—contrary to the interests of the offender population.

Moreover, the gateway to both kinds of programs is arrest. A substance abuser who is arrested has his or her case forwarded to the prosecutor's office where a decision is made to file a criminal case or to divert. Suitable candidates are offered the chance to complete the diversion program under the prosecutor's office guidance, knowing that if they fail to complete the program their case will be returned to the criminal court for conventional prosecution. If the case is filed and the defendant is transferred to drug court, a judge usually first requires the offender to plead guilty and then keeps track of his or her behavior to ensure compliance with the terms of the program. Failure to comply leads to immediate imposition of criminal sentence. In sum, because these programs reside entirely in the criminal justice sphere, criminal sanctions are ever-present as a hammer to induce the defendant to enter or stay in treatment. This architecture leads many users to feel as if they are constantly under surveillance and set up to fail.²⁵

Both accountability courts and prosecutor-led diversion programs have been in existence since the 1990s, and both represent a significant improvement over the conventional law-and-order approach associated with the War on Drugs.²⁶ Proponents have trumpeted their successes in terms of reduced recidivism and cost-

Split Labor Market and the Origins of Antidrug Legislation in the United States, 24 L. & SOC. INQUIRY 411 (1999). Similarly, African-American persons became the subjects of a cocaine panic in the American South in the early twentieth century, as they were seen as labor-market competition for lower-class white people in farming communities. Auerhahn, *supra*.

²⁵ See ISSA KOHLER-HOUSEMANN, *MISDEMEANORLAND: CRIMINAL COURTS AND SOCIAL CONTROL IN AN AGE OF BROKEN WINDOWS POLICING* (2019) (observing that in New York City misdemeanor courts, low-level defendants are marked and tracked, even if not convicted, by prosecutor and court practices).

²⁶ Susan E. Collins et al., *Seattle's Law Enforcement Assisted Diversion (LEAD): Program Effects on Recidivism Outcomes*, 64 EVALUATION & PROGRAM PLAN. 49, 54 (2017) (internal citations omitted) (“[S]ome programs targeting recidivism, including mental health court, drug court, and tailored psychosocial interventions, are superior to mainstream criminal justice processing across various outcomes.”)

savings to the jurisdictions that employ them, but substance abuse researchers and forward-thinking police chiefs have questioned these assertions or have otherwise been unsatisfied with these outcomes. They have worried that the stigma associated with the criminal legal system begins with arrest and that too many people in diversion programs and accountability courts end up with criminal convictions and/or jail stays as a result of noncompliance issues.²⁷ These approaches, like incarceration, sometimes limit opportunities for low-level offenders to re-enter the workforce or find suitable housing, which can inspire further criminal activity in illegal marketplaces.²⁸ In short, diversion programs and accountability courts fall short when it comes to reducing rates of substance abuse and rates of crime. Further, they have failed to significantly erode the links between substance abuse and criminal activity.

Frustrated with the existing alternatives, addiction researchers suggested we should find a way to keep drug users out of the system entirely by disentangling the provision of treatment, avoidance of stigma, and financial benefits of non-prosecution from the fact of arrest. In other words, they suggested that we provide this trifecta of benefits at an earlier intercept point, thus saving even more money and further improving the substance user's chances for recovery. When this set of ideas was shared with visionary police officials and community leaders who were reeling from the tragedy of opioid addiction and overdose in the early years of the Obama administration, deflection programs emerged.

²⁷ On the shortcomings of prosecutor-led diversion programs, see Wright & Levine, *supra* note 5; see also Collins et al., *supra* note 26, at 54 (reporting that “systematic reviews of diversion programs have indicated mixed findings.”). On the shortcomings of drug courts, see Maia Szalavitz, *How America Overdosed on Drug Courts*, PAC. STANDARD (May 3, 2017); *Drug Courts Are Not the Answer: Toward a Health-Centered Approach to Drug Use*, DRUG POL’Y ALLIANCE (March 21, 2011), <https://drugpolicy.org/drugcourts> [<https://perma.cc/8JCR-MWYM>]; Meredith Emigh, *The Efficacy of Drug Courts*, EBP SOC’Y (Sep. 17, 2017). Drug courts and diversion programs vary widely by jurisdiction, often cherry-pick participants to increase the chance of successful completion and fail to establish suitable control groups for robust comparison of outcomes. *Id.* Erin Collins argues that drug courts have spread not because they are empirically sound models, but because judges see them as a mechanism to restore judicial control after decades of having their authority reduced through sentencing guidelines and the like. Erin R. Collins, *The Problem of Problem-Solving Courts*, 54 UC DAVIS L. REV. 1573 (2021).

²⁸ Collins et al., *supra* note 26, at 49 (citing D.R. Fletcher, *Offenders in the Post-Industrial Labor Market: Lubricating the Revolving Door?* 1 PEOPLE, PLACE & POL’Y 80–89 (2013)); see also Albert M. Kopak, *Behavioral Health Indicators and Time-to-Rearrest in an Adult Pre-Arrest Diversion Program*, 38 BEHAV. SCI. L. 66, 67 (2020) (noting that policies that introduce barriers to employment compromise public safety because stable work enables desistance from crime).

A. *The Components of Deflection*

As the name suggests, deflection programs—also called pre-arrest diversion programs—were created to block entry into the criminal legal system for persons whose criminal violations stem from substance abuse disorders (SUD).²⁹ In essence, they encourage officers to refrain from making an arrest for a low-level offense when the offender is a substance user. Rather than making an arrest, officers are trained to consider connecting the substance user with a caseworker, who can get that person immediately into treatment for SUD. This is a significant change from “the traditional pro-arrest policing culture.”³⁰ It assumes that “police, armed with enhanced knowledge of vulnerability, will make more informed dispositional decisions when considering the options of arrest, transport to a [] facility or referrals to [] resources.”³¹ Deflection proponents assert that by using this approach, jurisdictions can simultaneously improve public safety, reduce criminal behavior, and improve health outcomes for participants with SUD.³²

Deflection programs grow from, and are infused with, a philosophy of harm reduction.³³ They strive to reduce the harms associated with the use of psychoactive drugs for people who are unable or unwilling to stop completely by themselves. They target regular but serious drug users (many of whom might also be suffering from untreated mental illness or other conditions that co-occur with poverty), and focus on preventing harm, not preventing drug use per se.³⁴ Treatment, medication

²⁹ Some programs also address crime related to untreated mental health conditions; others provide pre-arrest diversion for low-level offenses without ties to substance abuse or mental health conditions. See, e.g., Albert M. Kopak & Gregory A. Frost, *Correlates of Program Success and Recidivism among Participants in an Adult Pre-Arrest Diversion Program*, 42 AM. J. CRIM. JUST. 727 (2017) (discussing the Pre-Arrest Diversion program in Leon County, Florida). For purposes of this paper, we will focus on the substance abuse dimension of deflection.

³⁰ Barberi & Taxman, *supra* note 4, at 709. One police leader in their study put it bluntly: “We can’t arrest our way out of this problem.” *Id.* Two addiction researchers writing at the turn of the twenty-first century emphasized that the shift would not be easy because “officers themselves have become acculturated to criminal justice solutions, quick to dismiss treatment or harm reduction measures[.]” Barry Goetz & Roger E. Mitchell, *Pre-Arrest/Booking Drug Control Strategies: Diversion To Treatment, Harm Reduction and Police Involvement*, 33 CONTEMP. DRUG PROBS. 473, 484 (2006) (citing Barry Goetz & Roger E. Mitchell, *Community Building and Reintegrative Approaches to Community Policing: The Case of Drug Control*, 30 SOC. JUST. 222 (2003)).

³¹ Wood, *supra* note 8, at 57.

³² The deflection model envisions prevention of future offending, as well as prevention of entry into the legal system for the observed offense. Jac Charlier, *Want to Reduce Drugs in Your Community? You Might Want to Deflect Instead of Arrest*, POLICE CHIEF (Sep 2015) 30, 30–31; Paul, *supra* note 16 (describing program in Fayetteville, North Carolina).

³³ Collins et al., *supra* note 26, at 49 (citing Susan E. Collins et al., *Harm Reduction: Current Status, Historical Highlights and Basic Principles*, in HARM REDUCTION: PRAGMATIC STRATEGIES FOR MANAGING HIGH RISK BEHAVIORS (G. Alan Marlatt, Mary E. Larimer & Katie Witkiewitz, eds., 2nd ed. 2011) (noting that harm reduction approaches entail “meeting people where they are” in their communities and in their motivation to change their behavior)).

³⁴ Michelle Wright, *Atlanta’s Pre-Arrest Diversion Initiative Offers an Updated Model for Law*

and counseling are all offered on a voluntary basis.³⁵ Although there are several “pathways” that programs have adopted to deliver services, addiction researchers Daniela Barberi and Faye Taxman describe the five existing models as follows:

- The Self-Referral Pathway (an individual goes voluntarily to the police station to ask for help);
- The Prevention Pathway (an officer initiates the referral process in the hospital, usually after a failed overdose attempt);
- The Intervention Pathway (after first making a criminal justice contact with the person, an officer initiates referral to treatment instead of arrest);
- The Active Outreach Pathway (an officer identifies the individual from a prior contact as someone in need of services); and
- The Naloxone Pathway (an officer uses Naloxone on the scene of an attempted overdose and then tries to connect the survivor to treatment once he or she is conscious).³⁶

As suggested by Barberi and Taxman’s taxonomy, the intercept point varies between programs. In certain programs, the substance user is first contacted for an observable criminal violation and then referred to treatment, where referral to treatment occurs in place of arrest. In other programs an officer can refer someone whom he or she knows to be a substance abuser, who has in the past committed—and may in the future commit—crimes as a result of addiction. This latter type of contact is called a social referral, or a social contact referral, so as to distinguish it from a criminal contact referral. Some programs begin at the point of non-fatal overdose where an outreach team contacts the survivor shortly after release from the hospital. Others invite anyone experiencing SUD to come to the police station to request help. If users have active warrants, program staff help them to clear those warrants or to postpone court dates until after treatment. The objective in all settings is to provide non-judgmental and non-coercive referral to treatment.

Whichever pathway(s) the program incorporates, deflection models differ from diversion and accountability courts in two important ways. First, both diversion and

Enforcement Assisted Diversion, DRUG POL’Y ALL. (Oct. 30, 2017), <https://drugpolicy.org/blog/atlantas-pre-arrest-diversion-initiative-offers-updated-model-law-enforcement-assisted> [perma.cc/4N53-FT5L].

³⁵ We acknowledge that the Intervention Pathway, described herein, in which the police officer retains the choice to arrest or to refer the user for treatment, complicates the meaning of “voluntary” in deflection models. Because the officer need not make the referral at the outset, the user might feel steered to accept treatment because arrest remains an option. However, the empirical evidence collected from users who entered programs through intervention pathways does not suggest that this is perceived as a problem by the users. Future research attention should be paid to (and training should focus on) how police communicate the handoff to users, including clearly articulating that the decision to seek treatment is entirely the user’s and that the decision is not coercively encouraged by the threat of legal processing or sanction.

³⁶ Barberi & Taxman, *supra* note 4, at 705.

accountability courts hold the threat of criminal sanction over the head of the user as a “stick” to get him or her to take treatment seriously. The possibility of criminal conviction and the imposition of incarceration remains ever-present as a way to motivate the user to follow through with treatment. Second, because both diversion and accountability courts bring some people into the legal system who otherwise would have escaped criminal justice surveillance, they threaten to widen the net of social control. Lynne Roberts and David Indermaur sum up the diversion and accountability court downsides like this:

[I]ndividuals who would not otherwise have been charged may be arrested and appear in court simply because diversionary options are available. [Moreover,] many diversion programs require and depend on the offender admitting guilt to at least some of the charges they are facing. [Third,] diversion programs may be offered to individuals who fall outside the target group the program was designed for, [such as] when an offender who is not facing a sentence of imprisonment is placed on a drug court program. ... The temptation will be to reach into the vast supply of ‘needy’ cases to provide help rather [than] use the drug court as an alternative to custody... [Lastly,] many offenders diverted to the treatment net return to the criminal justice net when they fail to complete the diversionary program successfully.³⁷

Deflection programs, by contrast, keep a person with substance abuse issues out of the legal system entirely. They do not use the threat of a criminal sanction to coerce someone into treatment³⁸ or to influence his or her decision about whether to remain in treatment. And because they offer treatment outside the context of arrest and prosecution, deflection programs pose little risk of widening the net of criminal justice surveillance for vulnerable populations, reduce the stigma associated with criminal justice contacts,³⁹ and work to dilute (rather than to reinforce) the unhealthy connection between criminal justice institutions and public health needs for persons with SUD.

Deflection programs also differ from approaches that simply train officers to provide Naloxone on-site. Naloxone-only programs train and equip officers to provide medication when they respond to a person who appears to be suffering from an opioid overdose. In so doing, they are responsible for saving unknown numbers

³⁷ Roberts & Indermaur, *supra* note 11, at 225–28. The authors also note that failures to comply are more likely to be detected due to increased surveillance through the diversion program or drug court, because these programs subject clients to “close[] scrutiny[.]” *Id.* at 227.

³⁸ *But see supra* note 35, regarding the potentially coercive effect in the intervention pathway, because the user knows that the officer can make an arrest if he or she does not agree to treatment.

³⁹ We say “reduce stigma” rather than “eliminate stigma” because, as Tracey Meares notes, many people experience stigma just from contact with the police even if they are not in fact arrested. Meares, *supra* note 12.

of lives in jurisdictions across the US and have been an extremely valuable addition to the police toolkit for crisis response.⁴⁰ But Naloxone-only approaches do not provide follow-up services after the overdose event, making them considerably more limited in terms of helping with long-term recovery than the deflection approaches described herein.⁴¹

The same is true for straight non-prosecution approaches; a person who is arrested but not prosecuted exits the legal system but does not receive help or services of any kind. Addiction researchers note that to achieve “both short and long-term improvements in criminal offending, drug use and social functioning[,]” persons with SUD need treatment.⁴²

Finally, in contrast to the criminal legal system, which works through a series of interlocking but otherwise independent components, deflection programs adopt a team approach from the start. They originate and draw strength from partnerships between law enforcement, first responders and medical service providers, such as drug addiction recovery programs and hospitals.⁴³ Collaboration and frequent communication among stakeholders are regarded as essential components of program success.⁴⁴ But team members are not always professionals, in the usual sense of that word. Most programs employ case workers who are recovering addicts to smooth the participant’s path into treatment in both the short and the long term. The case worker diagnoses the extent of the person’s needs up front, facilitates his or her entry into immediate treatment, and continues to provide peer support and

⁴⁰ For a description of naloxone programs see Karla Wagner et al., *Training Law Enforcement to Respond to Opioid Overdose with Naloxone: Impact on Knowledge, Attitudes, and Interactions with Community Members*, 165 DRUG & ALCOHOL DEPENDENCE 22 (2016); Chin Hwa Dalem et al., *Beyond Rescue: Implementation and Evaluation of Revised Naloxone Training for Law Enforcement Officers*, 34 PUB. HEALTH NURSING 516 (2017).

⁴¹ See Laurie Chassin et al., *Substance Use Treatment Outcomes in a Sample of Male Serious Juvenile Offenders*, 36 J. SUBSTANCE ABUSE TREATMENT 183, 184 (2009) (noting that “treatment must last long enough to produce stable changes, and that those with severe drug problems or co-occurring disorders usually require treatment that lasts at least 3 months”).

⁴² Yatsco et al., *supra* note 11, at 6 (citing M.L. Prendergast et al., *The Effectiveness of Drug Abuse Treatment: A Meta-Analysis of Comparison Group Studies*, 67 DRUG & ALCOHOL DEPENDENCE 53 (2002)).

⁴³ See Kathleen Hartford et al., *Pre-arrest Diversion of People with Mental Illness: Literature Review and International Survey*, 24 BEHAV. SCI. L. 845 (2006) (reviewing programs in the United States, Australia, Canada, New Zealand, and the United Kingdom, and noting that successful programs integrate mental health, substance abuse, and criminal justice agencies by bringing these three branches together for regular meetings); OFF. OF THE ASSISTANT SEC. FOR PLANNING AND EVALUATION, *Approaches to Early Jail Diversion: Collaborations and Innovations* (July 2019), <https://aspe.hhs.gov/system/files/pdf/262096/EarlyJail.pdf> [perma.cc/2JCH-VSMV] (noting that collaboration between police departments and community groups is essential to help shift police culture and attitudes).

⁴⁴ Barberi & Taxman, *supra* note 4, at 709 (quoting a police chief who offers this advice: “[G]et together with your community stakeholders such as your hospitals, treatment centers, your judges, form a plan[;] ... you come up with an agreement on how to handle the opioid or whatever the epidemic is. Then you need to put your plan in place.”)

coaching throughout the recovery process.

In commenting on the importance of this peer support position, a police chief who has embraced deflection said, “The peer support position is critical, as he or she has lived the substance abuse experience and is not a member of law enforcement.”⁴⁵ He continued by implicitly invoking the importance of procedural justice:⁴⁶ “[t]rust-building is always important with populations that have typically had a negative perception of law enforcement. The partnership between law enforcement and peer support aims to build that bridge.”⁴⁷

B. *Current Models of Deflection Programs*

Having sketched the contours of the deflection approach to SUD, we now offer more detail about three specific deflection programs that presently exist in the United States: the LEAD program in Seattle, Washington; the Angel program in Gloucester, Massachusetts; and the HEROES program in Houston, Texas. In this part, we describe the institutional design of each program and provide evaluation metrics, where available. While these programs take slightly different forms, they are united by a commitment to address the “vulnerabilities of people encountering police in a range of crisis situations” by using social service mechanisms instead of courts and jails.⁴⁸ Thus, they depend on voluntary enrollment, rather than force, to achieve successful transformations⁴⁹ and aim to bring the social service dimension of police work out of the shadows.⁵⁰

⁴⁵ Paul, *supra* note 16, at 172 (describing program in Fayetteville, North Carolina). Jac Charlier, the Director of Consulting and Training for the Center for Health and Justice, agrees about the large and crucial role played by case managers in his assessment of the deflection program in Montgomery County, Maryland. He says, “Case managers focus on rapid treatment access, retention, motivation, engagement and completion. In addition, case managers make referrals to ancillary services, such as housing, employment, food, clothing and recovery support.” Charlier, *supra* note 32, at 31.

⁴⁶ TYLER, *supra* note 12; Trinkner & Cohn, *supra* note 12.

⁴⁷ TYLER, *supra* note 12; Trinkner & Cohn, *supra* note 12, at 603.

⁴⁸ Wood, *supra* note 8, at 58; *see also* Barberi & Taxman, *supra* note 4, at 703 (referring to the shift from an enforcement model to a health model by certain criminal justice agencies).

⁴⁹ Wood writes of the multidimensional nature of the enrollment paradigm employed by these programs: “Police enroll drug users in treatment initiation. Case managers enroll drug users in sustained treatment engagement. Safe injection facilities enroll police in supporting a harm reduction orientation and encouraging safer drug use practices. Community-based triage centres enroll police in keeping vulnerable people out of hospital emergency rooms which are not designed to manage ‘grey zone’ vulnerabilities or provide long-term recovery support.” Wood, *supra* note 8, at 59.

⁵⁰ Wood, *supra* note 8, at 61 (citing M. Punch, *The Secret Social Service, in THE BRITISH POLICE* (Simon Holdaway, ed., 1979)); *see also* Barberi & Taxman, *supra* note 4, at 709 (noting that officers need “to perceive the health model as part of policing[.]” rather than apart from it).

1. Seattle's LEAD Program

The LEAD program, originating in Seattle, is usually credited with launching deflection programs in the United States. LEAD was established in 2011 as a way to divert persons suspected of committing low-level drug and prostitution offenses to social and legal services instead of prosecution.⁵¹ It is a Prevention Pathway collaboration between the Kings' County Prosecuting Attorney, civil rights leaders, Seattle-area law enforcement, and peer support individuals.⁵² Police officers screen arrestees for LEAD eligibility following apprehension,⁵³ but a dedicated law enforcement officer and a peer support person work together to assist a substance user with entry into appropriate treatment.

The LEAD program has three primary components: an initial program entry process, which includes diversion out of the legal system after initial contact with police; harm-reduction case-management, which includes low-barrier counseling and connection to social and clinical services offered irrespective of substance abuse treatment or abstinence; and higher-level coordination of legal system involvement.⁵⁴ Individuals are not eligible to participate if they possess more than three grams of drugs, are suspected of dealing above a subsistence income, do not seem amenable to diversion, are suspected of exploiting minors, are suspected of promoting prostitution, are already part of Mental Health or Drug Diversion court, or have a disqualifying criminal history based on crimes of violence.⁵⁵

The program's success has been well-documented: LEAD participants in Seattle had a 60% lower incidence of arrest in the six months following program entry compared to offenders who did not participate in LEAD.⁵⁶ Over the long term, LEAD participants had 58% lower incidence of arrest and 39% lower incidence of being charged with a felony in the two years after program entry as compared to non-participants.⁵⁷

⁵¹ Kopak & Frost, *supra* note 29, at 729 (citing Dan Satterberg et al., *Seattle LEAD's on Law Enforcement Diversion*, 6 The E-Newsletter of the COPS Off. 4 (2013), https://cops.usdoj.gov/html/dispatch/04-2013/seattle_leads.asp [perma.cc/PX4Q-TAU6]).

⁵² Collins et al., *supra* note 26, at 49. According to Jesse Benet, an attorney with the Public Defender's Association of King County and one of the LEAD program leaders, LEAD has now expanded county-wide; services are available in satellite cities, suburbs, and unincorporated areas of the county. Telephone interview with Jesse Benet, Deputy Dir., Pub. Def. Ass'n (Feb. 15, 2021) [hereinafter Benet Phone Call].

⁵³ The individual would be apprehended but not booked if he or she chooses to accept the referral, and no paperwork documenting the police contact would exist outside the police station. Benet Phone Call, *supra* note 52.

⁵⁴ Collins et al., *supra* note 26, at 49. The program now also provides a Social Contact Pathway and includes a residential housing component; referrals based on criminal contacts are an increasingly small part of the Seattle program. Benet Phone Call, *supra* note 52.

⁵⁵ Collins et al., *supra* note 26, at 50.

⁵⁶ Collins et al., *supra* note 26, at 52.

⁵⁷ Collins et al., *supra* note 26, at 53.

After entering the program, LEAD participants had 1.4 fewer average annual jail bookings, spent about 41 fewer days in jail each year, and had an 88% lower incidence rate of prison incarceration relative to non-participants.⁵⁸ LEAD program participants were 89% more likely than non-participants to have obtained permanent housing—which is remarkable, given that 82% of participants in the evaluation’s sample were homeless prior to contact with LEAD.⁵⁹

Evaluators believe these results largely stem from the work of case managers, who perform many important functions for LEAD: “building strong, trusting therapeutic alliances with LEAD participants,” providing “tailored case management that supports fulfillment of basic needs” in housing, job placement, educational advancement, substance treatment, and coordinating with prosecutors “to ensure nondiverted cases are managed to support and not compromise LEAD intervention plans.”⁶⁰ Participants almost unanimously report positive experiences with the program and with program management—all of them said LEAD changed their lives for the better.⁶¹ LEAD models have sprung up nationwide, with programs

⁵⁸ Susan E. Collins, Heather S. Lonczak & Semma L. Clifasefi, *Seattle’s Law Enforcement Assisted Diversion (LEAD): Program Effect on Criminal Justice and Legal System Utilization and Costs*, 15 J. EXPERIMENTAL CRIMINOLOGY 201 (2019).

⁵⁹ Seema L. Clifasefi, Heather S. Lonczak & Susan E. Collins, *Seattle’s Law Enforcement Assisted Diversion (LEAD) Program: Within-Subjects Changes on Housing, Employment, and Income/Benefits Outcomes and Associations with Recidivism*, 63 CRIME & DELINQUENCY. 429, 435 (2017).

⁶⁰ Collins et al., *supra* note 26, at 54. Study authors considered other factors that might account for these dramatic results, such as law enforcement’s intentional decisions not to arrest LEAD participants, but they concluded that none of these factors was likely to have exerted much influence.

⁶¹ Seema L. Clifasefi & Susan E. Collins, *LEAD Program Evaluation: Describing LEAD Case Management in Participants’ Own Words*, U. WASH. HARBORVIEW MED. CTR. (Nov. 1, 2016), https://56ec6537-6189-4c37-a275--02c6ee23efe0.filesusr.com/ugd/6f124f_7a73efa412874d0cb238d36c11f8954d.pdf [perma.cc/4J8H-TH84].

initiated in Fayetteville, North Carolina;⁶² Portland, Oregon;⁶³ Santa Fe, New Mexico;⁶⁴ Longmont, Colorado;⁶⁵ and Albany, New York, for example.⁶⁶

2. Gloucester's Angel Program

In Gloucester, Massachusetts, a small city north of Boston, the Gloucester Police Department's Angel Program was the brainchild of the police chief, Leonard Campanello, without involvement from local prosecutors.⁶⁷ The program, launched in 2015, is a no-arrest, voluntary screening and referral program for opioid users.⁶⁸ Officers can refer people to the program based on criminal justice contacts in the field (the Intervention Pathway), but the department has also invited anyone to simply come to the police department—on their own volition—to get screened for the program (the Self-Referral Pathway).⁶⁹ Officers help users clear active warrants on the day they come for referral, and diagnostic intake occurs right in the police station, by trained police officers.⁷⁰ Once a referral is accepted, officers ensure immediate transport to a rehab facility from a friend, relative, or ambulance.

In the first 14 months of the program's operation, 376 people sought help for substance abuse from the Gloucester PD; just under half of those people came from

⁶² Paul, *supra* note 16.

⁶³ Portland reports a 91% reduction in recidivism among program graduates. CITY OF PORTLAND, OR., ADOPTED BUDGET FISCAL YEAR 2020-21, 31 (2020), <https://www.portlandoregon.gov/cbo/article/764229> [perma.cc/SHH5-MUZ6].

⁶⁴ In Santa Fe, participants experienced a statistically significant decrease in the number of arrests in the six months after entry into the program (from 1.31 arrests to .93 arrests, post-program); the number of new arrests decreased by 30%, compared to a largely unchanged number for the non-participants. None of these new arrests were for crimes of violence. *New Data Shows Promise for Santa Fe's Innovative Law Enforcement Assisted Diversion (LEAD) Program*, POL'Y ALLIANCE (Oct. 11, 2018), <https://drugpolicy.org/press-release/2018/10/new-data-shows-promise-santa-fes-innovative-law-enforcement-assisted> [perma.cc/SE3Z-KKQF] [hereinafter Press Release].

⁶⁵ The Longmont LEAD program posts the following success data: a 50% reduction in arrest rate after first contact with LEAD, and a 59% reduction in illegal activities after first contact with LEAD. Monte Whaley, *Longmont LEAD program helping people, reducing recidivism per city report*, LONGMONT LEADER (Aug. 23, 2020), <https://www.longmontleader.com/local-news/longmont-lead-program-helping-people-reducing-recidivism-per-city-report-2657155> [perma.cc/9C9Z-7PBH].

⁶⁶ The results in Albany were less impressive. Fewer than 8% of eligible offenders were diverted by police to support services; two-thirds of police officers surveyed had less than favorable attitudes about the program and about the potential for rehabilitation to work. Neusteter & Khogali, *supra* note 22. Similar attitudes were found in New Haven, Connecticut, where only six successful diversions occurred in the first few years of the program, because officers did not want to be “social workers” for people who commit crimes due to substance use. Breen, *supra* note 22. These attitudes will be explored further in the next section documenting the deflection efforts in Atlanta.

⁶⁷ Schiff et al., *supra* note 8, at 42.

⁶⁸ Schiff et al., *supra* note 8, at 42.

⁶⁹ Wood, *supra* note 8, at 56 (describing the program as one that encourages drug users to ask officers for help accessing community-based drug treatment services).

⁷⁰ Schiff et al., *supra* note 8, at 42.

somewhere other than the Gloucester region (including from other states).⁷¹ In an evaluation conducted in 2016–2017, most participants said the Angel program was a positive experience, welcoming and non-judgmental.⁷² They also praised the police for working hard to find them placements, and for staying in touch with their friends and families (although not everyone was satisfied with the speed of the police response).⁷³ Thirty-seven percent of participants reported no drug usage afterwards (with average follow-up time after program completion of 6.7 months).⁷⁴ Evaluators concluded that the program was feasible to implement and acceptable to participants, and was particularly effective in finding initial, short-term access to treatment. However, the program needed to do more to provide effective long-term care, which requires further coordination among treatment providers due to fragmentation of the current addiction treatment system.⁷⁵

3. Houston's HEROES Program

In Houston, Texas, the HEROES program (Houston Emergency Opioid Engagement System) follows a team-based approach but specifically targets survivors of non-fatal overdoses for intervention using a Prevention Pathway and Naloxone Pathway approach. According to program designers, this is “a community wide initiative between hospital emergency departments, emergency medical responders, law enforcement and other first responders, recovery centers, psychiatric facilities, substance abuse treatment clinics, local physicians, and other healthcare providers” who work in the field of addiction.⁷⁶ Certain officers from the Houston Police Department Narcotics Division were selected to conduct outreach to persons who had experienced a non-fatal overdose, to engage them in a consensual conversation once the medical emergency had passed, and then, if the person was amenable, to refer him or her to the next stage—contact with program staff to discuss treatment options within 24–48 hours.⁷⁷ All individuals who agree to treatment receive medication until a more permanent outpatient treatment bed becomes available; peer coaching, clinical behavioral counseling and support group sessions are available throughout.⁷⁸

⁷¹ David Rosenbloom, *If We Build It, Will They Come? Police Deflection Programs; Gloucester, Ma and PAARI*, B.U. SCH. PUB. HEALTH (July 2017), <https://www.bu.edu/federal/files/2017/07/Powerpoint-Presentation-by-David-Rosenbloom.pdf> [perma.cc/H2YL-LFAC].

⁷² Schiff et al., *supra* note 8, at 44.

⁷³ Schiff et al., *supra* note 8, at 44.

⁷⁴ Schiff et al., *supra* note 8, at 44.

⁷⁵ Schiff et al., *supra* note 8, at 46.

⁷⁶ Yatsco et al., *supra* note 11, at 6.

⁷⁷ Yatsco et al., *supra* note 11, at 6.

⁷⁸ Yatsco et al., *supra* note 11, at 6. A similar program, Project Outreach, was formed in Plymouth, Massachusetts: the goal of this collaboration between police, hospitals and substance abuse

The first evaluation of the program,⁷⁹ published in the summer of 2020, tracked only the population of referrals as compared to the population of Houston; it was too soon after the program's launch to gather any data on effectiveness. 23% of the contacted individuals agreed to be referred to treatment.⁸⁰ The referral group differed from the population of Houston in terms of age (they were both older and younger than the average Houston resident), and in terms of race (referrals were more likely to be white non-Hispanic/Hispanic than expected from the Houston population data). There was no statistically significant difference based on gender.⁸¹

II. TAKING A CLOSE LOOK AT ATLANTA'S EXPERIENCE WITH DEFLECTION

Atlanta offers us the opportunity to examine how deflection can change conventional policing when it comes to low-level drug offenders. In 2017 Atlanta adopted a deflection program, called Pre-Arrest Diversion (PAD).⁸² The program vests officers with discretion to call case workers, rather than make arrests, when encountering people who have committed low-level offenses that are linked with poverty, mental illness, and substance use. Case workers then facilitate connection to social services for people who otherwise would have been arrested. Prior to 2017, Atlanta police used conventional policing techniques and favored arrest as the principal option for low-level drug offenders.

In this section, we first illustrate what conventional policing looked like for low-level drug offenders in 2012, five years before the implementation of PAD. PAD covers arrests for many low-level offenses that are linked with poverty, mental illness, and substance use, so this dataset of just felony drug offenses significantly under-represents the range of arrests that might have been replaced with PAD referrals. We use it to provide a snapshot of a portion of Atlanta Police Department activity that might have been re-directed if PAD had existed that year. We then explain the approach of the PAD program, as well as the challenges it faced during the first year of implementation. In viewing these metrics side-by-side, we can speculate about the ways in which the 2012 population of felony drug arrestees might have been handled if PAD were in effect at that time.

treatment providers is to visit non-fatal overdose patients in their homes within 12–24 hours of their discharge from the hospital. Botieri, *supra* note 16. Sara Cloud, the director of social work at BID-Plymouth, says the program's key elements are the array of representatives from multiple areas (MAT programs, recovery coaches, hospital and detox facilities, in addition to law enforcement) and the frequency of meetings to keep communication flowing. Botieri, *supra* note 16, at 3.

⁷⁹ Yatsco et al., *supra* note 11.

⁸⁰ Yatsco et al., *supra* note 11, at 7.

⁸¹ Yatsco et al., *supra* note 11, at 8–9.

⁸² Recently, Atlanta, Georgia changed the name of the program to Policing Alternatives and Diversion (PAD). See POLICING ALTERNATIVES & DIVERSION INITIATIVE, <https://www.atlantapad.org/> [<https://perma.cc/J9B7-DBJT>] (last visited Feb. 1, 2021).

A. *The Conventional Approach to Policing Low-Level Drug Offenses*

Records maintained by the Fulton County District Attorney's Office reveal that there were 1081 felony drug arrests made by officers of the Atlanta Police Department (APD) during the calendar year 2012.⁸³ Possession was the top drug charge in 57% (n=620/1081) of the APD drug arrests. Other drug charges in the dataset include possession with intent to sell, trafficking, sales, and manufacturing; possession of drug paraphernalia alone would not have yielded inclusion in our dataset.

What portion of these possession offenses bore the hallmarks of serious criminal activity? Taking first the issue of quantity: fewer than half of the arrest reports (46%, n=286/620) mention the officers finding more than a single dose or container, or what they describe as more than a small quantity of drugs. Viewed from the other side, in more than half of those possession arrests (54%, n=334/620), officers appear to have found only a single dose or what they describe as a small quantity of drugs in a small container.

Was possession the principal reason for the arrest in these 620 instances, or was other criminal activity suspected before the drugs were found? In 33.1% of these encounters (n = 204/620), officers had a different arrest basis before finding the drugs and in fact made an arrest on that basis;⁸⁴ the possession charge thus was ancillary to arrest for what we regard as a "primary" offense in one-third of these arrests. Those primary offenses were for minor forms of misbehavior (like loitering, public urination, drinking in public, pedestrian in roadway and jaywalking) in more than two-thirds of those instances (68.6%, n=140/204). Serious charges (like aggravated assault, robbery, and terroristic threats) were the primary arrest offense in only 15.2% (n=31/204) of cases. In 16.2% of the cases (n=33/204), the officer first arrested the defendant on an outstanding warrant.

Was it common for officers to find weapons in the possession of people they arrested for drug possession? In only 3.7% of possession arrests (n=23/620) was the arrestee found in possession of a weapon (knife or firearm) in addition to the drugs, and in half of those circumstances (n=11/23), the basis for arrest was a primary (non-drug) offense or a pre-existing warrant. Moreover, in 5 of those 11 instances, the weapon appears to feature as part of (or appears related to) a serious primary crime (such as firearm possession, battery, and aggravated assault), rather than as part of the drug possession.

How often did these 620 arrests involve contemporaneous use of the drugs, as

⁸³ These data are part of the CODE dataset (Contexts of Drug Enforcement), research that was supported by the National Science Foundation under Grant Number (NSF SES-1252125). Any opinions, findings, and conclusions or recommendations expressed in this material are those of the author(s) and do not necessarily reflect the views of the National Science Foundation.

⁸⁴ Here, we are noting only those instances where the officer actually arrested the defendant on these other charges first; simply noting that there was evidence of other criminal activity would not yield inclusion in this category.

opposed to simply possession? Our data show that in 11.3% (n=70/620) of these instances the officer came upon the arrestee using (smoking or injecting) drugs, saw the arrestee preparing to use drugs, or heard the arrestee admit that he was under the influence of drugs recently consumed. Notably, the vast majority of these contemporaneous users present very little threat from a public disorder perspective. Only 27.1% (n=19/70) of the arrest reports for contemporaneous users mention the officers finding more than a single dose or small container, or what they describe as more than a small amount of drugs, and none of the contemporaneous users were armed at the time of arrest.

Putting the pieces together, the data tell a story of hundreds of men and women arrested for possessing small quantities of drugs on the streets of Atlanta in 2012. Very few of them were engaged in other serious criminal activity or were actively ingesting drugs in public locations, and an even smaller number were arming themselves while engaged in these activities. This is the exact population PAD was meant to address.

B. *The New Approach: Pre-Arrest Diversion*

In 2017, after a “year-long process that involved the City of Atlanta, Fulton County government officials, neighborhood and faith leaders, law enforcement, judges, prosecutors, public defenders, social service providers, substance addiction and mental health experts, business leaders, and community advocates,”⁸⁵ the Atlanta City Council approved the creation of a deflection program for the midtown Atlanta region.⁸⁶ The pilot program, funded with more than 2 million dollars, aimed over two years to help people who might otherwise be arrested for offenses related to poverty, untreated mental illness, or problematic substance abuse.⁸⁷ Instead of arrest, participants receive social services, including drug treatment, mental health assistance, housing, and job placement training. The program was called PAD

⁸⁵ Wright, *supra* note 34.

⁸⁶ The PAD initiative came out of a campaign to help LGBTQI+ individuals, many of whom were dealing with trauma and mental health issues, better survive on the street. Grace Walker, *Atlanta Pre-Arrest Diversion Initiative Expands, Aims To Help Those In Need Of Resources*, WABE (Oct. 2, 2020), <https://www.wabe.org/atlanta-pre-arrest-diversion-initiative-expands-aims-to-help-those-in-need-of-resources/> [perma.cc/H2HB-WM65]. The program was launched in Zones 5 and 6, which cover midtown and downtown Atlanta, but the program aims for citywide expansion in the near future. *Id.*

⁸⁷ KEVIN JEFFERSON & CALLA JAMISON, YEAR ONE POLICE PROCESS EVALUATION FOR ATLANTA’S PRE-ARREST DIVERSION PROGRAM 2 (2019) [hereinafter YEAR ONE PAD REPORT]. Funding for PAD comes from the City of Atlanta, Fulton County, as well as private foundation partners. Walker, *supra* note 86. The program is seen as working in tandem with Mayor Keisha Lance Bottom’s commitment to close the city jail. *Id.* In fact, in June of 2020, the program received a funding boost of about \$1.5 million dollars from a trust fund previously tied to the city jail. J.D. Capelouto, *Growing Initiative in Atlanta Offers an Alternative to Calling the Police*, ATLANTA J. CONST. (Oct. 1, 2020), <https://www.ajc.com/news/atlanta-news/growing-initiative-in-atlanta-offers-an-alternative-to-calling-the-police/UOELDTXGUZDQDIUQV3ENRABJTQ/> [perma.cc/YS6G-CBHR].

(originally named Pre-Arrest Diversion, the acronym now stands for Policing Alternatives and Diversion); the goal is to shuttle low-level offenders out of the legal system and into treatment before an arrest occurs, thereby aiming to reduce the individual's future contact with the criminal legal system and to address quality of life concerns without sacrificing dignity.⁸⁸

1. PAD Program Components

Deflection in the Atlanta PAD program occurs as follows. When a law enforcement officer has probable cause to arrest someone for a non-violent crime,⁸⁹ and that person fits the profile of a potential participant, does not have a violent criminal record, is at least 17 years old, and does not appear to be a threat to other people,⁹⁰ the officer has discretion to contact a “care navigator” rather than make the arrest. The job of the care navigator is first to diagnose the person, and then to determine what services that person needs.⁹¹ It is a “person-centered” program, rather than a standard set of terms and conditions that all participants must obey.⁹² Once the diagnostic phase is complete, the care navigator directs the person to services. The program does not automatically exclude a person based on prior criminal record, homelessness, or inability to pay, but a violent record or threatening behavior would be disqualifying.

Police officers encountering low-level offenders do not have to contact care navigators; they retain authority to make an arrest in these circumstances. Furthermore, they do not have to diagnose problems or secure treatment for individuals they otherwise might have arrested. The choice to refer or arrest remains theirs, but the idea is to “replace a criminal justice approach with a program that supports wellness for all participants and works toward improving the quality of life” of each participant, proponents say.⁹³ Atlanta's PAD director says the first step is, simply, to reverse our “addiction to arrest.”⁹⁴

⁸⁸ The PAD official website declares, “The focus of our direct services is to reduce criminal legal contact and address quality of life concerns in a way that honors the dignity and self-determination of the participant.” *LEAD Diversion Services*, PAD, <https://www.atlantapad.org/lead-diversion-services> [perma.cc/YA8U-WJD7] (last visited Dec. 1, 2020).

⁸⁹ Starting in 2020, the program expanded to include another referral pathway: community members can call 311 to refer residents who are displaying substance abuse issues, mental health issues or homelessness issues. Walker, *supra* note 86.

⁹⁰ YEAR ONE PAD REPORT, *supra* note 87, at 2.

⁹¹ The program now employs Harm Reduction specialists in addition to care navigators. The Harm Reduction team has taken over most responsibility for first response, while the care navigators are serving as long term case managers. Telephone Interview with Moki Macias, Exec. Dir., PAD (Feb. 11, 2021) [hereinafter Macias Phone Call].

⁹² Walker, *supra* note 86.

⁹³ Wright, *supra* note 34.

⁹⁴ Capelouto, *supra* note 87 (quoting program director, Moki Macias).

PAD offers a range of services to any person who agrees to join.⁹⁵ For instance, all participants are offered immediate food assistance, transportation, and shelter for up to 3 months. Office visits, as well as street visits, by care navigators and outreach team members occur weekly, and team members facilitate services by outside providers for things like identification documents, recovery support and employment. PAD's website also notes that the team prioritizes working with people who have experienced disadvantage based on race or LGBT status in the legal system or in other service institutions. Characterized as a "health-based approach with wrap-around social services,"⁹⁶ PAD is far less likely to wreak havoc on the lives of individuals, families, and communities than the conventional law enforcement approach and in so doing strives not only to treat individuals but to "improve relations between communities and law enforcement."⁹⁷

2. Successes and Challenges

After the first year of PAD's operation, autonomy of decision-making ranked very highly on officers' positive evaluations of the program, in two distinct ways. First, they appreciated having the autonomy to implement PAD or to choose another alternative; it was important to field officers that the choice of how to handle a situation on the street remained firmly in their control. Second, officers acknowledged that for much of this population, the pattern of arrest followed by re-arrest had not achieved much in prior years; for that reason, they liked "having options other than arrest for dealing with offenses related to poverty, mental illness and substance use."⁹⁸

Despite scoring high marks for autonomy, the program was not used by APD officers as much as its organizers expected. In the first year of PAD's operation, officers encountered over 7,000 PAD-eligible people (where eligibility was based on the alleged crime committed, the area of the city in which the encounter occurred, and time of day),⁹⁹ but they made only 128 successful referrals, and 8 unsuccessful referrals. When evaluators tried to identify the weak points in program design and implementation that might have accounted for this lackluster performance, lack of empathy for the target population and lack of understanding of program protocols unfortunately featured quite prominently.

With respect to the empathy point, some officers disparagingly referred to PAD as a "get out of jail free card" and questioned whether it really helped people.¹⁰⁰

⁹⁵ *LEAD Diversion Services*, *supra* note 88.

⁹⁶ Wright, *supra* note 34.

⁹⁷ Wright, *supra* note 34.

⁹⁸ YEAR ONE PAD REPORT, *supra* note 87, at 7.

⁹⁹ YEAR ONE PAD REPORT, *supra* note 87, at 7. PAD referrals can only be made during certain hours (10 a.m. to 6 p.m.). Walker, *supra* note 86.

¹⁰⁰ YEAR ONE PAD REPORT, *supra* note 87, at 6. These comments mirror those found in studies of police in Albany, New York and New Haven, Connecticut. *See supra* note 66.

More generally, APD officers questioned whether the people they encountered on the streets really wanted to change their lives (or, for the people with mental illness, were equipped to do so).¹⁰¹ Both attitudes were correlated with diminished interest in calling the care navigators to get the process started.¹⁰² There was also a concerning lack of understanding of the program among officers. Despite eight different training sessions,¹⁰³ some officers appeared to be confused about eligibility requirements for PAD and the process for entry into the program.¹⁰⁴ Finally, officers noted that making an arrest counts as a good “stat” (or credit) for one’s employment record, while making a PAD referral might not. That uncertainty factored into their decision about whether to use the option PAD offered in any given case.¹⁰⁵

Notably, the two zones in which PAD was implemented¹⁰⁶—Zone Five and Zone Six—showed quite different rates of activity, differences that can be traced back to leadership and messaging. While “high-level management has modeled engagement with PAD” in numerous ways,¹⁰⁷ messaging and implementation at the zone level has been inconsistent. The supervisors in Zone Five expressly supported PAD and encouraged their line officers to make referrals. In contrast, the supervisors in Zone Six were not as supportive of the program, and the referral rate in that zone paled by comparison.¹⁰⁸

¹⁰¹ YEAR ONE PAD REPORT, *supra* note 87, at 8.

¹⁰² These negative attitudes may have been compounded by recurring contact with this subset of offenders; officers report feeling frustrated when they see a person whom they referred to PAD back out on the streets, engaged in the same behavior. YEAR ONE PAD REPORT, *supra* note 87, at 8.

¹⁰³ YEAR ONE PAD REPORT, *supra* note 87, at 7.

¹⁰⁴ YEAR ONE PAD REPORT, *supra* note 87, at 6.

¹⁰⁵ YEAR ONE PAD REPORT, *supra* note 87, at 14 (documenting that officers worry about not making arrest quotas if they do a PAD referral). Similar views were expressed by some of the interviewees in Barberi and Taxman’s study: “Being available for calls that might involve more dangerous situations, affect more people, or assisting another officer were described as more important than referring one individual to treatment. . . [and] treatment referrals do not have an incentive, such as overtime compensation, and [may not] help their careers as [much as] arrests.” Barberi & Taxman, *supra* note 4, at 710. The authors observed that line officers tend to focus on “the issues [with] referring rather than the benefits of it.” Barberi & Taxman, *supra* note 4, at 710.

¹⁰⁶ The Atlanta Mayor’s Use of Force Advisory Council recently recommended to the Mayor that PAD be extended to all zones, instead of remaining limited to Zones 5 and 6, and that all officers be subject to mandatory training. See CITY OF ATLANTA, GA., ONE ATLANTA: ONE APD COMMUNITY POLICING ROADMAP (Apr. 6, 2021), [https://www.atlantaga.gov/Home/ShowDocument?id=50607\[perma.cc/H2S3-FZ75\]](https://www.atlantaga.gov/Home/ShowDocument?id=50607[perma.cc/H2S3-FZ75]). In August 2020, the Mayor signed a directive to train officers across the city in PAD. Capelouto, *supra* note 87.

¹⁰⁷ YEAR ONE PAD REPORT, *supra* note 87, at 12–13.

¹⁰⁸ YEAR ONE PAD REPORT, *supra* note 87, at 12.

3. How Might PAD Have Changed the Fate of People Arrested in 2012 for Felony Drug Possession?

Although the PAD program's first year of implementation showed less than stellar results, PAD leadership is working on numerous ways to increase the referral rate.¹⁰⁹ PAD's website notes that as of late 2020, more than 200 people had participated in the program;¹¹⁰ program leadership believes support for the program received a boost from the tragic events of the summer of 2020, in which community-police relations across the country were strained by a series of police killings nationwide.¹¹¹ But irrespective of early returns, PAD represents a significant shift in attitude about, and strategy for handling, disorder caused by low-level drug offenders. If the shift away from pro-arrest policing and toward harm reduction had come about by 2012, if the principles and the approach of the PAD program had been embraced by the Atlanta City Council five years earlier and applied city-wide, how many lives might have been affected?

Our data from 2012 suggests that, in that year alone, approximately 540 felony arrests (of the 620 felony drug possession arrests made that year) could have been avoided if PAD had been running at full capacity across all policing zones in the city of Atlanta. That accounts for 87% of the possession arrests made that year.¹¹² The vast majority of the possession cases involved only a small amount of drugs for personal use, or possession coupled with a minor offense (like public urination or jaywalking) that is often correlated with a substance abuse disorder. Had PAD existed in 2012, officers would have had the option with these 540 offenders to do something other than arrest on site.

¹⁰⁹ For example, the Harm Reduction team has been talking with police officers and community members to explain the pattern of relapse and recovery that many addicts experience, so as to forestall their frustrations with seeing PAD participants back on the street. Macias Phone Call, *supra* note 91. Additionally, the program's recent creation of the 311-call pathway should generate more referrals. Macias Phone Call, *supra* note 91. Finally, PAD has now been extended to include Zone 4, as well as Zones 5 and 6, and transit police (MARTA) have been added as referral sources. PAD, *supra* note 82.

¹¹⁰ Capelouto, *supra* note 87.

¹¹¹ Capelouto, *supra* note 87 (noting, "Public support for the program has grown among Atlanta's city leaders in the wake of recent civil rights protests and calls to reevaluate the work of the city's police department").

¹¹² The twenty-three arrestees found in possession of both a weapon and drugs would have been excluded under the terms of the PAD program, as would the sixty-four arrestees who were primarily arrested for non-eligible serious offenses (like aggravated assault or robbery) or who were arrested on outstanding warrants. There is some overlap between these two groups, because five of the weapon-holders were arrested on a non-eligible primary offense first. See *infra* Part IIA.

The existence of an outstanding warrant might not fully stand in the way of a person getting deflected in other cities; certain programs allow the substance-user to resolve outstanding warrants and then enter treatment while still avoiding new criminal charges. See *infra* Part IB. Moreover, while our dataset does not have information about criminal history for these 540 arrestees, PAD was designed not to disqualify people based on prior criminal record; only those with violent pasts are subject to exclusion. See Capelouto, *supra* note 87.

If officers had selected that option for even a percentage of these offenders, cost-savings for the city could have been significant. In its initial budget proposal, PAD estimated that reductions in criminal justice costs would be balanced favorably against the costs of the program (which includes outreach, case management services, program services and administrative salaries). On the criminal justice side of the ledger, we would count jail costs (for booking, bed days and jail services), the use of emergency rooms, and cost for criminal legal services (including prosecution, indigent defense counsel, and courthouse personnel). How much do those things cost, in real taxpayer dollars? Looking just at the cost of jail stays, the Atlanta City Detention Center requires \$16-\$20 million to run each year (depending on the year); it holds 1300 beds and employs more than 180 people.¹¹³ If every bed were full, the jail costs taxpayers \$33-42 per inmate per day (depending on the year). If arrestees are housed in the county jail instead of the city jail, the cost is \$74.15 per inmate per day.¹¹⁴ Atlanta does not currently provide an estimate of total criminal justice costs for low-level crimes, but we can look to other jurisdictions for relevant data. In New York City, for example, \$1,000-\$2,000 is spent for each marijuana arrest.¹¹⁵ In Santa Fe, New Mexico, the average cost of emergency medical system care, emergency department, police, court, district attorney, public defender, and detention for an individual who is not diverted is \$9,098 per year.¹¹⁶ We should also factor in the cost to the city of managing a homeless population; PAD reports that the public cost of homelessness is at least \$40,000 a year per person, on average, across US cities.¹¹⁷

How do these figures compare to the costs of running deflection programs? Substance abuse treatment costs taxpayers from \$2,000 to \$7,000 a year per participant.¹¹⁸ Consider Santa Fe, for example, which runs a LEAD program like Seattle's. In this New Mexico city, the program costs an average of \$3,169 per person per year, which, when added to the cost incurred by the criminal legal system before the point of diversion (because diversion sometimes occurs in Santa Fe post-arrest,

¹¹³ Stephen Deere, *Atlanta Mayor, City Council Differ on Status and Future of the Jail*, ATLANTA J. CONST. (Nov. 25, 2020), <https://www.ajc.com/news/atlanta-news/atlanta-mayor-has-made-seemingly-conflicting-statements-that-city-has-closed-its-jail/LFMQFNMYINFKFG2K6I16KYEYNQ/> [perma.cc/B23B-UZPB] (noting the 2021 ACDC operating budget is \$16.5 million even though very few beds are being occupied by inmates).

¹¹⁴ *Pretrial Services - Savings to Taxpayers*, SUPER. CT. OF FULTON CNTY., <https://www.fultoncourt.org/pretrial/savings.php> [https://perma.cc/GT5A-UDJX] (last visited May 22, 2021).

¹¹⁵ *\$75 Million a Year: The Cost of New York City's Marijuana Possession Arrests*, DRUG POL'Y, <https://drugpolicy.org/sites/default/files/%2475%20Million%20A%20Year.pdf> [perma.cc/3YCQ-DRGE] (last visited May 22, 2021).

¹¹⁶ See also Press Release, *supra* note 64.

¹¹⁷ Molly Moorhead, *HUD Secretary Says a Homeless Person Costs Taxpayers \$40,000 a Year*, POLITIFACT (Mar. 12, 2012), <https://www.politifact.com/factchecks/2012/mar/12/shaun-donovan/hud-secretary-says-homeless-person-costs-taxpayers/> [perma.cc/4YGU-RK3L].

¹¹⁸ PowerPoint Presentation to the Atlanta City Council: Atlanta/Fulton County Pre-Arrest Diversion Initiative (May 23, 2017) (on file with author K. Levine).

rather than pre-arrest), results in a total cost of \$7,541 per client per year.¹¹⁹ This amount is approximately \$1,500 (or 17%) less than criminal justice costs for non-diverted individuals, on a per annum basis. In Atlanta, the savings would be substantially greater, because PAD participants are shuttled out of the system before arrest and thus incur no costs for jail, attorney, or courthouse services.

Moreover, given the correlation between treatment for substance abuse and reduction in future criminal behavior (due both to the elimination of stigma and the reduced need for illicit behavior to support an expensive drug habit), the city of Atlanta might have experienced fewer crimes overall in the subsequent years if some portion of these offenders had been offered treatment instead of arrest. “[A]ccording to several conservative estimates, every dollar invested in addiction treatment programs yields a return of between \$4 and \$7 in reduced drug-related crime, criminal justice costs, and theft. When savings related to healthcare are included, total savings can exceed costs by a ratio of 12 to 1.”¹²⁰

Lastly, consider the impact on the individuals who could have been offered a chance to be diverted instead of arrested and prosecuted. Benefits for these arrestees could have been immeasurable in terms of time, effort, expense, and embarrassment associated with being prosecuted for nuisance-but-not-socially-harmful behaviors. These consequences extend beyond criminal court sanctions. Even misdemeanor convictions (including almost all drug possession convictions) can subject a non-citizen to deportation; in some cases deportation is mandatory.¹²¹ For citizens and non-citizens alike, drug convictions create barriers to employment, housing, and educational opportunities; even an arrest that is later dismissed might still be listed on a state’s public criminal records database, searchable by a potential employer or landlord.¹²² New research even shows the detrimental impact of full prosecution and incarceration on a person’s ability to access credit, which in turn correlates with an increase in recidivism.¹²³ What is more, these effects substantially and disproportionately burden individuals from already marginalized or disadvantaged communities, due to policing patterns that differentiate by race; while public health

¹¹⁹ See also Press Release, *supra* note 64.

¹²⁰ *Principles of Drug Addiction Treatment: A Research-Based Guide (Third Edition)*, DRUG ABUSE (Jan. 2018), <https://www.drugabuse.gov/download/675/principles-drug-addiction-treatment-research-based-guide-third-edition.pdf?v=74dad603627bab89b93193918330c223> [perma.cc/RTC4-R2XW].

¹²¹ See JENNY ROBERTS, *Prosecuting Misdemeanors*, in *THE OXFORD HANDBOOK OF PROSECUTORS AND PROSECUTION* 518 (Ronald F. Wright, Kay L. Levine & Russell M. Gold, eds., 2021).

¹²² *Id.* at 518–19.

¹²³ Abhay Aneja & Carolos Avenancio-Leon, *No Credit for Time Served? Incarceration and Credit-Driven Crime Cycles* (Jul. 2020), https://static1.squarespace.com/static/59dc0ec564b05fea9d3dfee3/t/5f11d977797b7f4875d36537/1595005305683/IncarcerationAccessToCredit_v07102020.pdf [perma.cc/7C5U-T4BM] (unpublished manuscript) (finding that “ex-convicts face a drop of 42 to 57 points in their credit scores, reductions in their auto loan financing of around 25 percentage points and declines in mortgages of around 20 [percentage points]”).

researchers have documented fairly consistent rates of drug use among White and Black individuals, arrest rates for Blacks remain much higher (five to eight times higher, in some states.)¹²⁴ It's certainly true that for some offenders each new conviction comes with only marginal burdens in terms of stigma or even jail time (because they are processed fairly quickly through the system), but even marginal burdens are greater than zero—particularly if they accumulate over time.

All told, whether the chosen unit of analysis is dollars or wellness, the impact of PAD could have been significant.

III. MAKING THE CASE FOR PROSECUTORIAL INVOLVEMENT IN DEFLECTION INITIATIVES

Drug deflection programs are built on the premise that, when dealing with substance users who have committed low-level crimes, the earliest possible intercept point creates the largest set of advantages for both the legal system and the substance user. Money will be saved, stigma will be avoided, relationships between the community and the police will be improved, and the user's odds of meaningfully starting the path to recovery in place of recidivism will be enhanced if we can provide a warm handoff into treatment before arrest takes place. Pre-arrest deflection programs are meant to supplement, not to replace, post-arrest (or post-charge) diversion programs and drug courts, offering criminal justice actors an array of options to manage the various intersections of substance abuse and criminal behavior that manifest in the local population. The key is to calibrate accountability and treatment, depending on the history and needs of the user and on the overall interests of the justice system.

And yet barriers to this approach remain, derived largely from entrenched mindsets around the need to punish law violators no matter the cost and deep-seated skepticism about the value of rehabilitative techniques. This stringent accountability-plus-skepticism perspective takes root in the fertile ground of police culture, but it also exists in certain segments of the wider community, particularly among those who have no personal or professional familiarity with the scourge of addiction.¹²⁵ Accounting for those patterns in police and wider subcultures, proponents of deflection must regularly communicate with both officers and community audiences about the true benefits of treatment over punishment for both the substance user and society, paying particular attention to the complicated relationship between addiction and criminal behavior that often drives recidivism

¹²⁴ ROBERTS, *supra* note 121, at 519.

¹²⁵ LEAD members regularly attend meetings of neighborhood safety associations and small business organizations to explain the harm reduction approach of LEAD, to forecast how the program will benefit the community, and to ask for their patience and cooperation. Benet Phone Call, *supra* note 52. This direct outreach is critical, because members of these groups otherwise regularly complain to police when chronic nuisance offenders remain visible in the community. ROBERTS, *supra* note 121, at 519.

for substance users.

We think the capacity for, and value of, prosecutorial involvement in these efforts is substantial. To illuminate this point, we first detail the approach taken by the county prosecutor's office in Burlington, New Jersey—a leader in this field. The Burlington office provides police training, funding, outreach, and courtroom services to persons with SUD as part of a comprehensive approach to recovery services in southern New Jersey. We use the Burlington experience as a springboard to ruminate on a larger role for prosecutors in the deflection effort nationwide. We argue that placing the prosecutor's office in the deflection partnership structure can achieve multiple benefits: early and productive intervention in the courthouse; consistency of countywide messaging about the value of a public health approach to substance abuse disorders; improved police buy-in; and an increase in procedural legitimacy for the justice system overall. We believe this array of benefits can help anchor and nourish deflection programs in jurisdictions that are committed to criminal justice reform, above and beyond that offered by police leadership alone.

A. *The Burlington County Approach*

Burlington County is located in the southern half of New Jersey. While it does not itself house a major urban center, it lies just outside the boundaries of Philadelphia, Camden, and Trenton. It is the largest county in New Jersey by area and is home to just under 450,000 residents. The population is about 75% White, 16% African American, and 4% Asian, with other groups making up the balance. Per capita income averages \$55,000 a year, making Burlington the tenth wealthiest county in the state and among the 250 wealthiest counties in the country.

Burlington experienced a 70 percent increase in fatal drug overdoses between 2016 and 2017, inspiring law enforcement and public health officials to create a “multi-dimensional approach” to “fight through” the drug crisis.¹²⁶ The result: a trio of programs, coordinated by the District Attorney's Office, that all have buy-in from local law enforcement and the courts. These programs are known as Operation Helping Hand, Straight to Treatment, and municipal court diversion.¹²⁷ We describe each of them briefly below.

Operation Helping Hand works through two-person teams, each of which consists of a police officer and a peer recovery specialist. The team makes contact with an at-risk individual in one of two settings: at the scene of a non-fatal overdose (Prevention Pathway), or at the person's last known address (Active Outreach Pathway). The specialist is a recovering addict; he or she is the person who offers to help the user seek treatment. If the user indicates he or she does not want treatment, the specialist offers harm

¹²⁶ Scott Coffina, quoted *in* TO PROSECUTE: INTERVIEWS ABOUT EARLY DECISION-MAKING 79 (Emily LaGratta, ed., 2020).

¹²⁷ *Id.* at 74.

reduction tips as well as the name of someone to talk to.

Straight to Treatment is a Self-Referral Pathway. Individuals can walk into any of 30 designated police departments and ask to meet with an officer and treatment provider. They can turn in drugs or paraphernalia without fear of being arrested or charged; outstanding arrest warrants will also be recalled. People from all over, not only county residents, are welcome to use this service, and have in fact used this service. Recovery coaches check in at least 6 times following this initial contact, as well as at the 6-month mark and the 1-year mark, to discuss progress in housing stability, education, and overall health (as well as substance use issues).¹²⁸ Police departments donate space to handle the Straight to Treatment assessment interviews and designate an officer to deal with outstanding warrants. Funding is accomplished through grants and use of forfeiture funds. As a result, the deflection program approach in Burlington “doesn’t really cost anything.”¹²⁹ The District Attorney’s Office reports that 75% of people who have expressed interest in Straight to Treatment have accepted recovery coaching, and 30% of people have immediately gone into treatment.¹³⁰

Municipal Court Diversion is a post-arrest, post-charge program that works in tandem with the two deflection programs described above. Following the arrest of a substance user, law enforcement officers make a referral to diversion; on the day of the person’s first court appearance, the prosecutor and the court give a willing participant the chance to enter diversion (to have the criminal case postponed while in recovery services). At the conclusion of the recovery program, the user can resolve his criminal case in court, although dismissal of charges is not guaranteed.

The District Attorney of Burlington, Scott Coffina, says that when he encounters skeptics (officers or other prosecutors who insist that recovery alternatives are too soft and therefore ineffective), he explains that the network of support in these programs helps to keep the user “on the path to recovery;” conventional channels of criminal justice intervention include few or no recovery services, and thus are much more likely to lead to re-offending.¹³¹ And he provides data to back up this claim. The office “collect[s] data on everything, from

¹²⁸ Interview with Melissa O’Mara, Assistant Prosecutor, Burlington Cnty. Prosecutor’s Off. (Aug. 27, 2020) [hereinafter O’Mara Phone Call].

¹²⁹ Melissa O’Mara, quoted in *TO PROSECUTE: INTERVIEWS ABOUT EARLY DECISION-MAKING* 76 (Emily LaGratta, ed., 2020).

¹³⁰ O’Mara Phone Call, *supra* note 128.

¹³¹ Coffina, *supra* note 126, at 78–79.

demographics to service usage,”¹³² he says. The data collected is not just quantitative; recovery coaches seek and receive narratives from participants about their experiences, which are then woven into the training materials to help both police and other prosecutors see—in living color—the benefits of this approach. DA Coffina says over time the presentation of data has generated “a significant mindset shift among law enforcement”—he believes more of them now have an instinct to “do something to avoid arrest.”¹³³

B. *Benefits of Prosecutorial Engagement in Deflection Partnerships*

By taking a closer look at the Burlington District Attorney’s Office programming, we can see numerous ways in which prosecutors can add value to the deflection effort currently managed by police and public health personnel. Prosecutorial contributions loosely track different dimensions of the prosecutor’s role and status, beginning with the prosecutor’s primary role in criminal case management.

1. Streamlining Case Intervention to Accommodate Treatment

Prosecutors serve as representatives of “the People” on all criminal matters in a given jurisdiction. In that capacity they control which cases are filed, which people become defendants, and how these cases are managed before judges and magistrates. Except in a very small number of jurisdictions in which police direct-file misdemeanors, prosecutors are the exclusive gatekeepers of the criminal legal system. For that reason, only prosecutors can provide courthouse benefits to substance users who choose to participate in deflection programs.

These courthouse benefits include the ability to clear existing arrest warrants, to prevent probation or parole violations from going forward on the basis of admitted substance use, and to prevent the issuance of failures to appear for users they know are in treatment.¹³⁴ In other words, prosecutors can help users glide over what are

¹³² Coffina, *supra* note 126, at 77. Coffina says they use the data to make sure they are serving all segments of the population—and pay particular attention to communities that “don’t feel safe with the police.” Coffina, *supra* note 126, at 77.

¹³³ Coffina, *supra* note 126, at 80.

¹³⁴ O’Mara Phone Call, *supra* note 128. Other deflection programs, such as The Safe Passage program in Illinois, include coordination between law enforcement and a representative from the prosecutor’s office to get warrants quashed or cases continued while the user is in treatment. Jessica Reichert et al., *Police-Led Referrals to Treatment for Substance Use Disorders in Rural Illinois: An Examination of the Safe Passage Initiative*, ILL. CRIM. JUST. INFO. AUTH., CTR. FOR JUST. RES. & EVALUATION (2017). Likewise, in Seattle’s LEAD program, which features a partnership with the King County District Attorney, coordination of legal system involvement is an important component of the program’s success. See *infra* Part IB1.

normally significant courthouse obstacles in order to enable them to participate in treatment. Because substance users have been known to express anxiety about the likelihood that presenting themselves to a police agency for treatment might trigger a host of criminal legal system consequences, active (and actively advertised) prosecutorial involvement in deflection programs might encourage more users to seek help. Moreover, having the prosecutor—rather than the defense attorney—bring the issue of treatment to the judge’s attention may alter both the judge’s perception of the value of treatment and the judge’s understanding of the prosecutor’s position on the value of treatment. Prosecutorial optimism and advocacy on this front can, in short, benefit the individual in his future courthouse experiences.

Even if the case ends up in standard criminal legal processing rather than one of these alternative pathways, early and open communication about the person’s substance abuse history can yield dividends. According to Melissa O’Mara, the assistant district attorney in charge of Burlington’s recovery services, such communication helps the prosecutor “make decisions about pre-trial release and ... a warm handoff to other recovery resources. It also gives us more information when going into plea negotiations with defense counsel to ensure a fair and just result.”¹³⁵ Often prosecutors resist “sob stories” that are raised mid-way through a case because they doubt the sincerity of the defendant’s efforts and perceive a feeble attempt at rehab as mere gamesmanship. O’Mara’s comments suggest that a defendant’s entry into treatment at the earliest possible moment, or willingness to provide information about the linkages between his past substance abuse and criminal history, might improve the odds of a speedy and compassionate resolution to his case.

2. Creating Countywide Programming and Messaging

In the United States, most prosecutors work at the county level,¹³⁶ not at the city or municipality level.¹³⁷ Their jurisdictional scope means that they work with dozens of police agencies, handling a variety of crimes that occur across hundreds of miles of terrain, and create programs and policies that have the capacity to impact diverse populations living in communities far from where the office itself is located. For this reason, the creation of a deflection program at the county level ensures a much broader reach than any program developed at the local level by a single police

¹³⁵ O’Mara, *supra* note 129, at 75.

¹³⁶ In places where county populations are not large enough to support a county-level prosecutor’s office, prosecutors are elected by district (where each district is composed of two or more counties). See Carol J. DeFrances, *Prosecutors in State Courts 2001*, BUREAU JUST. STATS. BULL. 11 (May 2002).

¹³⁷ Prosecutors are sometimes hired to work at the city level, but these are (for the most part) part-time positions, held on the basis of a contract, and limited just to misdemeanor and traffic cases that occur within the city limits. In some jurisdictions, the county boundaries are co-extensive with the city’s boundaries (such as in San Francisco or Honolulu).

department.

This broader reach is significant for many reasons. To begin, county prosecutors can instigate, coordinate, and promote the deflection efforts of multiple law enforcement agencies who work within the county's borders. This means, first and foremost, that deflection would be available to many more substance users than a single department could serve alone. What is more, prosecutor involvement would provide consistency across locales; coordination at the county level would ensure that substance users would receive the same notification and services wherever in the county they happen to intercept the police. The municipal model that currently prevails in many regions risks leaving users unsure about which agencies are participating in deflection and which remain firmly committed to the "arrest-first" mindset. A county-wide message about the availability of deflection services would limit that kind of uncertainty and inspire confidence in a substance user about his ability to access help wherever in the county he happened to be.

Lastly, because deflection is not only a regulatory strategy for the criminal legal system but also a bridge between the legal system and the public health system, county-wide scope would improve its functioning. Prosecutors as county-level officials are likely to be connected to county-level health care providers and treatment facilities; city limits would not be jurisdictionally prohibitive when it comes to finding available treatment beds. In Burlington, for example, the prosecutor's office constructed and nurtured relationships with Medicaid-funded facilities to get them to accept people immediately.¹³⁸ That kind of networking would be extremely time intensive and inefficient for individual police departments to pursue on their own.

3. Improving Police Buy-In

Police agencies don't directly work for the prosecutor's office (and police chiefs are commonly chosen at the city level, by elected city officials like the mayor or city council), which means an agency's cooperation with the partnership would have to be voluntary. We do not envision a scenario where the prosecutor's office could force a reluctant police chief to join a partnership he did not support. However, we do believe the prosecutor's office could—through training, case filing and funding decisions—transparently indicate the value of deflection to any police agency within its jurisdictional reach.

At the outset, the county prosecutor's office could assume a primary role in training police officers in the science of addiction and recovery, and in educating them about harm reduction approaches to managing substance abuse. This would produce multiple positive effects. First, involving the prosecutor's office in training would significantly increase the number of rank-and-file officers exposed to the treatment mindset and treatment protocols. Recall that lack of training and inconsistent messaging from leadership featured in the lackluster referral rate in

¹³⁸ O'Mara Phone Call, *supra* note 128.

Atlanta's PAD program during the first year of operation. Police leadership was committed to PAD, but localized trainings were sparse or inconsistent between zones. In contrast, Burlington's prosecutor conducts regular trainings for officers across 30 departments (including the state police) and is available for individual outreach when officers call for assistance.¹³⁹ Melissa O'Mara says of this comprehensive approach: "[t]he relationships we've developed with officers on the street through our recovery initiatives have allowed us to do our jobs better. If someone gets arrested for possession of heroin, officers with a recovery mindset will reach out to our office and tell us what's going on, or ask us what deflection or diversion program the person may be eligible for."¹⁴⁰ Identifying a point person inside the prosecutor's office who is responsible for this mission seems critical; officers need to see one consistent face (or set of faces) associated with the program, and need to know whom to call with questions, in order for outreach and training to take hold among the rank and file.

Second, training and communication by the prosecutor's office—the institution responsible for filing cases—would send a strong signal to officers about the value of using deflection instead of arrest and full prosecution for low-level drug offenders. As the data from Atlanta reveal, officers frequently express frustration when someone they have arrested is back out on the street; they do not understand why this revolving door exists, and they feel disrespected when their efforts appear to be ignored. This pattern results from a lack of communication between the prosecutor's office and the police agency. If the prosecutor's office designed and delivered training about the value of deflection, officers would get a clear picture of the prosecutor's priorities for low-level drug offenses. They would hear that treatment (rather than arrest and stigma) is the best way to reduce recidivism. They might, in time, come to question the implicit and explicit professional incentives that previously led them to make arrests and embrace the professional incentives of making treatment referrals.

Of course, breaking their "addiction to arrest" would depend on police agencies not just agreeing to participate in the partnership but also changing their internal metrics for professional success. Many large police agencies, including the Atlanta Police Department, use a variation¹⁴¹ of Compstat, a police management model designed to achieve results by holding middle managers directly accountable for

¹³⁹ O'Mara Phone Call, *supra* note 128. In the Seattle area, when the LEAD program was extended county-wide, prosecutors and other members of the partnership met with mayors and police chiefs in the region to explain how the program works and the benefits they could expect to see. They emphasized that referral was meant to be another tool in the officer's toolkit for dealing with chronic but low-level offenders in their cities. LEAD partners also conduct trainings for rank-and-file police during roll call, and weave in narratives of success stories. Benet Phone Call, *supra* note 52.

¹⁴⁰ O'Mara, *supra* note 129, at 75.

¹⁴¹ This variation is called COBRA, which stands for Command Operations Briefing to Revitalize Atlanta. See ATLANTA POLICE DEP'T, *History of the APD* (last visited Oct. 2, 2021, 2:31 PM), <https://www.atlantapd.org/about-apd/apd-history> [perma.cc/68GM-Y957].

producing results in the geographic area under their command.¹⁴² Research has found that the model has tended to reinforce traditional law enforcement tactics, such as increased patrols and arrests in an effort to reduce crime rates.¹⁴³ For that reason, the use of conventional Compstat may be a barrier to officer buy-in to deflection programs, in light of the comments from some APD officers that arrests were a good “stat” for career advancement, while PAD referrals may not be.

But the Compstat model can be tweaked to promote and achieve any goal; it can use metrics beyond arrests and crime reductions to evaluate success and supervisor performance. Given that more PAD referrals occurred in the zone in which supervisors were most supportive of the program, incorporating promotion and evaluation of deflection programs into Compstat would appear to be a fruitful strategy for getting police supervisors on board and increasing referrals by responding officers in their jurisdiction. These kinds of decisions would not rest with the prosecutor’s office per se, but it is a topic on which the prosecutor’s office could surely offer guidance and support, pursuant to the deflection partnership.

Finally, consider the significance of funding streams for deflection programs. The prosecutor’s use of forfeiture funds to subsidize the cost of deflection programs, as occurs in the Burlington office, would send a strong signal to law enforcement about where prosecutorial priorities lie. Forfeiture funds are derived from police activity but are collected to benefit the jurisdiction as a whole. In most places, there is a formula or application process governing how to divide proceeds from forfeiture among various law enforcement or county prosecution agencies.¹⁴⁴ The prosecutor’s office-level decision to use its supply of forfeiture money for this purpose would communicate to law enforcement the importance of the deflection mission.

4. Augmenting Procedural Justice for Substance Users and Communities

As noted above, deflection programs provide fertile ground to seed and nurture supportive relationships between police and the communities they serve. In an era of heightened mistrust and troubling questions about the legitimacy of law enforcement, particularly in communities of color, research has consistently shown

¹⁴² See John A. Eterno & Eli B. Silverman, *The New York City Police Department’s Compstat: Dream or Nightmare*, 8 INT’L J. POLICE SCI. & MGMT. 218, 221 (2006).

¹⁴³ David Weisburd et al., *Reforming to Preserve: Compstat and Strategic Problem Solving in American Policing*, 2 CRIMINOLOGY & PUB. POL’Y 421, 422 (2003).

¹⁴⁴ See, e.g., U.S. DEP’T OF JUST. & U.S. DEP’T OF TREASURY, *Guide to Equitable Sharing for State, Local, and Tribal Law Enforcement Agencies* (Jul. 2018), <https://www.justice.gov/criminal-afmls/file/794696/download> [perma.cc/V5SH-JRMH] (describing the federal Equitable Sharing program to distribute forfeiture funds among state and local law enforcement, as well as prosecutor agencies). Equitable sharing has generated considerable controversy over the years, as forfeitures sometimes occur even without an active prosecution. See Christopher Ingraham, *The Feds Have Resumed a Controversial Program That Lets Cops Take Stuff and Keep It*, WASH. POST (Mar. 28, 2016), <https://www.washingtonpost.com/news/wonk/wp/2016/03/28/the-feds-have-resumed-a-controversial-program-that-lets-cops-take-stuff-and-keep-it/> [perma.cc/T7W3-YQ6B]. States also have their own forfeiture laws. See, e.g., Va. Code Ann. § 19.2-386.14 (2018).

that frayed relationships can be strengthened when police act in procedurally just ways.¹⁴⁵ It is not merely avoiding unnecessary use of force or curtailing blatant racial profiling that facilitates perceptions of procedural justice; fair and respectful treatment in routine encounters and a commitment to a community-partnership orientation that emphasizes joint problem-solving (in lieu of significant criminal justice intervention) go a long way toward generating trust, confidence, and public support of law enforcement.

If police can be trained to recognize substance abuse and addiction as public health problems rather than criminal justice problems, and to act as catalysts for treatment rather than as crusaders for punishment, they will better embody a problem-oriented policing model and demonstrate suitable empathy for the substance user. They will also display and reinforce positive police-community sentiment to the kin and the friendship networks that extend well beyond substance users' immediate households.¹⁴⁶ Treating people with dignity and respect in a fair and neutral manner need not be widespread in order to influence perceptions of police legitimacy, as even brief single encounters can elevate citizen perceptions of procedural justice.¹⁴⁷ The implications, then, of a coordinated deflection program that is buoyed county-wide by prosecutors and supported by numerous police agencies has the potential to considerably improve police-community relations.¹⁴⁸

Calls for defunding the police in recent months track a larger trend toward reforming criminal justice in light of racial disparities in criminal justice processing and social justice concerns. The President's Taskforce on 21st Century Policing generated a 2015 report that encouraged, among more specific measures, a revision of police culture. The historical roots of police as protectors or "guardians" of the community "sits in opposition to a 'warrior' ethos conveying the view that police are at 'war' with those they serve."¹⁴⁹ Deflection efforts that join police and treatment providers to address substance use better reflect the guardianship role and the set of health and welfare-oriented values that lie at the heart of current reform efforts.

What is more, court procedural justice, or perceptions of prosecutor and judicial fairness, are equally important for citizens' views of criminal justice and compliance

¹⁴⁵ See, e.g., Trinkner & Cohn, *supra* note 12, at 603.

¹⁴⁶ See Kimberly Kaiser & Michael C. Reisig, *Legal Socialization and Self-Reported Criminal Offending: The Role of Procedural Justice and Legal Orientations*, 35 J. QUANTITATIVE CRIMINOLOGY 135, 137 (2019).

¹⁴⁷ See Lorraine Mazerolle et al., *Shaping Citizen Perceptions of Police Legitimacy: A Randomized Field Trial of Procedural Justice*, 51 CRIMINOLOGY 33, 35 (2012) (showing that a brief but procedurally just traffic stop can shape general orientations toward law enforcement).

¹⁴⁸ Compliance with the law and cooperation with police are bolstered when police are perceived to act in procedurally just ways, increasing their legitimacy to exercise authority. Consequently, an ancillary benefit of enhancing police legitimacy is that it fosters public cooperation in solving more serious offenses. See Jason Sunshine & Tom R. Tyler, *The Role of Procedural Justice and Legitimacy in Shaping Public Support for Police*, 37 LAW & SOC'Y REV. 513, 529 (2003).

¹⁴⁹ Wood & Watson, *supra* note 10, at 289.

with the law.¹⁵⁰ A partnership model for providing deflection, reflected in the actions of multiple agents in the criminal legal system working in conjunction with external health providers, may augment perceptions of procedural justice more broadly than programs that haphazardly arise in a handful of policing jurisdictions. This is particularly true in circumstances where police maintain complete discretion to refer or not to refer the substance user into the deflection pathway.¹⁵¹

Strong messaging from the prosecutor's office about the need to provide consistent encouragement for deflection services irrespective of a suspect's race, gender, or age (and prosecutors' collection of data to track demographic patterns in referrals, as occurs in Burlington)¹⁵² should help counter concerns that police, left to their own devices, will channel disadvantaged persons into the criminal courts while offering deflection to members of already-advantaged populations.¹⁵³ To sum up, the person-based approach that is at the core of deflection (in contrast to the traditional case-based approach) highlights respectfulness, harm-reduction, and guardianship in ways that standard processing for low-level drug offenses does not, bolstering procedural justice and law enforcement legitimacy in a broader range of contexts.

CONCLUSION

At this moment in our nation's history, we are enveloped by stories of scandalous, appalling behavior in the criminal legal system. Wrongful conviction of innocent people, police violence during citizen encounters, misconduct by court and prison officials—these problems have eroded many people's faith in the legal system as a foundation of our democracy. Inspired at least in part by the Black Lives Matter movement and the Innocence Projects, reformers are calling on local governments

¹⁵⁰ TYLER, *supra* note 12; *see also* Thomas Baker et al., *Shared Race/Ethnicity, Court Procedural Justice, and Self-Regulating Beliefs: A Study of Female Offenders*, 49 LAW & SOC'Y REV. 433, 434 (2015).

¹⁵¹ Deflection programs that rely heavily on police discretion risk subjecting communities of color to unequal treatment. *See, e.g.*, Michael R. Smith & Geoffrey P. Alpert, *Explaining Police Bias: A Theory of Social Conditioning and Illusory Correlation*, 34 CRIM. JUST. & BEHAV. 1262, 1279 (2007) (concluding that police officers treat minorities differently from white individuals because of "unconscious biases" towards minorities, associating them with "deviant or criminal behavior"). Moreover, police may be viewed with distrust by members of such communities. *See, e.g.*, Kevin L. Nadal et al., *Perceptions of Police, Racial Profiling, and Psychological Outcomes: A Mixed Methodological Study*, 73 J. SOC. ISSUES 808, 824 (2017) (finding that Black Americans hold less favorable views of police than white Americans, in part because they have been "frequently targeted by overt discrimination and racial microaggressions").

¹⁵² *See supra* note 132 (Burlington office is particularly concerned about how police communicate deflection to members of communities that don't feel safe around the police.). Partners in the Seattle-area LEAD program also track patterns in police referrals and discuss the issue when referrals seem to skew in favor of the White population. Benet Phone Call, *supra* note 52.

¹⁵³ Likewise, when communities of color come to feel respected more generally, they are less likely to view outreach by officers with suspicion and may more readily accept offers of deflection referral and services. Mistrust between communities of color and local police might account for the depressed rate of deflection referrals among non-Whites in Houston. *See* Yatsco et al., *supra* note 11.

to make seismic shifts at the most basic level; some have advocated for de-funding the police,¹⁵⁴ or abolishing the carceral system entirely.¹⁵⁵ In the prosecutorial context, wide-scale reform might mean having prosecutors substantially relinquish their power and funding to other institutions, such as public health agencies or public defender services.¹⁵⁶ Others less radically suggest we recast the prosecutor as a “caretaker” of the criminal legal system, someone who should support programs of leniency when the system becomes so overly punitive that it undermines the ideals embedded in our Constitution.¹⁵⁷

In this article, we propose a prosecutorial reform at the intersection of these rhetorical ideals: prosecutorial involvement in, or leadership of, pre-arrest deflection networks for low-level drug offenders in their communities. These initiatives, meant to supplement existing options for low-level offenders, train police officers to become a source of information about, and connection to, recovery and treatment services. Deflection programs are designed to dissolve the unhealthy relationship that has long existed between the criminal legal system and substance abuse disorders, improving the user’s chance for sustained recovery, allowing him to emerge without stigma, minimizing the risk of further criminal violation, and saving thousands of dollars for jurisdictions in the process.

Embracing deflection would represent a threefold shift in prosecutorial control over low-level crimes committed by substance users: a shift in power, funding, and expressed support for leniency. With regard to the first point, prosecutors in deflection partnerships would be yielding power to two populations: to public health and rehabilitation agencies, and to substance users. Unlike diversion programs, which arise and exist entirely within the prosecutor’s office, treatment facilities and other recovery services are independent entities that reside outside of the criminal legal system; they do not answer to the elected prosecutor, and they track metrics other than recidivism when accounting for success. These agencies bear most of the

¹⁵⁴ See, e.g., Simone Weichselbaum & Nicole Lewis, *Support for De-Funding the Police is Growing: Here’s Why It’s Not a Silver Bullet*, THE MARSHALL PROJECT, <https://www.themarshallproject.org/2020/06/09/support-for-defunding-the-police-department-is-growing-here-s-why-it-s-not-a-silver-bullet> [perma.cc/672U-4QD5] (last visited May 22, 2021).

¹⁵⁵ See, e.g., Allegra M. McLeod, *Envisioning Abolition Democracy*, 132 HARV. L. REV. 1613 (2019); Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156 (2015); see also MAYA SCHENWAR & VICTORIA LAW, PRISON BY ANY OTHER NAME (2020).

¹⁵⁶ See, e.g., Darcy Covert, *Transforming the Progressive Prosecutor Movement*, WIS. L. REV. (forthcoming) (arguing in support of “the reallocation of funds from prosecutors’ offices—rather than the expansion of diversion programs—to social services to keep the mentally ill, substance addicted, and poor out of the criminal system. Rather than hoping to prevent wrongful convictions and over-punitiveness by changing who works in your office, lobby for a stronger indigent defense system and more external limits on prosecutorial power.”)

¹⁵⁷ See Jeffrey Bellin, *Expanding the Reach of Progressive Prosecution*, 110 J. CRIM. L. & CRIMINOLOGY 707, 707 (2020). This conception builds on Fred Zacharias’ description of the prosecutor as someone who should not take advantage of justice system breakdowns and must restore order before resuming any sort of advocacy on behalf of the state. See generally Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 VAND. L. REV. 45 (1991).

responsibility for the successes achieved by deflection partnerships. With respect to user power, a user's decision to participate in treatment services is free from the shadow of criminal sanction that would haunt him if he were in a diversion or post-conviction probation program. He can join or not, follow through or not, based on his decision about how best to manage his life—not because he is afraid of jail. By ceding power on two fronts, prosecutors' support of deflection signals a rejection of the imperial prosecutorial approach that has dominated since the 1970s.

Second, as partners in deflection initiatives, prosecutors would help to secure funding for these ventures to succeed, knowing that such funding would be outside of their exclusive control. Prosecutor's offices often have access to grant funds that are part of law enforcement funding streams. These channels would normally be closed to agencies outside of the criminal legal system universe. By partnering with outside agencies to form deflection networks, prosecutors could unlock access to these funding streams, thereby generating shared resources in service of, and in commitment to, the goal of eroding the connection between substance use and crime. No longer would drug programs have to center or coordinate a legal framework in order for them to receive public financial support.

Third, prosecutors who initiate or join deflection networks would be publicly and proudly supporting leniency, rather than punitiveness, for a population of offenders most deserving of such treatment. Developers of accountability courts and diversion programs have already acknowledged the failures of conventional punishment models for those battling substance abuse disorders, but these efforts kick in at later stages of the criminal process. Pre-arrest deflection programs would supplement these existing programs for a subset of users who are at the earliest end of the spectrum, allowing them to pursue treatment and recovery on their own terms with no threat of punishment. For low-level offenders who have caused little to no social harm, deflection offers a solid chance to emerge from this experience without stigma and with the tools necessary to turn their lives around.

The goal of this article has been to introduce the concept of deflection and to compare it to the mix of approaches that prosecutors have used for decades when handling low-level drug cases—full prosecution and diversion. But as some scholars have called for full divestment, and some reform-minded prosecution offices recently have begun to implement forms of non-prosecution (what we here call “blanket declination”) that align with these insights, we would be remiss if we didn't also begin the work of comparing deflection to that approach as well. Our aspiration on that front is somewhat limited, though, given space constraints; we document the sentiments that motivate blanket declination policies and offer a brief assessment of how deflection contrasts with those policies. A full-bodied comparison of the two approaches (as well as other techniques for reducing harm to low-level offenders) must wait for another paper.

The scholarly movement in support of blanket declination stems from a series of interlocking observations about the harmful effects of legal system involvement with low-level offenders. Devon Carbado and Patrick Rock, for example, have observed that because police are frequently placed in positions where they encounter

people in marginalized communities, they have too many opportunities to use force against them.¹⁵⁸ Reducing the front-line presence of the police (by removing their authority to arrest low-level offenders, as a start) would thereby automatically reduce the number of police-involved violent episodes. Elizabeth Hinton makes a different point; she demonstrates that well-intentioned social service programs were co-opted by law enforcement during the latter half of the twentieth century.¹⁵⁹ Law enforcement entities dominated in terms of both control and money, leaving social service programs with little choice in the matter. If we were to remove law enforcement from the landscape, she contends, social service programs could flourish and citizens would benefit. Finally, Amanda Agan, Jennifer Doleac and Anna Harvey have recently shown, using data from Suffolk County (Boston) Massachusetts, that non-prosecution of non-violent misdemeanors is correlated with lower rates of re-offending than prosecution of such misdemeanors, at least for 3 years.¹⁶⁰ Although their dataset did not include any deflection-type programs and prosecuted cases included those who were diverted but did not succeed, the authors concluded that if a jurisdiction wants to reduce recidivism, non-prosecution pays more dividends than prosecution.¹⁶¹ Reading all of these works together, one comes away with the impression that the less involved the criminal legal system gets with low-level offenders, the better.

Faced with these insights, how does deflection measure up? Let's begin with cost. Affirmative assistance, such as that provided through deflection pathways to treatment, requires a dedication of resources from the prosecutor's office. For that reason, it might be less appealing to some offices than blanket declination, which requires no money and in fact offers immediate savings. But short-term spending on assistance for substance users is likely to yield long-term gains for the whole community. Guiding users toward recovery will, over time, reduce overdose deaths and crime committed by substance users to support their habits. When viewed from this perspective, proactively helping substance users appears to be a wise investment

¹⁵⁸ Devon W. Carbado & Patrick Rock, *What Exposes African Americans to Police Violence?* 51 HARV. C.R.-C.L. L. REV. 159 (2016).

¹⁵⁹ See ELIZABETH HINTON, *FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA* (2017).

¹⁶⁰ Amanda Agan, Jennifer Doleac & Anna Harvey, *Misdemeanor Prosecution*, NAT'L BUREAU OF ECON. RES. (2021), https://s18798.pcdn.co/annaharvey/wp-content/uploads/sites/6417/2021/03/Misdemeanor_Prosecution_ADH.pdf [perma.cc/9T5C-QQB9] (The authors use the term "non-prosecution" to refer to cases that both a) do not proceed past the day of arraignment and b) do not result in a conviction or an "admission to sufficient facts." Everything else is considered "prosecution.").

¹⁶¹ Non-prosecution of misdemeanors might also have a beneficial effect on violent crime rates. Elizabeth N. Brown, *Violent Crime in Baltimore Plunges After City Ditches Prosecution of Prostitution, Drug Possession, Other Minor Offenses*, REASON (Apr. 1, 2021), <https://reason.com/2021/04/01/violent-crime-in-baltimore-plunges-after-city-ditches-prosecution-of-prostitution-drug-possession-other-minor-offenses/> [perma.cc/6VRK-PNFF] (last visited Sep. 13, 2021).

in the community's wellness, although we recognize that yearly budget requirements and frequent election cycles complicate an office's ability to focus on and accurately calculate long-term strategic advantage.

Beyond the fiscal impact, jurisdictions might have an obligation to do more than simply stand back from a problem they helped to create. After decades of prosecutorial efforts to quash the lives of substance users, promises to remain hands-off in the future might not be a sufficient course correction. Although the scholarly work in support of blanket declination models offers important warnings about the dangers of any criminal legal system involvement, significant public health research establishes that treatment is essential to achieve long-term gains in recovery from substance abuse.¹⁶² Where the substance user wants to pursue that path, criminal justice officials may have an obligation to support that decision and to facilitate its success.

Recall that an office involved in a deflection partnership has the opportunity to support substance users in multiple settings, beyond just intercepting them at the scene of their crimes and deciding not to prosecute. Currently five deflection pathways exist, and only one of those pathways stems from a police officer observing criminal activity in progress. In the other pathways, a police officer contacts a substance user at a more neutral time and location (like in a hospital following an overdose attempt), is accompanied by a health care worker or social worker, or responds to a user-initiated request for help. In these non-street level intercepts, there is no presently-occurring crime to document and no "arrest or refer" choice for the individual officer to make. These non-criminal-justice-related intercepts—in a safe location, when accompanied by a social or health care worker, at the user's instigation—are important to this discussion for two reasons. First, they fall outside of the prosecutor's case-based jurisdiction and thus would not be governed by a blanket declination policy. Secondly, they present far less risk of police violence, and may in fact reduce the level of friction between law enforcement and marginalized communities, because the contact is non-confrontational, and the emotional temperature of the police-citizen encounter is lower than on the streets.

Perhaps most importantly, deflection may simply be more realistic than blanket declination for jurisdictions to pursue. Despite recent and robust calls for law enforcement and criminal justice agencies to divest themselves of certain powers to intervene (or to be defunded by local governments for this purpose), not every prosecutor's office can withstand the political heat of a blanket declination policy, such as was adopted in Baltimore in the wake of COVID in 2020.¹⁶³ A jurisdiction

¹⁶² See *supra* notes 41–43.

¹⁶³ See Tim Prudente & Phillip Jackson, *Baltimore State's Attorney Mosby to Stop Prosecuting Drug Possession, Prostitution, Other Crimes Amid Coronavirus*, BALT. SUN (Mar. 18, 2020), <https://www.baltimoresun.com/coronavirus/bs-md-ci-cr-mosby-prisoner-release-20200318-u7knneb6o5gqvnqmtpejftavia-story.html>. The State's Attorney of Baltimore has faced resistance from local law enforcement for announcing that she would no longer prosecute minor drug possession of any kind. Officers have accused her of effectively nullifying the state's drug laws and insist they will continue to make arrests.

might even be subject to a state law limiting or removing its ability to reduce law enforcement funding.¹⁶⁴ Deflection is a softer approach, a less radical departure in jurisdictions where drug laws remain on the books. It does not appear to threaten the power of the legislature to enact penal laws (in the way blanket declination policies do, at least in some corners) and thus might garner more political support from a wider range of constituencies.¹⁶⁵ The partnership model also shows respect for police decision-making authority. As a member of a deflection partnership, the prosecutor's office does not force police to make a choice nor tell them in advance that all of their arrests will be disregarded. The objective is to convince officers that making arrests is not in their professional best interest, and that a warm handoff to recovery offers the best odds of reducing future crime and enhancing public safety. Considering the realities of both legislative and policing institutions, a deflection partnership is likely to avoid provoking the sort of antagonism that blanket declination might generate, and thus it might have greater staying power as a prosecution initiative in the long term.

Alternatively, deflection can be treated as a step on the path to blanket declination in the future, for a jurisdiction that is so inclined. As in other policy areas, the most effective incremental approaches are (and are perceived as) "stepping stones" rather than "stumbling blocks" to wide-scale reform; if they reinforce underlying pathologies or entrench existing narratives they will ultimately be counter-productive to the reformers' goals.¹⁶⁶ Lindsay Wiley and her co-authors express the difference like this: "Will implementing a modest reform use up political energy that could eventually be channeled into transformation? Or will it demonstrate success that will both maintain a movement's momentum and make the next step forward a smaller one?"¹⁶⁷ We believe that the public health underpinnings of deflection challenge the political orthodoxy that has long labeled substance users as criminals, and that the partnership model at the core of deflection erodes the level of control previously asserted by criminal justice actors alone. These are positive steps in the right direction. Moreover, the successes of deflection programs thus far (in terms of recidivism and user satisfaction) ought to encourage more jurisdictions

¹⁶⁴ See, e.g., Kirby Wilson, *Ron DeSantis: Any Municipality that 'Defunds' Police will Lose State Funding*, TAMPA BAY TIMES (Sep. 21, 2020), <https://www.tampabay.com/news/florida-politics/2020/09/21/ron-desantis-any-municipality-that-defunds-police-will-lose-state-funding/> [perma.cc/MQM8-FQ32]; Jeff Amy, *Kemp Signs Bill Aimed at Banning 'Defund the Police' Efforts*, AP NEWS (May 7, 2021), <https://apnews.com/article/george-floyd-racial-injustice-police-police-reform-government-and-politics-a11edff75f6ef955fa074dc4e1d3a6fa> [perma.cc/V7L3-7DYA]; *Defund Cities that Defund the Police Act of 2020*, H.R. 7632, 116th Cong. (2020).

¹⁶⁵ Logan Sawyer, *Reform Prosecutors and Separation of Powers*, 72(3) OKLA. L. REV. 603, 620 (2020).

¹⁶⁶ Lindsay F. Wiley et. al., *Health Reform Reconstruction*, 55(2) UC DAVIS L. REV. 3, 61–62 (2022 forthcoming) <http://ssrn.com/abstract=3760086> [perma.cc/5UZZ-6K29] (discussion of stepping stones and stumbling blocks) (citing Rachel Brewster, *Stepping Stone or Stumbling Block: Incrementalism and National Climate Change Legislation*, 28 YALE L. & POL'Y REV. 246 (2009)).

¹⁶⁷ *Id.* at 62.

to add deflection to their menu of options, although law enforcement resistance (such as that revealed in our Atlanta data) remains an obstacle to be overcome.

In support of our plea to add deflection to the prosecutorial toolkit, we have profiled the program established in recent years by the District Attorney of Burlington, New Jersey. We acknowledge that this jurisdiction's model might not be easily adaptable outside the state, due to some unique features of the legal landscape in New Jersey. For example, the Governor of New Jersey and the Attorney General of New Jersey have been strongly supportive of this approach; in fact, the Attorney General has recently made Operation Helping Hand a statewide program.¹⁶⁸ Moreover, and perhaps more importantly, county prosecutors in New Jersey are appointed by the Governor, rather than elected directly by the population.¹⁶⁹ They thus do not need to fear retaliation at the ballot box if a substance user who receives treatment later commits a more serious crime. Accountability runs only upward, to the state Capitol in Trenton; it does not flow downward toward the electorate. In other states where re-election concerns tend to dominate the agendas of elected county prosecutors, fear of the Willie Horton effect may depress their incentive to innovate around leniency initiatives.

But even so, we believe there are powerful reasons elected county prosecutors ought to create or join deflection partnerships with local law enforcement and public health agencies. County prosecutors can manage case-level interventions for substance users in the courthouse. They can create and coordinate a consistent message among multiple, fragmented police agencies and county-level health care providers operating within county borders, leading to more and better services for substance users. Prosecutor training and outreach can increase police buy-in to treatment alternatives by fostering transparent communication about filing priorities in these cases. And lastly, prosecutorial involvement can enhance procedural legitimacy, leading to improved relationships between law enforcement and the communities they serve. Prosecutors serving as leading voices in deflection programs thus can reduce the likelihood that mistrust and misunderstanding will impede substance users from getting the services they need.

In conclusion, it is time to end our insistence on controlling the destiny of substance users through the trifecta of full prosecution, diversion programs, and accountability courts. It is also imperative that we do more than simply promise not to prosecute persons with substance use disorders; we should be devoting resources to building a better future. By championing deflection alternatives in their respective jurisdictions, prosecutors can become leaders in the effort to help their constituents and their communities recover from the web of punishment and stigma that for decades has strangled users, their families, and the justice system overall.

¹⁶⁸ O'Mara Phone Call, *supra* note 128.

¹⁶⁹ Only 5 states have appointed county prosecutors—Connecticut, New Jersey, Rhode Island, Delaware and Alaska. All are very small in terms of either area or population. George Coppolo, *States That Elect Their Chief Prosecutors*, OLR RES. REP. (Feb. 24, 2003), <https://www.cga.ct.gov/2003/rpt/2003-R-0231.htm> [perma.cc/UFE8-VJM5].