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OPIOID POLICING

BARBARA FEDDERS

This Article identifies and explores a new, local law enforcement approach to alleged drug offenders. Initially limited to a few police departments, but now expanding rapidly across the country, this innovation takes one of two primary forms. The first is a diversion program through which officers refer alleged offenders to community-based social services rather than initiate criminal proceedings. The second form offers legal amnesty as well as priority access to drug detoxification programs to users who voluntarily relinquish illicit drugs. Because the upsurge in addiction to—and death from—opioids has spurred this innovation, I refer to it as “opioid policing.”

This new approach improves in key ways upon previous state responses to illicit drug use. Opioid policing has explicit public-health aims—seeking improved life outcomes for people addicted to drugs without relying on arrest. By contrast, the War on Drugs incentivized arrests, which create myriad negative consequences for drug-law offenders—with few discernible offsetting social gains. Opioid policing also avoids the most problematic aspects of specialized drug courts. Scholars and reformers have documented how these courts provide substandard treatment and employ procedures that frequently lead to more, rather than less, entanglement with the criminal system. Unlike the drug court, opioid policing operates at the pre-booking phase, rather than after legal proceedings have already begun, allowing drug users to avoid the harms of criminal processing entirely.

Notwithstanding its salutary features, opioid policing retains key troubling characteristics of both War on Drugs policing and drug courts. The structure of opioid policing programs creates incentives for law enforcement to expand, rather than reduce, surveillance of marginalized populations. What is more, opioid policing may re-entrench rather than disrupt the distributive inequities of race and class that permeate previous state responses to illicit drug use. Ultimately, the assessment this Article undertakes reveals both the limitations of drug-reform efforts situated within law enforcement as well as the reach and the power of the contemporary carceral state.
Prescriptions for, addiction to, and death from opioids have risen dramatically in the past two decades.\(^1\) In this period, personal use of opioid painkillers went up nearly

\(^{1}\) See generally Opioids: Brief Description, Nat’l Inst. on Drug Abuse, https://www.drugabuse.gov/drugs-abuse/opioids [https://perma.cc/3XNJ-ZEMs] (defining opioids as a class of drugs that includes pain relievers available legally by prescription, such as oxycodone, marketed as OxyContin; hydrocodone, marketed as Vicodin; codeine; morphine; the illegal drug heroin; and synthetic products such as fentanyl and carfentanil). While medical commentators once differentiated between natural and synthetic forms of the drug, with “opiate” referring to the former and “opioid” to the latter, that distinction has for the most part been abandoned. Stephanie Labonville, *IWP: The Patient Advocate Pharmacy, Opiate, Opioid, Narcotic - What’s the Difference?* (Mar. 29, 2017, 8:00 AM), http://info
500%.

Though regulators have begun to crack down on over-prescription by doctors, illicit opioid use persists; heroin and fentanyl use are both on the rise. Over two million people currently meet the medical criteria for opioid use disorder. In 2017, 47,000 people died from opioid-related overdose deaths, a number higher than in the previous year. The number of drug overdose-related deaths exceeds American casualties at the peak of the AIDS crisis.

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5. Ctrs. for Disease Control and Prevention, Heroin Overdose Data (2017) ("[H]eroin use has been increasing in recent years among men and women, most age groups, and all income levels."). The CDC rejects the causal link that some observers have made between increased regulation of opioid prescription and increase in use of street drugs. See, e.g., Gery P. Guy Jr., Kun Zhang, Michele K. Bohm, Jan Losby, Brian Lewis, Randall Young, Louise B. Murphy & Deborah Dowell, Vital Signs: Changes in Opioid Prescribing in the United States, 2006–2015, MORTALITY & MORTALITY Wkly. Rep. (2017), https://www.cdc.gov/mmwr/volumes/66/wr/mm6626a4.htm [https://perma.cc/TSL9-B2MY].


Federal and state policymakers have begun to push for severe criminal penalties for people who sell or share opioids, including urging prosecutions under so-called “drug-induced homicide” statutes. Such statutes permit homicide prosecutions whenever a defendant delivers a controlled substance and someone dies from ingesting it; the only mens rea requirement is that the defendant knew she was delivering a controlled substance, as opposed to a standard of recklessness or negligence.

Notwithstanding this move to crack down on suspected opioid dealers, the dominant cultural narrative surrounding people who take opioids is sympathetic. In contrast to the negative rhetoric that characterized the crack cocaine crisis—most prominently the demonization of pregnant women of color who used crack—and


10. At present, a substantial minority of states have drug-induced homicide statutes. See, e.g., **720 Ill. Comp. Stat. Ann. 5/9-3.3** (West 2018) (“A person commits drug-induced homicide when he or she violates Section 401 of the Illinois Controlled Substances Act or Section 55 of the Methamphetamine Control and Community Protection Act by unlawfully delivering a controlled substance to another, and any person’s death is caused by the injection, inhalation, absorption, or ingestion of any amount of that controlled substance.”); **N.J. Stat. Ann. § 2C:35-9** (West 2018) (“Any person who manufactures, distributes or dispenses methamphetamine, lysergic acid diethylamide, phencyclidine or any other controlled dangerous substance classified in Schedules I or II, or any controlled substance analog thereof, in violation of subsection a. of N.J.S. 2C:35-5, is strictly liable for a death which results from the injection, inhalation or ingestion of that substance, and is guilty of a crime of the first degree.”); **Wyo. Stat. Ann. § 6-2-108** (West 2017) (“A person is guilty of drug induced homicide if: (i) He is an adult or is at least four (4) years older than the victim; and (ii) He violates W.S. 35-7-1031(a)(i) or (ii) or (b)(i) or (ii) by unlawfully delivering a controlled substance to a minor and that minor dies as a result of the injection, inhalation, ingestion or administration by any other means of any amount of that controlled substance.”).


heroin users in the 1950s and 1960s derided as “junkies.” Today’s opioid discourse tends to avoid excessively harsh judgment of users. Commentators instead highlight the genetic component of opioid misuse; advocates point to science showing that addiction is a disease, arguing that as a result people who misuse opioids deserve treatment instead of punishment. Elected officials stress the culpability of pharmaceutical companies for aggressive marketing, and physicians for profligate prescribing. Social scientists link opioid addiction to the high unemployment rate and personal isolation in areas where it is most widespread. They argue for more highlighting the political advantages of racializing the crack epidemic, and providing statistics and data on the effect racialization had in the criminal justice system; Craig Reinarman & Harry G. Levine, Crack in the Rearview Mirror: Deconstructing Drug War Mythology, 31 SOC. JUST. 182, 191–94 (2004) (describing hysteria about “crack babies” and noting that the notion that babies whose mothers used crack cocaine during pregnancy were severely at risk was misguided); Dorothy E. Roberts, Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy, 104 HARV. L. REV. 1419, 1481 (1991) (noting racist media portrayal of pregnant Black women and “crack babies”).

15. Glenn Ellis, The Forgotten Opioid Epidemic: African Americans and Heroin, The PHILADELPHIA TRIBUNE (Sept. 27, 2016), http://www.phillytrib.com/news/health/the-forgotten-opioid-epidemic-african-americans-and-heroin/article_7903fc9-9f8c-5d2c-88a7-26b36952dc6d.html [https://perma.cc/5U9D-JHJW] (noting that heroin users in 1960s were punished harshly and arguing that such punishments were seen as socially acceptable because users were primarily Black and poor).


17. Eric J. Miller, Embracing Addiction: Drug Courts and the False Promise of Judicial Interventionism, 65 OHIO ST. L.J. 1479, 1518 (2004) (noting that the notion of addiction as disease is controversial but that it does have some support from the medical community).

18. See, e.g., Brief for the Probationer on a Reported Question and on Appeal from a Finding of Probation Violation from the Concord Division of the District Court Department at 2, 4, 6, Commonwealth v. Eldred, 101 N.E.3d 911 (Mass. 2018) (arguing that “science now recognizes that drug addiction . . . is not caused by moral turpitude but rather is a chronic brain disease whose defining feature is the compulsive use of a substance despite significant substance-related problems” and that “punishing relapse is clinically contraindicated” (citations omitted)); America’s New Drug Policy Landscape, PEW RES. CTR. (Apr. 2, 2014), http://www.people-press.org/2014/04/02/americas-new-drug-policy-landscape [https://perma.cc/6WT7-4G59] (noting that most Americans believe drug users deserve treatment, not punishment).


drug treatment and overdose prevention for users. Policymakers and journalists highlight the fact that opioid addiction affects white, young suburbanites. These references to race and class work to differentiate opioid addiction in the popular imagination from drug scourses from the last five decades, which instead primarily affected poor people of color, thereby justifying—however implicitly—the calls for a response to the opioid crisis that lies outside the criminal system.


23. Szalavitz, supra note 19 (noting that “[b]y now, many Americans have heard sad stories that begin with a white teen innocently ingesting a prescription obtained from a pharma-influenced doctor” (emphasis omitted)). Some scholars warn that exclusively critiquing the ways that race defines state responses to drug epidemics understates the important role played by class in shaping criminal justice policy. See, e.g., Rebecca Tiger, Race, Class, and the Framing of Drug Epidemics, CONTEXTS (Dec. 18, 2017), https://contexts.org/articles/race-class-drugs [warning against “exclusive focus on racial inequality in drug policy”).


25. Seelye, supra note 16 (describing sympathetic portrayal of white opioid users and citing Kimberle Crenshaw arguing “one cannot help notice that had this compassion existed for African-Americans caught up in addiction and the behaviors it produces, the devastating impact of mass incarceration upon entire communities would never have happened”).

26. See, e.g., Ed Stetzer, “‘Lock Them Up:’ My Double Standard in Responding to the Crack Crisis vs. the Opioid Epidemic, WASH. POST (Oct. 26, 2017), https://www.washingtonpost.com/news/acts-of-faith/wp/2017/10/26/lock-them-up-my-double-standard-in-responding-to-the-crack-crisis-vs-the-opioid-epidemic/?noredirect=on&utm_term=ecedf59b&dec [“In our rush to protect our communities, our families and our values, we sought to put distance between ‘us’ and ‘them.’ We made groups, constructed labels, and tried to do everything we could to separate what we perceived as the ‘clean’ from the ‘unclean’—in many cases, the white from the black.”]; Ekow N. Yankah, When Addiction Has a White Face, N.Y. TIMES (Feb. 9, 2016), https://www.nytimes.com/2016/02/09/opinion/when-addiction-has-a-white-face.html [noting isolation of white opioid users].
Against this backdrop of a spike in fatal overdoses and a more compassionate attitude toward opioid users, a growing number of police departments have moved away from the use of arrest, detention, and initiation of criminal proceedings as the primary means for addressing violations of drug-possession statutes.\textsuperscript{27} Instead, these departments have adopted one of two distinct approaches, each of which incorporates public-health perspectives on drug use and addiction.\textsuperscript{28} The first is a pre-booking program through which officers refer low-level alleged offenders to community-based social services with an aim of diverting them from the criminal system.\textsuperscript{29} The second form allows individuals to walk into a precinct or approach an officer in the community, relinquish their illicit drugs, and request admission to a detoxification program—typically without fear of arrest or prosecution.\textsuperscript{30} While not explicitly

\begin{itemize}
  \item \textsuperscript{27} Scholars and elected officials from both parties have shifted toward a critical view of the War on Drugs. See, e.g., MICH\textsuperscript{I}CLE \textsuperscript{E}X\textsuperscript{A}\textsuperscript{L}\textsuperscript{E}\textsuperscript{R}\textsuperscript{\textperiodcentered}LEX, THE \textsuperscript{N}E\textsuperscript{W} \textsuperscript{J}IM \textsuperscript{C}ROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 6–7, 47–49, 53, 59 (2012); PETER \textsuperscript{M}OSKOS, COP IN THE HOOD: MY \textsuperscript{Y}E\textsuperscript{A}R \textsuperscript{P}OLICING BALTIMORE’S EASTERN DISTRICT (2008) (decrying war on drugs as a failure); COREY \textsuperscript{B}OOKER, FACEBOOK (Aug. 1, 2017), https://www.facebook.com/corybooker/videos/10157111094132228 [https://perma.cc/WD5U-LMF9] (“For decades, the failed War on Drugs has locked up millions of nonviolent drug offenders—especially for marijuana-related offenses—at an incredible cost of lost human potential, torn apart families and communities, and taxpayer dollars.”); CHRIS \textsuperscript{C}HRI\textsuperscript{S}TE, FACE THE NATION TRANSCRIPTS JUNE 7, 2015: CHRISTIE, DE BLASIO, CBS NEWS, https://www.cbsnews.com/news/face-the-nation-transcripts-june-7-2015-christie-de-blasio [https://perma.cc/334W-M52F] (“And I think, quite frankly, the war on drugs has been a failure . . . . And let’s stop spending money on incarcerating nonviolent people because they are drug-addicted.”).
  \item \textsuperscript{28} See Elizabeth Joch, IMAG\textsuperscript{I}NING THE ADDICT: EVALUATING SOCIAL AND LEGAL RESPONSES TO ADDICTION, 2009 UTAH L. REV. 175, 192 (2009) (noting that with respect to drug policing, traditionally, “[a] stark moralism tends to play a leading role in the perception of harm; other perspectives from public health and public policy, secondary roles”).
  \item \textsuperscript{29} See Katherine Beckett, THE USES AND ABUSES OF POLICE DISCRETION: TOWARD HARM REDUCTION POLICING, 10 HARV. L. & POL’Y REV. 77, 86 (2016) (“Seattle’s Law Enforcement Assisted Diversion (LEAD) program is believed to be the first pre-booking diversion program for people arrested on drug and prostitution charges in the United States.”); see also SARA J\textsuperscript{E}AN GR\textsuperscript{E}EN, LEAD PROGRAM FOR LOW-LEVEL DRUG CRIMINALS SEES SUCCESS, SEATTLE TIMES (Apr. 9, 2015, 12:00 PM), https://www.seattletimes.com/seattle-news/crime/lead-program-for-low-level-drug-criminals-sees-success [https://perma.cc/Z8NL-XEYL] (explaining that the LEAD founders included prostitution as a qualifying offense because of data indicating that “[w]hile men are more likely to be arrested for using or selling drugs, women involved with drugs are most often arrested for prostitution”).
  \item \textsuperscript{30} See, e.g., BRIAN M\textsuperscript{A}C\textsuperscript{Q}\textsuperscript{U}\textsuperscript{R}E, “ANGEL” OPIOID INITIATIVE THRIVES DESPITE EXIT OF GLouceSTER POLICE CHIEF, BOS. GLOBE (July 18, 2017), https://www.bostonglobe.com/metro/2017/02/21/angel-opioid-initiative-thrives-despite-exit-gloucester-police-chief/hvH14GgG0dRrTYXJOpGEswO/story.html [https://perma.cc/SK9Z-FJCC] (describing that in 200 police agencies in twenty-eight states, departments have adopted an approach through which people who come to the police department and ask for help for drug addiction will be taken to a hospital and later placed in a recovery program and noting that some departments also adopt a “[no-arrest” policy).
confined to opioids, these new police approaches reflect and reinforce the comparatively sympathetic popular view of opioid users. This Article therefore refers to them, collectively, as “opioid policing.”

On the one hand, opioid policing seems like progress. Its use of social services programs to divert people from the criminal system renders it less costly and more humane than War on Drugs policing, which included elements of militarization and has been characterized by a heavy reliance on arrest. These tactics in turn led to long prison sentences that disproportionately affected Black people—all with no reduction in the availability of illicit drugs. In addition, opioid policing improves upon the specialized, treatment-oriented drug courts created with the putative aim of providing treatment to drug users to stop the cycle of criminal offending. Such courts, which have proliferated in the last three decades, historically have demanded abstinence from participants, consigning them to jail or prison if they relapse.

Long-term outcomes for drug-court participants have been poor overall. By contrast, opioid policing programs do not necessarily terminate participation for, or consign to jail or prison, alleged offenders who relapse, or who do not stop using illicit drugs in the first instance. Instead, they adopt a harm-reduction philosophy that emphasizes attainment of housing, improvement of health, and avoidance of crime.

On the other hand, opioid policing retains troubling characteristics of each of these earlier state responses to illicit drug use. For one, the design and


33. See infra notes 159–78 and accompanying text. The enforcement of prohibition laws proved equally costly and difficult, as noted in THE NAT’L COMM’N ON LAW OBSERVANCE & ENFORCEMENT, REPORT ON THE ENF’T OF THE PROHIBITION LAWS OF THE UNITED STATES 78–109 (1931).

34. See infra notes 193–251 and accompanying text.

35. See infra notes 262–69 and accompanying text.


implementation of some opioid policing programs create incentives for law enforcement to expand, rather than reduce, surveillance of historically marginalized populations. In addition, opioid policing has the potential to create significant racial and socioeconomic disparities in terms of who benefits most. Indeed, careful analysis of opioid policing reveals the limitations of drug-reform efforts situated within law enforcement as well as the power and reach of the contemporary carceral state.

This Article is the first to analyze each version of opioid policing. It contributes to two separate yet related strands of criminal-law scholarship. It speaks first to the literature that explores how arrest and prosecution are tools not only for responding to crime but also for managing populations. Such work documents the harms of arrest and prosecution—even absent conviction—and argues that the contemporary criminal system is problematically functioning as a mechanism of social control that exacerbates distributional inequities and troubling power dynamics. The Article also interacts with scholarship that imagines a supportive state, outside the criminal apparatus, that can more effectively address, if not prevent outright, the wide variety of social ills currently within the purview of the criminal system.

38. See infra notes 372–420 and accompanying text.
39. See infra notes 421–30 and accompanying text.
40. Two legal scholars have analyzed the programmatic development and early operation of the Seattle LEAD program. See Mary Fan, Street Diversion and Decarceration, 50 Am. Crim. L. Rev. 165 (2013); Beckett, supra note 29. No legal scholar has yet considered the second form of opioid policing.
41. See, e.g., Rachel A. Harmon, Why Arrest?, 115 Mich. L. Rev. 307, 307 (2016) (“Given their costs, arrests should be used only when they serve an important state interest; yet, they often happen even when no such interest exists”); Eisha Jain, Arrests as Regulation, 67 Stan. L. Rev. 809, 809 (2015) (arguing that civil regulatory bodies that make decisions based on arrests can pool resources with prosecutors and police officers, achieving a level of enforcement neither could achieve alone, and describing this phenomenon as undermining important aims of the criminal justice system); Anna Roberts, Arrests as Guilt, Ala. L. Rev. (forthcoming 2019) (unpublished manuscript on file with the Indiana Law Journal) (noting ways in which arrest has become fused with guilt and outlining harms of this fusion).
42. Issa Kohler-Hausmann, Managerial Justice and Mass Misdemeanors, 66 Stan. L. Rev. 611, 615 (2014) (noting data showing that as misdemeanor arrests in New York City rose, convictions fell and asserting that this result suggests that a managerial model of justice has replaced an adjudicative one that functions to manage people over time through engagement with the criminal justice system).
44. See, e.g., Amna Akbar, Toward a Radical Imagination of Law, 93 N.Y.U. L. Rev. 405, 405 (2018) (noting with approval how the Movement for Black Lives’ policy platform advocates “shrinking the large footprint of policing, surveillance, and incarceration and shifting resources into housing, health care, jobs, and schools” and urging legal scholars to engage with this vision); Allegra McLeod, Prison Abolition and Grounded Justice, 62 UCLA
The Article proceeds as follows. Part I lays out previous state responses to illicit drug use upon which opioid policing improves—War on Drugs policing and drug courts—and identifies the harms, costs, and limitations of each of these responses. After sketching the contours of the contemporary opioid crisis, Part II argues that a new theory of systemic discretion has emerged in the departments practicing opioid policing. It then considers each form of opioid policing in detail. Part III analyzes the promise of opioid policing. Part IV discusses its limitations.

I. PREVIOUS STATE RESPONSES: MAPPING THE CRITIQUES

A. War on Drugs Policing

1. A Tough-on-Crime, Racialized Politics

U.S. policymakers have referenced and relied on racial stereotypes in crafting drug legislation at least since the beginning of the twentieth century. A paradigmatic example is the federal government’s response to opium users during this time period. Notably, both middle-class white people—particularly women—and Chinese immigrants used the drug. Middle-class whites typically could easily obtain prescriptions from doctors and ingest the drugs in the privacy of their homes. Chinese immigrants, by contrast, mostly obtained opium by visiting smoking dens in urban areas. In 1909, Congress passed the Opium Exclusion Act, which targeted only opium smokers. The Harrison Narcotics Tax Act, enacted five years later, made explicit that only medical professionals could legally dispense opiates. Thus,

L. REV. 1156 (2015) (arguing for a prison abolitionist ethic, which entails gradual decarceration and a substitution of other regulatory forms to address the social ills that we currently allocate to policing). For arguments that the state should change to better support families and that liberal democratic theory must take more seriously human dependency, see MAXINE EICHNER, THE SUPPORTIVE STATE: FAMILIES, GOVERNMENT, AND AMERICA’S POLITICAL IDEALS (2010); Martha Albertson Fineman, The Vulnerable Subject: Anchoring Equality in the Human Condition, 20 YALE J.L. & FEMINISM I (2008).


46. TIGER, supra note 45; Luna, supra note 45, at 834. See generally DAVID T. COURTWRIGHT, DARK PARADISE: A HISTORY OF OPIATE ADDICTION IN AMERICA (2001) (tracing patterns of opiate addiction and comparative treatment based on race and class in the late 1800s and early 1900s).

47. TIGER, supra note 45, at 29.


49. Luna, supra note 45, at 829–30 (also noting that the Harrison Act sought to obtain revenue for the federal government); see also ACKER, supra note 48, at 34 ("The Harrison Act ended a period in which any substance could be packaged and sold as a medicine to the general public."); Laws: A History of Opiate Laws in the United States, NAT’L ALL. ADVOCATES FOR BUPRENORPHINE TREATMENT, https://www.naabt.org/laws.cfm [https://perma.cc/PW9C-LF6P].
Chinese immigrants faced sanctions for using the same drugs that white citizens could easily obtain from a physician, often even for a non-medical use.\textsuperscript{50} These laws corresponded with rising xenophobic sentiment; many hoped the Opium Exclusion Act might persuade immigrants to “go back to China.”\textsuperscript{51}

Around this same time, marijuana legislation was also being driven by negative perceptions of people of color, with whom the drug was most closely associated.\textsuperscript{52} At the state and federal level, legislators argued for marijuana’s criminalization by drawing upon racist stereotypes.\textsuperscript{53} Mexican laborers in the Southwest became associated with marijuana smoking, which was in turn blamed for their perceived lawlessness.\textsuperscript{54} Arguing in support of a marijuana criminalization statute in Texas, one senator in 1908 opined: “All Mexicans are crazy, and this stuff [marijuana] is what makes them crazy.”\textsuperscript{55}

By 1971, President Nixon was declaring drug abuse “public enemy number one” and committing his administration to an “all-out offensive” to end it.\textsuperscript{56} As articulated by the Nixon Administration, the War on Drugs had two, ostensibly equally important goals: reducing demand through prevention and rehabilitation programs, and curtailing supply through interdiction and other law enforcement initiatives.\textsuperscript{57} Nixon’s proposed federal budget that year actually allocated more money for prevention than law enforcement.\textsuperscript{58}

The National Institute of Drug Abuse (NIDA), created in 1974,\textsuperscript{59} was founded on the principle that addiction is a disease that is amenable to treatment;\textsuperscript{60} the NIDA’s

\textsuperscript{50} Federal law enforcement interpreted the Act as prohibiting prescriptions solely to maintain an addiction, but middle-class patients could circumvent this prohibition. Acker, \textit{supra} note 48, at 34 (citation omitted); Luna, \textit{supra} note 45, at 830–31.

\textsuperscript{51} Luna, \textit{supra} note 45, at 834 (citation omitted).


\textsuperscript{53} Kenneth B. Nunn, \textit{Race, Crime, and the Pool of Surplus Criminality: Or Why the “War on Drugs” Was a “War on Blacks,”} 6 \textit{J. GENDER RACE & JUST.} 381, 412 n.244 (2002) (stating “political interest in maintaining the connection between drugs and race has been a central theme of drug prohibition from the outset” (citation omitted)).

\textsuperscript{54} Steven W. Bender, \textit{Joint Reform?: The Interplay of State, Federal, and Hemispheric Regulation of Recreational Marijuana and the Failed War on Drugs}, 6 \textit{ALB. GOV’T L. REV.} 359, 361–2 (2013).

\textsuperscript{55} \textit{Id.} (documenting enactment in western states of laws prohibiting marijuana).


\textsuperscript{57} Alex Kreit, \textit{Drug Truce}, 77 \textit{OHIO ST. L.J.} 1323, 1328–29, 1331 (2016).

\textsuperscript{58} Michael Massing, \textit{The Fix} 112 (1998) (noting that Nixon proposed a federal drug budget that allocated $105 million of $155 million to treatment); see also Tiger, \textit{supra} note 45, at 29.


\textsuperscript{60} \textit{NAT’L INST. ON DRUG ABUSE}, \textit{UNDERSTANDING DRUG USE AND ADDICTION},
existence stood for the proposition that drug users were deserving of rehabilitation.\textsuperscript{61} A Supreme Court case from a decade earlier had already recognized that the \textit{condition} of being addicted to drugs could not constitutionally be punished through a criminal prosecution.\textsuperscript{62}

Notwithstanding this stated commitment to treatment, the federal emphasis quickly shifted to supply-side efforts. The Nixon Administration apparently perceived political benefits in overstating the public-safety threat posed by illicit drugs and employing a rhetorical strategy that linked this threat to racial minorities. This strategy drew on racialized tropes from the previous five decades.\textsuperscript{63} Successive presidential administrations from both parties\textsuperscript{64} have moved even farther from an emphasis on treatment and prevention and toward punishment as the preferred mode for addressing drug-law infractions, drawing on the historically entrenched stereotypes linking drugs to people of color and people of color to crime.\textsuperscript{65}

The tough-on-crime, racialized politics leading up to and following the War on Drugs declaration has dramatically altered criminal sentencing.\textsuperscript{66} Most states

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62.  \textit{Robinson v. California} invalidated a state statute that purported to criminalize the condition of being addicted to drugs. 370 U.S. 660 (1962).

63.  \textit{See, e.g.,} Dan Baum, Legalize It All: \textit{How To Win the War on Drugs}, HARPER’S (Apr. 2016), https://harpers.org/archive/2016/04/legalize-it-all [https://perma.cc/G59J-TMEK] (describing 1994 interview with John Ehrlichman, President Nixon’s domestic policy advisor, in which Ehrlichman said, “The Nixon campaign in 1968, and the Nixon White House after that, had two enemies: the antiwar left and black people . . . . We knew we couldn’t make it illegal to be either against the war or black, but by getting the public to associate the hippies with marijuana and blacks with heroin, and then criminalizing both heavily, we could disrupt those communities . . . . and vilify them night after night on the evening news”); Paul Butler, \textit{The System Is Working the Way It Is Supposed to: The Limits of Criminal Justice Reform}, 104 GEO. L.J. 1419, 1452 (2016) (also citing the Ehrlichman interview: “Look, we understood we couldn’t make it illegal to be young or poor or black in the United States, but we could criminalize their common pleasure . . . . We understood that drugs were not the health problem we were making them out to be, but it was such a perfect issue . . . . that we couldn’t resist it” (alterations in original)).

64.  \textit{See, e.g.,} IAN HANEY LÓPEZ, \textit{Dog Whistle Politics: How Coded Racial Appeals Have Reinvented Racism And Wrecked the Middle Class} 28–29 (2014) (“Though popularly associated with the Republicans, from the outset both parties adopted a Southern strategy based on dog whistle racism . . . . Democrats themselves would soon pick up the whistle at the national level, especially in the figures of two Southern politicians, Jimmy Carter and Bill Clinton.” (emphasis omitted)).


lengthened terms of incarceration, passed mandatory-minimum legislation, and eliminated parole for drug offenses. One of the most notorious examples of the harsh new sentencing regime occurred in New York. There, the legislature enacted a set of statutes that became known as the Rockefeller Drug Laws. These included a provision for a fifteen-year-prison sentence for people convicted of selling two ounces or possessing four ounces of narcotics. Other states soon followed suit.

These long sentences are characterized by racial disparities. For example, at the federal level, Congress passed a law imposing significantly higher penalties for crack use (associated with Black people) than powder cocaine use (associated with whites). In New York, more than ninety percent of the people sentenced under the Rockefeller Drug Laws were Black or Latino—a number dramatically out of proportion to the percentage of drug-law offenders these groups constitute.

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67. Anne R. Traum, Mass Incarceration at Sentencing, 64 HASTINGS L.J. 423, 429 (2013) ("From 1980 to 2007, there was a roughly twenty-fold increase in the number of federal offenders imprisoned for drug offenses—from 4900 in 1980 to 98,675 in 2007. [And d]uring the same period, the number of arrests for sale and manufacture of drugs more than doubled, [and d]rug offenders began to receive longer sentences than before.") (footnotes omitted).

68. See N.Y. PENAL LAW 220.00 (McKinney 2004).


71. See infra notes 109–11, 126–33 and accompanying text.


2. Primacy of Arrest

a. Incentives

A critical component of the Reagan Administration’s continuation of the War on Drugs was massive funding expenditures to local police departments. Made possible by cuts to prevention and treatment, these expenditures facilitated increases in hiring of police officers and purchasing of equipment. Departments began to invest in military-grade equipment: armored vehicles, night vision goggles, ballistic helmets, tactical vests, televisions, cameras, computers, and even camping gear.

Along with the militarization of police departments came a growing reliance on arrest as the primary weapon in the War on Drugs—for which there existed both financial and cultural incentives. Certain federal grants were explicitly conditioned on the number of drug arrests conducted. While the Department of Justice required state and local agencies receiving federal funds to report on how many arrests they made and the numbers of prosecutions that followed, grantees were not required to report on whether people in need of drug treatment received it. These demands signaled the prioritization of the appearance of cracking down on illicit drug use and sale over improvement in or even measurement of drug treatment or public safety.

In addition to funding incentives, incentives of police culture exist as well. Police academies typically instill a “warrior” mentality in cadets.

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74. Alex Kreit, Am. Constitution Soc’y, Toward a Public Health Approach to Drug Policy 2–3 (2009), https://www.acslegal.org/wp-content/uploads/2018/06/Kreit-Issue-Brief.pdf (https://perma.cc/7SB3-MHSB) (“The guiding tenet of the ‘war on drugs’ strategy has been that vigorous enforcement of uncompromising criminal justice measures is the most effective method to reduce drug abuse and associated problems. This philosophy has manifested itself in an almost singular focus on supply-side initiatives, including the mass incarceration of drug offenders at all levels of offense severity in an effort to deter domestic drug manufacture and distribution . . . . Efforts aimed directly at demand reduction have largely followed the same approach by increasing the number of arrests for drug possession and addressing drug use and addiction problems primarily within the criminal justice system.”).


76. Rahall, supra note 75, at 1800 n.103.

77. Id.

78. Inimai Chettiar et al., Brennan Ctr. for Justice, Reforming Funding to Reduce Mass Incarceration 4 (2013) (explaining how a federal grant program generated incentives to increase arrests, prosecutions, and incarcerations). Requirements also included reports on the amount of cocaine seized. Id.

79. Id.

80. Id.; see also Nicole Fortier & Inimai Chettiar, Brennan Ctr. for Justice, Success-Oriented Funding: Reforming Federal Criminal Justice Grants 1 (2015) (“Today, a complex web of federal crime-fighting grants funnels billions of dollars across the country . . . to encourage states to increase arrests, prosecutions, and incarceration, all in the belief that harsher punishment would better control crime.”).

81. Seth Stoughton, Principled Policing: Warrior Cops and Guardian Officers, 51 Wake
mentality sees himself as a uniquely skilled crime fighter, who must assume that the individuals he approaches are hostile and potentially life-threatening.\textsuperscript{82} A warrior mindset encourages a default to arrest when a citation or summons would suffice.\textsuperscript{83}

An emphasis on arrest and aggressive tactics reached its apex with “broken windows” policing.\textsuperscript{84} Described in a 1982 essay of the same name, broken windows policing is proactive, relying on arrests for low-level misdemeanors—including possessory drug offenses.\textsuperscript{85} The theory of this form of policing is that cracking down on “disreputable or obstreperous or unpredictable people: panhandlers, drunks, addicts, rowdy teenagers, prostitutes, loiterers, the mentally disturbed” deters more serious crime.\textsuperscript{86} Police departments deploy broken windows tactics in low-income, urban communities of color, populated by people with already negative experiences with police and who typically have insufficient social capital to resist.\textsuperscript{87}

Constitutional criminal procedure places few meaningful restraints on policing,\textsuperscript{88} particularly policing of suspected drug-law offenders.\textsuperscript{89} Faced with an apparent and

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\textsuperscript{82} In Paul Butler’s account, the problem is not only officer mindset but a series of Supreme Court cases that have shown great deference to officers when confronted with African American men, such that police have “super powers”—to arrest, racially profile, and kill. Butler, \textit{supra} note 63, at 1446.

\textsuperscript{83} Harmon, \textit{supra} note 41, at 334 (noting that criminal proceedings can be initiated through summonses and citations and need not begin with arrest).


\textsuperscript{86} Wilson & Kelling, \textit{supra} note 85, at 32.

\textsuperscript{87} Stoughton, \textit{supra} note 81. At the federal level, the Department of Justice was creating policies on traffic stops that encouraged state troopers to engage in racial profiling of drivers. David Kocieniewski, \textit{New Jersey Argues that the U.S. Wrote the Book on Race Profiling}, \textit{N.Y. Times} (Nov. 29, 2000), https://www.nytimes.com/2000/11/29/nyregion/new-jersey-argues-that-the-us-wrote-the-book-on-race-profiling.html (discussing Operation Pipeline federal program).

\textsuperscript{88} Stoughton, \textit{supra} note 81, at 648 (“The Supreme Court has consistently privileged policing through its tendency to determine whether constitutional regulation is appropriate—and, if so, what type of regulation is appropriate—in part by assessing whether the proposed rule would burden law enforcement.”) (citation omitted).

\textsuperscript{89} Levin, \textit{supra} note 75, at 2185–86 (“In their eagerness to combat drugs, the courts have departed from longstanding fourth, fifth, and fourteenth amendment protections . . . [and] upheld (1) vague and over-inclusive search warrants; (2) searches conducted in the absence of warrants and without either probable cause or individualized suspicion; (3) invasive hi-tech surveillance . . .; and (4) drug courier profiles, often including racial and ethnic characteristics
often unsympathetic drug dealer in a criminal prosecution, state and federal court judges seem to struggle to allow meritorious motions to suppress. Courts’ deference to the state in drug cases is great enough that scholars and jurists have identified a “drug exception” to the Bill of Rights. In response, commentators increasingly call for alternative, non-judicial modes of regulating the police generally, and in drug cases particularly.

These financial and cultural incentives for arrests predictably led to a dramatic spike in their occurrence. Between 1980 and 2009, the arrest rate for drug possession more than doubled; nearly 1.9 million such arrests occurred in 2006. In 2017, there were more than 1.5 million arrests for drug-law violations. The overwhelming percentage—eighty-five percent—were possessor offenses; of those, most were for marijuana possession.

b. Harms and Costs

Drug-law arrests create myriad individual and social harms. And, as shown below, an arrest-first policy creates particular danger for people arrested in the throes of opioid addiction.


90. See generally Erik Luna, Drug Exceptionalism, 47 VILL. L. REV. 753, 755–56 (2002) (noting that while constitutional criminal procedure theoretically does not observe distinctions among crimes, “numerous jurists and scholars have recognized that drug offenses receive exceptional treatment in the criminal justice system” and that “[l]egal commentators have likewise identified a ‘drug exception’ to the Bill of Rights created through judicial acquiescence to the activities of narcotics agents”).

91. Id. at 758.

92. Rachel Harmon argues that courts are institutionally ill-equipped to regulate the police and thus the reliance by reformers on constitutional criminal procedure to do so is misplaced. Rachel Harmon, The Problem of Policing, 110 MICH. L. REV. 761, 764 (2012) (asking “not how the Constitution constrains the police but how law and public policy can best regulate the police”). Others urge that constitutional criminal procedure should be seen not only as a means to regulate the police but also a method of facilitating resistance by the populace to the state. See, e.g., Alice Ristroph, Regulation or Resistance: A Counter-Narrative of Constitutional Criminal Procedure, 95 B.U. L. REV. 1555, 1563 (2015) (“[C]onstitutional litigation creates a way in which non-state actors can keep raising the subject, and there is value even in noticing that the courts do not want to talk about it”).


96. Id.

97. Drug-war policing practices trouble both progressives and conservatives. Compare Butler, supra note 63 (discussing pretextual stops and suspicion-less frisks), with Anthony L. Fisher, The Disposable Life of a 20-Year-Old Confidential Informant, REASON, (June 15,
i. Individual

Even when it does not result in conviction, an arrest ushers in adverse consequences. The severity of these consequences suggests, as Anna Roberts argues, “an assumption of guilt (or an assumption that one’s likelihood of guilt is far higher than the low threshold that probable cause suggests).” These include governmentally imposed consequences, consequences imposed by private entities, and stigma. Governmentally imposed consequences include a widely accessible record that can be difficult, if not impossible, to seal or expunge; probation or parole violations; civil asset forfeiture; threats to rights of child custody; bans on receiving public benefits; and, in some cases, adverse findings in legal cases when a judge uses a prior arrest record to refuse to grant relief to which a defendant would otherwise be eligible. Suspension from school can also result. Burdens imposed by private entities include refusal to hire and other forms of workplace discipline. Publication of “mug shots” and the “perp walk”—the coordinated law enforcement and media display of arrestees—bring humiliation and shame.

Each of these consequences endures upon conviction, which brings with it an additional array of negative impacts. Convictions that do not involve jail or prison sentences still create life altering harms, such as exclusion from the labor market and loss of voting rights. The process of arrest and prosecution leads to significant costs and fees—for probation, attorneys, general court costs, and incarceration itself—which can multiply when an individual is unable to pay, subjecting her to protracted entanglement in the criminal system, and sometimes additional penalties

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98. See Kohler-Hausmann, supra note 42, at 641 (“[A]rrest without conviction is not only possible, but is the norm.”).
99. Id.
100. Id. at 13–17 (summarizing consequences).
101. Id. at 13.
102. Id.
104. Roberts, supra note 41, at 14.
105. Id.
106. See HUMAN RIGHTS WATCH & ACLU, EVERY 25 SECONDS: THE HUMAN TOLL OF CRIMINALIZING DRUG USE IN THE UNITED STATES 2 (2016) (“Each day, tens of thousands more are convicted, cycle through jails and prisons, and spend extended periods on probation and parole, often burdened with crippling debt from court-imposed fines and fees. Their criminal records lock them out of jobs, housing, education, welfare assistance, voting, and much more, and subject them to discrimination and stigma.”).
such as loss of driver’s licenses.\textsuperscript{107} All told, the consequences accompanying arrest and conviction can render full participation in civic life nearly impossible.\textsuperscript{108}

The negative impacts of drug arrests and convictions are not spread evenly or equitably throughout the population.\textsuperscript{109} Although data show relatively similar levels of illicit drug use among Black people and other racial groups—and a \textit{higher} tendency of whites to become dependent on drugs—police officers enforce the drug laws in racially disproportionate ways.\textsuperscript{110} Between 1980 and 2000, for example, the national Black drug arrest rate increased from roughly 6.5 to 29.1 (per 1000 persons), while the white drug arrest rate increased much more modestly, from approximately 3.5 to 4.6 (per 1000 persons).\textsuperscript{111}

Arresting and detaining people with addiction to opioids\textsuperscript{112} creates significant health dangers. Deprived of access to the drugs, users can quickly become dehydrated.\textsuperscript{113} Withdrawal-induced dehydration can be treated with intravenous fluids.\textsuperscript{114} However, people who are jailed while addicted do not receive access to this care.\textsuperscript{115} Even when such care is available, jails frequently lack sufficient numbers of trained staff to effectively monitor its provision.\textsuperscript{116} While no organization

\textsuperscript{107} See generally Laura I. Appleman, \textit{Nickel and Dimed into Incarceration: Cash-Register Justice in the Criminal System}, 57 B.C. L. REV. 1483, 1487–89 (2016) (surveying the array of “criminal justice costs, fines, fees, restitution, surcharges, and interest”). In a landmark victory, a federal district court judge, within the Sixth Circuit Court of Appeals jurisdiction, ruled that the state of Tennessee may no longer revoke driver’s licenses for failure to pay fines and fees and found that “suspending licenses without an effective, non-discretionary safety valve for the truly indigent violates both equal protection and due process principles.” \textit{Robinson v. Purkey}, No. 3:17-cv-01263, 2018 WL 2862772, at *53 (M.D. Tenn. June 11, 2018).

\textsuperscript{108} Roberts, supra note 41, at 13–17; see also Eisha Jain, \textit{Capitalizing on Criminal Justice}, 67 DUKE L.J. 1381, 1417–19 (2018) (noting that notwithstanding the enormous negative impact wrought by these consequences, no agency is tasked with systematically ensuring accuracy of these records, or correcting them when they are wrong).

\textsuperscript{109} \textit{Michael Tonry, Malign Neglect—Race, Crime and Punishment in America 79} (1995); see also Hannah LF Cooper, \textit{War on Drugs Policing and Police Brutality}, 50 SUBST. USE & MISUSE 1188 (2015) (describing disparities in Black arrests for drug use and noting that drug arrests were more racially disparate than arrests in other offense categories); supra note 87 and accompanying text.


\textsuperscript{111} Beckett, supra note 29, at 81. See also supra notes 71–73 and accompanying text.

\textsuperscript{112} For a definition of opioids, see infra notes 225–26 and accompanying text.


\textsuperscript{114} Id.

\textsuperscript{115} Blake, supra note 13, at 489.

\textsuperscript{116} Lurie, supra note 113.
tracks how many people have died from drug withdrawal in jail, at least twenty lawsuits were filed between 2014 and 2016 alleging that an inmate died from complications from opioid withdrawals—a number likely representing just a fraction of such deaths.117 This number is on top of deaths from overdose that occur in jails from opioids brought in at the time of arrest or smuggled in later.118

Given that drug-law convictions continue to account for a significant portion of the people sent to jail and prison each year,119 public-health experts call for drug treatment, including medication-assisted treatment (MAT) and overdose prevention, to be available for and accessible to people in jails and prisons; however, out of 3200 jails around the country, only 23 provide MAT to people who are detained, and of the 50 state prison systems, only 4 do so.120 States historically are unwilling to fund drug treatment for incarcerated people121 because of misguided but persistent notions that “nothing works” for drug offenders.122 These policy decisions ignore the reality that a person with untreated addiction upon release from jail or prison is particularly vulnerable to relapse.123 And post-release relapses are extremely dangerous, as users often return to the dose they were using prior to jail or prison—which is more than

117. Id.
120. See, e.g., Beth Schwartzapfel, A Better Way to Treat Addiction in Jail, MARSHALL PROJECT (Mar. 1, 2017, 10:00 PM), https://www.themarshallproject.org/2017/03/01/a-better-way-to-treat-addiction-in-jail [https://perma.cc/T8UA-9EX7]; see also infra note 182 and accompanying text (defining medication-assisted treatment as the use of medications in combination with behavioral and counseling therapies for substance use disorders).
123. Megan McLemore, Prisons Are Making America’s Drug Problem Worse, HUMAN RIGHTS WATCH (Mar. 11, 2015), https://www.hrw.org/news/2015/03/11/prisons-are-making-americas-drug-problem-worse [https://perma.cc/3M6M-3427] (explaining how the lack of treatment options for inmates increases the harmful effects of incarceration); Aaron D. Fox et al., Release from Incarceration, Relapse to Opioid Use and the Potential for Buprenorphine Maintenance Treatment: A Qualitative Study of the Perceptions of Former Inmates with Opioid Use Disorder, 10 ADDICT. SCI. CLIN. PRAC. no. 2, 2015, at 2 (finding that nearly three quarters of people with opioid use disorder relapsed to heroin use within three months of release from prison).
their bodies can tolerate. The risk of fatal overdose is particularly acute in the two weeks after release from jail or prison.

ii. Social

Along with harm to individuals, the “arrest first” policing of the War on Drugs has imposed negative community-wide impacts in the low-income neighborhoods of color where it is practiced. A heavy police presence and aggressive tactics makes entire communities feel under siege, regardless of any particular individual’s wrongdoing, creating environments akin to a “hornet-like invasion where [young males of color] are barraged with questions such as ‘where’s the weed?’ and ‘where’s the guns?’.” Environments characterized by arbitrary and heavy-handed policing can, according to procedural justice scholars, undermine community members’ sense that police officers are acting legitimately. Those who perceive policing as illegitimate are less likely to follow the law. By the procedural justice account, then, tough-on-crime policing practices from the War on Drugs fail as mechanisms of deterrence. Even assuming that heavy police presence can deter illicit drug use, it is far from clear that arrest is an officer’s best mechanism for doing so. Rather than acting solely as “apprehension agents” officers could equally if not more effectively deter and respond to crime through the issuance of criminal citations or

124. Williams, supra note 118.

125. Schwartzapfel, supra note 120; see also Shabbar I. Ranapurwala et al., Opioid Overdose Mortality Among Former North Carolina Inmates: 2000–2015, 108 AM J. PUB. HEALT 1207, 1207–09 (2018) (noting that, within two weeks of their release, heroin overdose death risk among former inmates was seventy-four times as high as non-incarcerated North Carolina residents, respectively).


128. Tom R. Tyler & Yuen J. Huo, Trust in THE LAW: Encouraging Public Cooperation with the Police and Courts, at xiv (2002) (ebook) (describing “procedural justice” as “the belief that legal authorities are entitled to be obeyed and that the individual ought to defer to their judgments” the importance of fair process to respect of the law and describing such

129. Id. at 49–75, 141–51 (finding that deference to legal authorities is shaped by procedural justice and trust in the motives of legal actors, and that minority group members are less willing to defer to the decisions made by legal authorities as well as less likely to report that their experiences with legal authorities are procedurally fair and unbiased).

even warnings.\textsuperscript{131} Beyond questions of deterrence, the aggregate impact of decades of War on Drugs policing in low-income communities of color has been a profound sense of cultural dislocation and cynicism—what Monica Bell calls “legal estrangement”\textsuperscript{132} and which she identifies as galvanizing the organized resistance of groups like Black Lives Matter.\textsuperscript{133}

In addition to these human costs, the War on Drugs has exacted great financial costs. Over $50 billion are expended each year at the federal, state, and local level.\textsuperscript{134} Well over half of that is spent on supply-side efforts, such as policing and arrests, and interdiction.\textsuperscript{135} In 2018, the National Drug Control budget included an additional $1.4 billion for international spending and $5 billion for interdiction efforts.\textsuperscript{136} The high rates of incarceration that have resulted from the War on Drugs have placed significant strain on the budgets of states, which have cut critical spending on education and social services as a result.\textsuperscript{137}

While Congress in 2018 allocated three billion dollars for the opioid crisis, some of which is designated for treatment, experts argue that this amount is inadequate.\textsuperscript{138} The shredding of the social safety net and disinvestment in treatment options over the last several decades underlies the current treatment gap in which only one in four people with opioid use disorder receive specialty care and only twelve percent of adults who need treatment for any substance use disorder receive it.\textsuperscript{139}

\begin{itemize}
\item \textsuperscript{131} Harmon, supra note 41 (arguing that arrest is overused).
\item \textsuperscript{132} Bell, supra note 126, at 2086–87 (arguing that because “the law’s purpose is the creation and maintenance of social bonds[,] [a]n emphasis on inclusion implies concerns not only about how individuals perceive the police and the law (and thus whether those individuals cooperate with the state’s demands), but about the signaling function of the police and the law to groups about their place in society”).
\item \textsuperscript{133} Id. at 2088 (“[S]hifting the orientation of legitimacy theory from governmental power to social inclusion is one way that theory can better capture the concerns of activists in the era of Black Lives Matter”); see also Akbar, supra note 44, at 412–18 (noting the rebellions in Ferguson and Baltimore and the formation of Black Lives Matter).
\item \textsuperscript{134} Drug Pol’y ALL., supra note 9.
\item \textsuperscript{135} Id.
\item \textsuperscript{137} See, e.g., Michael Mitchell & Michael Leachman, Ctr. on Budget & Policy Priorities, Changing Priorities: State Criminal Justice Reforms and Investments in Education 1 (2014) (showing the correlation between increasing prison costs and decreasing spending on public education).
\end{itemize}
The inefficacy of the War on Drugs is apparent in the fact that decades of militarized policing, arrest, prosecution, and long prison sentences have not reduced illicit drug use. Illicit drugs are now generally cheaper and more potent than before the War on Drugs began. What is more, they remain widely accessible.

B. Specialized Drug Courts

The harms, costs, and inefficacy of the War on Drugs have spurred a rethinking and rejection of its tenets. One popular local reform effort is the specialized drug court. One of the many so-called “problem-solving” courts to emerge in the last


141. DAN WEBR, THOMAS KERR, BOHDAN NOSYK, STEFFANIE STRATHDEE, JULIO MONTANER & EVAN WOOD, THE TEMPORAL RELATIONSHIP BETWEEN DRUG SUPPLY INDICATORS: AN AUDIT OF INTERNATIONAL GOVERNMENT SURVEILLANCE SYSTEMS 3 (2013), bmjopen.bmj.com/content/bmjopen/3/9/e003077.full.pdf [https://perma.cc/JZ3N-TPZ5] (“With few exceptions and despite increasing investments in enforcement-based supply reduction efforts aimed at disrupting global drug supply, illegal drug prices have generally decreased while drug purity has generally increased since 1990. These findings suggest that expanding efforts at controlling the global illegal drug market through law enforcement are failing.”).

142. U.S. DEP’T HEALTH & HUMAN SERVS., NAT’L CTR. FOR HEALTH STAT., HEALTH, UNITED STATES, 2016, 213 (2017), https://www.cdc.gov/nchs/data/hus/hus16.pdf#050 [https://perma.cc/T3CL-FAAC] (showing continued use of drugs and current rates of drug use in America); Daniel Denvir, The Opioid Crisis Is Blurring the Line Between Victim and Perpetrator, SLATE (Jan. 15, 2018) (quoting drug policy expert Leo Beletsky stating “[w]e have consistently invested in punishment and repression, while our health and social safety nets have crumbled. Over time, crackdowns and incarceration supposed to dismantle drug trafficking organizations have made illicit drug supplies cheaper, purer, and more readily available”)

143. Voters Have Little Faith in War on Drugs, RASMUSSEN REPS. (Jan. 10, 2018), http://www.rasmussenreports.com/public_content/politics/general_politics/january_2018/voters_have_little_faith_in_war_on_drugs [https://perma.cc/7HSR-6T9H] (finding that only nine percent of “likely U.S. voters” think the United States is winning the War on Drugs); see also Rethinking America’s War on Drugs as a Public-Health Issue, 357 LANCET 971, 971 (2001) (editorial) (noting a 2001 Pew survey in which fifty percent of those surveyed said drug use should be considered a disease not a crime and that fifty-eight percent of those younger than thirty years expressed this view); supra note 27 and accompanying text.

144. See, e.g., SUPER. CT. OF CAL., COUNTY OF ORANGE, COLLABORATIVE COURTS (2017), http://www.occourts.org/directory/collaborative-courts [https://perma.cc/XQ7Z-A7XK] (defining problem-solving courts as “specialized court tracks that address underlying issues that may be present in the lives of persons who come before the court on criminal, juvenile, or dependency matters,” including mental health courts, girls’ courts, and veterans’ courts). Some commentators have criticized the term “problem-solving” for being presumptuous and overly ambitious. See, e.g., Allegra M. McLeod, Decarceration Courts: Possibilities and
thirty years, drug courts started in Florida in 1989. They have spread to every state and currently number over three thousand.

In a drug court, an offender who would otherwise face a jail or prison sentence is given an opportunity to avoid it. To do so, she must plead guilty to the underlying offense and then successfully complete a court-ordered monitoring and rehabilitation regimen during the pendency of the suspended sentence, which may include outpatient and sometimes inpatient treatment; random drug screens; and intensive supervision by probation officers, including an order to avoid re-arrest. Frequent court appearances occur, at which the judge, typically adopting an inquisitorial role, scolds or praises, depending on probation reports on treatment progress and the offender’s attitude about her addiction. The adversarial positions of criminal court collapse, and defense attorneys, prosecutors, and probation officers operate as a “team.” Success means court supervision ends; failing to complete the requirements leads to the imposition of the sentence.

While drug courts have won praise across the political spectrum—tough-on-crime conservatives appreciate the incarceration threat, while liberals support the notion of rehabilitation—the courts at the same time are riddled with problematic features that complicate their most ambitious claims. For one, they rest on theoretical premises about addiction and its treatment that are contraindicated by public-health and scientific findings. In addition, they operate according to an understanding about the link between drug dependency and criminal activity that is contested. Finally, notwithstanding their therapeutic trappings, they remain firmly entrenched

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Perils of a Shifting Criminal Law. 100 GEO. L.J. 1587, 1606 n.72 (2012) (describing the decision to instead use the term “problem-oriented” as a way of suggesting that courts may not in fact solve the problems they set out to solve).


146. TIGER, supra note 45, at 17.

147. Jessica M. Eaglin, The Drug Court Paradigm, 53 AM. CRIM. L. REV. 595, 603 (2016). While a small number of drug courts operate part of a deferred prosecution and thus prior to the taking of a guilty plea, most contemporary drug courts employ a post-plea model. See TIGER, supra note 45, at 17.


149. Bowers, supra note 148, at 784.

150. TIGER, supra note 45, at 19; see also Eaglin, supra note 147, at 603 (describing drug courts’ abandonment of the traditional adversarial proceeding of criminal court adjudications).

151. For an exemplary critique of how defendants are ill-served by this non-adversarial structure, see Mae C. Quinn, Whose Team Am I on Anyway—Musings of a Public Defender About Drug Treatment Court Practice, 26 N.Y.U. REV. L. & SOC. CHANGE 37, 55–56, 61–63 (2000).


153. See infra notes 193–235 and accompanying text.

154. See infra note 244–52 and accompanying text.
within the criminal system. As a result, participants too frequently suffer many of the same harmful life outcomes as people prosecuted outside of drug court.

1. The Problem with Compulsory Treatment

The notion of addiction as a chronic and relapsing disease of the brain increasingly finds support in the medical and public-health establishment. The growing public acceptance of this view surely has reduced the stigma that has long attached to users of illicit drugs. That drug addiction is a disease is an ideological pillar of drug courts.

It might seem that if addiction is a disease, one of the features of which is relapse, then the use of criminal sanctions for relapse could constitute cruel and unusual punishment. Yet defense attorneys have not prevailed in making such arguments. The Massachusetts Supreme Judicial Court in 2018 rejected a claim by a probationer that a jail sanction for relapse when she was ordered to remain drug-free violates the

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155. See infra notes, 254–76, and accompanying text; see also Michael M. O’Hear, Federalism and Drug Control, 57 VAND. L. REV. 783, 828 (2004) (explaining drug courts as “‘insider reform’ . . . adopted by officials within the criminal justice system and intended to deal with institutional problems like caseload pressures and prison overcrowding” and contrasting them with reform movements such as medical marijuana and marijuana decriminalization pushed by people outside the criminal system).

156. O’Hear, supra note 156 (conceptualizing these features as arising in part because of the influence of federal money, which is conditioned on drug courts adopting policies consistent with punitive, enforcement-oriented federal drug policy agenda).

157. See Nora D. Volkow, George F. Koob & A. Thomas McLellan, Neurobiologic Advances from the Brain Disease Model of Addiction, 374 N. ENG. J. MED. 363 (2016) (reviewing neurobiological evidence showing the link between brain function and addiction); supra notes 59–60 and accompanying text (noting that the National Institute on Drug Abuse was founded on this notion).

158. See, e.g., Brief for the Probationer on a Reported Question and on Appeal from a Finding of Probation Violation from the Concord Division of the District Court Department at 4, Commonwealth v. Eldred, 101 N.E.3d 911 (Mass. 2018) (arguing that “science now recognizes that drug addiction . . . is not caused by moral turpitude but rather is a chronic brain disease whose defining feature is the compulsive use of a substance ‘despite significant substance-related problems’”); id. at 2–3 (citing Alfred Prentice, The Problem of the Drug Addict, 76 J. AMERICAN MED. ASS’N 1551, 1556 (1921) (noting that “unfortunates suffering from narcotic addiction [were] weak-minded deteriorated wretches, mental and moral derelicts, pandering to morbid sensuality; taking a drug to soothe them into dream states and give them languorous delight; held by us all in despite [sic] and disgust, and regarded as so depraved that the rescue is impossible and they unworthy of its attempt”).

159. See, e.g., U.S. DEP’T OF JUSTICE, BJA DRUG COURT DISCRETIONARY GRANT PROGRAM: FY 2011 REQUIREMENTS RESOURCE GUIDE 3 (2011) (“Drug court practitioners understand that drug addiction is a complex, chronic, relapsing disease.”).

160. David Sack, 5 Ways We Punish Addicts – and Why We Should Stop, PSYCHOL. TODAY (Oct.13, 2014), https://www.psychologytoday.com/us/blog/where-science-meets-the -steps/201410/5-ways-we-punish-addicts-and-why-we-should-stop [https://perma.cc/SE6E -3FPD] (“Substance use disorders are not just a criminal justice issue, but also a major public-health concern. Decades of research demonstrate that addiction is a disease of the brain — one that can be prevented, treated, and from which people can recover.”).
Eighth Amendment, relying on the U.S. Supreme Court case that found criminal behavior arising from intoxication was properly subject to criminal punishment.

Drug court proponents and practitioners reconcile what seems to be a contradiction between a disease framework and the imposition of criminal punishment. They do so through a belief that “tough love” in the form of criminal sanctions can best motivate a drug user to manage her illness and maintain sobriety. Indeed, the whole point of a drug court is to “capitalize on the trauma of arrest” in order to show the drug user that even more serious criminal consequences can follow if the drug use does not cease. Judges will impose a set of graduated sanctions—periods of “flash” incarceration and, eventually, imposition of a jail or prison sentence—when the addicted person relapses or is otherwise believed to be out of compliance with the mandated treatment. Drug court ideology holds, then, that criminal tools can have therapeutic benefits.

While this belief in the usefulness of coerced treatment is a hallmark of drug courts—an administrator’s statement that “force is the best medicine” for treating addiction is emblematic of this thinking—recent scientific findings do not support it. The notion that people who seek treatment only to avoid the imposition of a criminal sanction are more motivated to complete it than people who enter treatment voluntarily is increasingly contested. A recent evaluation of drug court data reveals that “the limited literature on this subject did not, on the whole, suggest improved outcomes from compulsory treatment, with some studies suggesting harms.”

What is more, the dominant drug court framework does not make room for the body of research suggesting that people who abuse and become addicted to drugs

162. Id. at 919 (“There can be no question of the authority of the State . . . to regulate the . . . use of . . . drugs [through, inter alia] a program of compulsory treatment for those addicted to narcotics[,] . . . [even requiring] involuntary confinement [and] penal sanctions for failure to comply with established compulsory treatment procedures.” (citing Robinson v. California, 370 U.S. 660 (1962))).
163. See generally Maura Ewing, The Court System Shouldn’t Interrupt the Treatment Process, ATLANTIC (Dec. 16, 2017), https://www.theatlantic.com/politics/archive/2017/12/opioids-massachusetts-supreme-court/548480/ [https://perma.cc/M7UQ-ZPVL] (quoting Harvard Medical School psychiatry professor John Kelly arguing against notion that drug addicts lose the ability to make choices and “that the degree to which a person loses their ability to avoid relapsing depends on their addiction’s severity”).
164. TIGER, supra note 45, at 20.
165. TIGER, supra note 45, at 108–10.
166. Id.
168. TIGER, supra note 45, at 108–10.
often do so because of a lack of “competing reinforcers.”  

This social science scholarship complicates the disease narrative by noting that both the crack and opioid crises have occurred disproportionately in low-income communities among individuals with few affordable sources of purpose or pleasure.  

As one commentator puts it, “[i]f you’re living in a poor neighborhood deprived of options, there’s a certain rationality to keep taking a drug that will give you some temporary pleasure.”  

Notwithstanding the evidence of sociocultural factors underlying addiction, drug courts maintain an individualistic paradigm with an emphasis on personal responsibility.  

2. The Problem of the Abstinence Imperative

Drug courts rest on a commitment to abstinence. Some disallow even certain prescribed medications. While a single relapse may not result in termination of probation and imposition of a jail or prison sentence, drug court administrators must believe that the offender is progressing in her commitment to abstinence. A refusal to accept that one is an addict and needs treatment can count against a participant; the discretion of a drug court judge is more likely to be deployed negatively against an offender with a perceived poor attitude.  

The corollary of the drug court’s abstinence imperative is skepticism about the principles and practices of harm reduction. Harm reduction accepts that some illicit drug use is inevitable. Its strategies center on reducing the negative effects

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170. See, e.g., Carl L. Hart, As With Other Problems, Class Affects Addiction, N.Y. TIMES (Mar. 10, 2014), https://www.nytimes.com/roomfordebate/2014/02/10/what-is-addiction/as-with-other-problems-class-affects-addiction [https://perma.cc/D4VP-SSSS] (arguing that addiction disproportionately affects poor people because they have few “competing reinforcers”—affordable sources of pleasure and purpose—and thus that the notion of addiction as a disease is overly simplistic); see also Warren K. Bickel, Matthew W. Johnson, Mikhail N. Koffarnus, James MacKillop & James G. Murphy, The Behavioral Economics of Substance Use Disorders: Reinforcement Pathologies and Their Repair, 10 ANN. REV. OF CLINICAL PSYCHOL. 641, 654 (2014) (noting “considerable experimental and descriptive evidence [that] supports the importance of alternative reinforcers . . . [and that] the highest rates of substance use are present in contexts with the least availability of substance-free reinforcements, such as palatable food, exercise, enriched housing, and social access.”).

171. See, e.g., Hart, supra note 170.


173. TIGER, supra note 45, at 107.

174. Id. at 136–38 (noting that the National Association of Drug Court Professionals, the primary advocacy group for drug courts, highlights ensuring abstinence as one of ten key components of the U.S. drug court model).

175. PHYSICIANS FOR HUMAN RIGHTS, supra note 148, at 13.

176. TIGER, supra note 45, at 9.

177. Id.

178. Id. at 136–38.

179. Karen Mary Leslie, Harm Reduction: An Approach to Reducing Risky Health
of drug use, and the philosophy rests on tenets of public health rather than criminal justice.\textsuperscript{180} Its practices include needle exchanges, safe injection sites, and distribution of the overdose-reversing drug Naloxone, among others.\textsuperscript{181} Rather than seek to eradicate all illicit drug use, harm reduction proponents accept the likely continuation of illegal drug use and seek to minimize its secondary harms.\textsuperscript{182}

The skepticism among drug-court practitioners about harm reduction sometimes extends even to medication-assisted treatment, despite its clear benefits for people who are addicted.\textsuperscript{183} MAT comprises medications such as buprenorphine, methadone, and naltrexone\textsuperscript{184} administered in conjunction with behavioral and counseling therapies. MAT medications help people addicted to opioids by eliminating psychological cravings without inducing withdrawal symptoms.\textsuperscript{185} They make overdose-related death significantly less likely;\textsuperscript{186} MAT is more effective than either medication or behavioral therapy alone.\textsuperscript{187} Notwithstanding these benefits, many drug court practitioners are opposed to MAT.\textsuperscript{188} One source of opposition is the belief that provision of overdose-reversing medications to drug addicts incentivizes illicit drug use\textsuperscript{189} and that this risk outweighs its benefits in reducing the


\textsuperscript{181} Id.

\textsuperscript{182} What is Harm Reduction?, \textit{N.C. HARM REDUCTION COALITION}, http://www.nchrcc.org/harm-reduction/what-is-harm-reduction [https://perma.cc/7QWK-X2BQ]


\textsuperscript{188} Matusow et al., supra note 183, at 478.

\textsuperscript{189} \textit{VERA}, supra note 180 (citing an expert noting that a commonly shared misconception among drug court administrators is that equipping drug users with naloxone incentivizes
likelihood of fatal overdose.\textsuperscript{190} In addition, some drug courts discourage MAT use because of stigma\textsuperscript{191} derived from the notion that MAT is simply “replac[ing] one addiction with another.”\textsuperscript{192} Another misconception is that MAT negatively affects cognitive capacity and basic functioning.\textsuperscript{193} A final barrier to widespread adoption of MAT is that the medications can be prohibitively costly and difficult to obtain—particularly in rural areas.\textsuperscript{194}

3. The Problem of an Exclusive Emphasis on Addiction

An additional premise of drug courts is that a participant’s addiction leads to criminal activity, including commission of violent crime, if it is not cured.\textsuperscript{196} The inverse of this premise is that curing addiction will eliminate criminal activity. These beliefs in turn reinforce the abstinence imperative.\textsuperscript{197} Yet the link between addiction and criminality is not as certain as drug-court ideology would suggest. And, inasmuch as there is a connection between drug use and crime, it is difficult to discount the many negative social and economic factors—homelessness and unemployment, for example—that frequently accompany addiction and that may equally explain criminal activity.\textsuperscript{198}

Shima Baradaran explains:

The literature generally suggests that criminal activity is neither an inevitable consequence of illicit drug use (apart from the illegal nature of drug use itself) nor [is illicit drug use] a necessary or sufficient condition for criminal behavior. Many illegal drug users commit no other kinds of crimes, and many persons who commit crimes never use illegal drugs. Furthermore, even when people commit crimes while using illegal drugs, there may not be a causal connection between the two.\textsuperscript{199}
Despite this literature, drug courts maintain a near-exclusive focus on preventing drug use and curing addiction. The rehabilitation discourse of drug court emphasizes personal responsibility to the exclusion of addressing economic and social factors that contribute to, and exacerbate the harms of, addiction. Drug court probation officers work to move users away from a so-called drug “lifestyle” and acculturate within them a work ethic perceived to be absent. And when the drug-court participant does not fulfill the probation conditions intended to move her to sobriety, criminal consequences result.

4. The Vetting Problem

The drug court process can be protracted, invasive, and demeaning, with paternalistic judges inquiring into personal details of participants’ lives and making demands frequently unrelated to the underlying charge. Drug court practitioners and proponents justify these features because they believe drug courts offer critical and otherwise inaccessible rehabilitation and treatment to people who will benefit from it.

The evidence, however, suggests otherwise. A foundational 2008 critique of drug courts found that the courts were less likely to enroll individuals who were legitimately drug-dependent or addicted than they were to accept people seeking a drug-court placement simply to avoid incarceration. Insufficient vetting of defendants can lead to enrollment of defendants simply trying opportunistically—and understandably—to game the system to avoid jail or prison rather than because they legitimately have a drug addiction problem that could benefit from treatment. In addition, even when vetting occurs, drug court personnel may inappropriately

(citation omitted).

200. Nicole Kaufman, Joshua Kaiser & Cesraéa Rumpf, Beyond Punishment: The Penal State’s Interventionist, Covert, and Negligent Modalities of Control, 43 L. & SOC. INQUIRY 468, 476 (2018). Some scholars have argued for a more holistic understanding of the reasons for drug use. See, e.g., Katherine McLean, “There’s Nothing Here”: Deindustrialization as Risk Environment for Overdose, 29 Int’l J. DRUG POL. 19, 19 (2016) (“While state and county efforts to ameliorate overdose mortality have focused upon creating an open market in naloxone, this study suggests the need for interventions that address the poverty and social isolation of opiate users in the post-industrial periphery.”).


203. Tiger, supra note 23.

204. See, e.g., Quinn, supra note 151, at 53.


206. Id. at 783 (“[D]rug courts provide particularly poor results for the very defendants that they are intended to help most. Specifically, the most likely participants to graduate are volitional drug users, who strategically game exit from undesired conventional punishment and entry into treatment that they, in fact, do not need.”).
equate an individual’s self-reported drug use with drug abuse.207 Such mistakes are not surprising, given that the evaluations of potential enrollees are typically done not by trained physicians but by drug court staff; decisions about the participants’ failure or success are made not by addiction specialists but by judges, who similarly equate use with abuse.208

The pressure on drug courts to show that they are effective in reducing recidivism creates incentives for administrators to select clients likely to successfully complete the program. Yet, as described above, these are not necessarily the clients most in need of treatment.209 A further example of “cherry picking” clients can be found in the fact that drug courts often enroll only individuals with no criminal record—or at least no prior convictions of violent crimes.210 This exclusion makes little sense in the face of considerable evidence that the highest-risk offenders in terms of criminal records in fact make the best use of the kind of rehabilitative intervention found in the drug court.211

Similarly, drug courts tend to accept people charged only with possessory offenses.212 However, this restriction belies the fact that the line between those who distribute drugs and those who use them is sometimes conceptually thin and therapeutically meaningless. For example, many drug users sell to support their own drug dependency.213 In addition, drug users frequently share drugs with friends or family members, and they all may take them together.214

For those drug-court participants who fail, the jail or prison sentence that is imposed is typically longer than the sentence that was offered pursuant to a proposed plea deal at the outset of criminal proceedings.215 Unfortunately and predictably,

207. Id. at 800.
208. Id. at 784.
209. Tigier, supra note 45, at 15.
210. Id. at 14–15.
211. Id. at 15.
212. Id.
215. Bowers, supra note 148, at 811–15 (detailing reasons that drug users overestimate their ability to complete drug court programs, including the participants’ unrealistic assessment of their own ability to complete the drug-court regimen at the outset of criminal proceedings, which is heightened if the offender is detained at the time of the decision about whether to accept a drug-court option or an incarcerative sentence, and explaining the plea deals offered at the outset of prosecution).
those who end up in jail or prison are likely to be from the same marginalized populations as those negatively affected by War on Drugs policing.  

5. Absence of Accountability

Drug courts thus far remain popular, notwithstanding their ideological and operational problems. Part of the reason for their popularity likely is that their actual success rates are difficult to determine, such that drug-court proponents’ claims come to be accepted as true. Drug courts escape scrutiny at least in part because the National Association of Drug Court Professionals (NADCP) is both an organized advocacy group for drug courts and their primary evaluator. This fact helps explain some of the slipperiness of the drug court data that its proponents offer. For example, the quantitative evaluation tools used for drug courts purport to show that these courts work in saving money and reducing recidivism. Yet these evaluations in fact focus only on drug court participants who graduate, eliding any mention of the 30%-70% of participants who fail to make it that far. In addition, the evaluations have not examined how drug court participants would fare in a community-based supervision program operated entirely separately from the court.

Finally, while drug courts require the participant to alter his or her conduct, there is no corresponding mechanism to hold courts accountable when they provide substandard treatment and services. And recent studies show that many drug courts are indeed substandard. Human rights activists have documented that the treatment provided through drug courts is not evidence-based. In addition, they note instances of drug court administrators violating participants’ confidentiality rights.

II. OPIOID POLICING: THEORY AND PRACTICE

This Part identifies and describes a local law enforcement approach that departs from and in important ways improves upon tenets and practices of both War on Drugs policing and the specialized drug court—what the Article refers to as “opioid policing.” Section A provides a brief overview of the history, nature, and scope of

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216. Id. (noting that the most likely treatment failures are genuine addicts and members of historically disadvantaged groups).
217. TIGER, supra note 45, at 20.
218. Id.
219. Eaglin, supra note 147, at 605; see also Jessica M. Eaglin, Against Neorehabilitation, 66 SMU L. REV. 189, 190–95 (2013) (identifying drug courts as one of several “neorehabilitationist” reforms and criticizing such reforms as problematic for institutionalizing a focus on the least risky offenders, exacerbating racial disparities, and distorting perceptions of what criminal justice should do); Treatment Courts Work, Nat’l Ass’n Drug Ct. Profs., http://www.nadcp.org/treatmentcourts/ [https://perma.cc/7HH7-VN6G].
220. TIGER, supra note 45, at 20.
221. PHYSICIANS FOR HUMAN RIGHTS, supra note 148, at 20 (outlining additional problems of evaluations).
222. Id. at 16.
the contemporary opioid crisis. Section B discusses the theory of systemic discretion underlying opioid policing and provides a detailed description of its two primary forms.

A. Overview of the Opioid Crisis

Opioids are a class of drugs that includes pain relievers available legally by prescription, such as oxycodone, marketed as OxyContin; hydrocodone, marketed as Vicodin; codeine; morphine; the illegal drug heroin; and synthetic products such as fentanyl and carfentanil. Each is chemically related and interacts with opioid receptors on nerve cells in the body and brain, producing pain relief and euphoria.

While opioid misuse was not uncommon in the twentieth century, today’s opioids are significantly more ubiquitous and deadlier. Their widespread availability can be traced to a short study published in the New England Journal of Medicine in 1980, which reviewed records of patients prescribed opioids while in the hospital and found that most of those patients did not become addicted.

Notwithstanding its small sample size and limited scope, this report catalyzed a change in a near-century’s worth of conventional wisdom that opioids should be prescribed sparingly.
and only on an in-patient basis. Pharmaceutical companies, Purdue Pharma in particular, began an aggressive marketing campaign to persuade physicians that prescribing opioids on an out-patient basis was sound practice. The result of these developments has been a high rate of opioid prescription, one that is unique to the United States.

Prescription opioids can quickly produce dependency and addiction. What is more, a recent study found that 1 of every 550 patients started on opioid therapy died of opioid-related causes just over two years after the first prescription. This fact led the Center for Disease Control to conclude “[w]e know of no other medication routinely used for a nonfatal condition that kills patients so frequently.”

Dependency and addiction are concentrated in smaller cities and towns, particularly in the Rust Belt. From 2007 to 2012, pharmaceutical companies

228. Id. This reluctance to prescribe opioids can be traced to the period immediately preceding the passage of the Harrison Tax Act, when physicians worried about the addictiveness of opioids. See supra notes 49–51 and accompanying text.

229. For book-length treatments of this history, see, e.g., BARRY MEIER, PAIN KILLER: A “WONDER” DRUG’S TRAIL OF ADDICTION AND DEATH (2003); SAM QUINONES, DREAMLAND (2015).


232. Id. (noting that the proportion was as high as 1 in 32 among patients receiving high doses).


shipped more than 780 million doses of hydrocodone and oxycodone to West Virginia—approximately 433 pain pills for every person in the state.\(^{235}\) Nearly half the working-age men who are out of the labor force are taking pain medication, primarily opioids.\(^{236}\) Likely because of a historic reluctance of physicians to prescribe necessary pain medication to Black people,\(^{237}\) the initial wave of fatal overdoses from prescription medication mostly affected white people.\(^{238}\) Overdose deaths from opioids continue to rise, and deaths from heroin and synthetic opioids such as fentanyl now outpace those from prescription opioids.\(^{239}\)

In addition to the obvious tragic human cost of overdose-related deaths, opioid addiction and overdose place tremendous strain on the social safety net. Recent years have seen a spike in emergency room visits for symptoms relating to opioid addiction withdrawal.\(^{240}\) From 1997 to 2011, the number of people seeking treatment for addiction went up 900%,\(^{241}\) with demand dramatically exceeding supply.\(^{242}\) After

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the states with the highest rates of death due to drug overdose were West Virginia (52 per 100,000), Ohio (39.1 per 100,000), New Hampshire (39 per 100,000), the District of Columbia (38.8 per 100,000) and Pennsylvania (37 per 100,000)).

235. Colson, supra note 234.

236. Anne Case & Angus Deaton, Mortality and Morbidity in the 21st Century, BROOKINGS PAPERS ON ECON. ACTIVITY 397, 433 (2017); see also Alex Hollingsworth, Christopher J. Ruhm & Kosali Simon, Macroeconomic Conditions and Opioid Abuse (Nat’l. Bureau of Econ. Research, Working Paper No. 23192, 2017) (noting macroeconomic conditions and arguing that “[w]ith the increased availability of prescription opioids (and reductions in heroin prices), it se... conditions worsen and that some of this increased use leads to adverse outcomes including emergency department visits or death”).

237. Steven Ross Johnson, The Racial Divide in the Opioid Epidemic, MODERN HEALTHCARE (Feb. 27, 2016), http://www.modernhealthcare.com/article/20160227/MAGAZINE/302279871 [https://perma.cc/N36L-M5F3] (stating that doctors prescribe opiates to blacks less frequently due to racial bias and quoting the director of Physicians for Responsible Opioid Prescribing as saying, “It would appear that the prescriber may be more concerned about the possibility of the patient getting addicted or maybe the possibility that the pills will be diverted and sold on the street if the patient is black. If the patient is white, they may feel like there’s nothing to worry about . . . .”); see also Kelly K. Dineen, Addressing Prescription Opioid Abuse Concerns in Context: Synchronizing Policy Solutions to Multiple Complex Public Health Problems, 40 LAW & PSYCHOL. REV. 1, 20 (2016) (“Disparities in pain treatment also reflect ingrained biases based on gender, race, socioeconomic status, and other perceived differences.”).

238. Lopez, supra note 22 (noting that while white Americans still die disproportionately from opioid overdose-related deaths, the gap between whites and other racial groups is narrower with heroin and other illicit forms of the drug than for prescription drugs).


240. Alexander et al., supra note 2, at 560.

241. Id.

years of declining numbers, the child welfare population has increased by ten percent between 2012 and 2016 in conjunction with the worsening opioid crisis.\textsuperscript{243} Children removed from opioid abusers, often after the latter are arrested, face longer stays in foster care and require expensive long-term therapy and treatment.\textsuperscript{244} Morgues have run out of space for the bodies of people who died from opioids.\textsuperscript{245} Experts estimate that the economic cost of opioid misuse has been $500 billion per year, comprising lost productivity, additional spending on health care and social services, and criminal justice costs.\textsuperscript{246}

\section*{B. Addressing the Harms and Costs of Arrest}

The ubiquity and lethality of today’s opioid crisis have created space for a new law enforcement approach to alleged drug users. This approach has been shaped by advocates with social and political capital; some of its most effective advocates are the white and upper-middle-class friends and family members of people with opioid addiction.\textsuperscript{247} They have pushed for a less punitive set of tactics and strategies in part


\textsuperscript{247} A recently enacted federal statute reflects the more compassionate, treatment-oriented approach to the opioid crisis. The 2016 law provides for expanded access to naloxone among civilians as well as law enforcement, encourages awareness-raising around the misuse of opioid-based pain medication, and directs the Department of Justice to fund state and local initiatives that expand treatment alternatives to incarceration. \textit{See generally Physicians for Human Rights}, supra note 148, at 7 (describing law and explaining change in political environment).
by emphasizing that addiction and overdose-related deaths occur across all races and socioeconomic classes.\textsuperscript{248}

A new mantra has emerged: “we can’t arrest our way out of this” is now a common assertion by law enforcement officials at the local, state, and federal levels.\textsuperscript{249} This statement likely indicates several things: first, that police officers can neither regulate nor reach the many drivers of the opioid crisis. These include over-prescription by doctors;\textsuperscript{250} “pill mills,”\textsuperscript{251} improper marketing by pharmaceutical

\begin{footnotesize}
\textsuperscript{248} Yankah, supra note 26.


\textsuperscript{250} See, e.g., Blake, supra note 13, at 486 (arguing that “while criminal law certainly has its place in this epidemic, for example by targeting physicians who unlawfully abuse their prescriptions pads, prescription painkiller abuse is better handled by changes to how we regulate our healthcare system, in terms of both delivery and payment”); Erica Trachtman, Note, \textit{A Horrific Violation of Trust: Prosecuting Doctors for Patients’ Prescription Overdoses}, AM. CRIM. L. REV. (2012), http://www.americancriminallawreview.com/aclr-online/horrific-violation-trust-prosecuting-doctors-patients-prescription-overdoses [https://perma.cc/L2PQ-FYAD] (stating the DEA “reports a steady rise in successful criminal prosecutions of physicians, from just 15 convictions in 2003 to 43 in 2008”); see also Barack Obama, \textit{The President’s Role in Advancing Criminal Justice Reform}, 130 HARV. L. REV. 811, 859 (2017) (detailing efforts of Obama Administration).

\textsuperscript{251} See generally Richard C. Ausness, \textit{The Role of Litigation in the Fight Against Prescription Drug Abuse}, 116 W. VA. L. REV. 1117, 1119 (2014) (surveying individual and class action lawsuits, \textit{parens patriae} lawsuits initiated by state attorneys general, and criminal prosecutions against pharmaceutical companies, prescribing physicians, and pharmacists; concluding that state attorneys generals’ suits have been the most effective; but arguing that litigation will be insufficient as a means to address the harms of overprescription and suggesting instead to use comprehensive prescription monitoring programs, anti-doctor shopping laws, and prescription drug “take back” initiatives).
\end{footnotesize}
companies, insufficient monitoring by pharmacies, and illegal importation of synthetic fentanyl. Second, some departments recognize that fear of arrest can deter or delay users from seeking help for someone they are with who is overdosing—which can result in death. Third, the fact that so many white people, including upper and middle-upper-class white people, are addicted to opioids surely influences the sense among police departments that arrest is an inappropriate response.

Law enforcement officials know that their first encounter with a person misusing opioids frequently involves a response to a 911 call reporting an overdose, and that the opioid user may die without quick and life-saving action. Many people using


253. Ausness, supra note 251, at 1121.

254. See SEAN O’CONNOR, U.S.-CHINA ECON. AND SEC. REVIEW COMM’N, FENTANYL: CHINA’S DEADLY EXPORT TO THE UNITED STATES 6 (2017) (“Chemical flows from China have helped fuel a fentanyl crisis in the United States . . . . Unlike previous opioid epidemics, including a temporary spike in U.S. fentanyl use in 2006 that was traced to a single clandestine lab in Mexico, fentanyl sold in the United States is now being processed by many individual distributors across the country. The diffused nature of the problem has made it difficult for law enforcement to contain.”).

255. This fear is likely to become more pronounced as more states enact and prosecutors enforce laws that make people who supply illicit drugs that lead to death eligible for homicide charges. NAZGOL GHANDNOOSH & CASEY ANDERSON, THE SENTENCING PROJECT, OPIOIDS: TREATING AN ILLNESS, ENDING A WAR (2017), http://www.sentencingproject.org/wp-content/uploads/2017/12/Opioids-Treating-an-Illness-Ending-a-War.pdf?eType=EmailBlastContent&eld=059ecf35-73cd-412d-a1a1-6c006c4a5b2 [https://perma.cc/T7KN-X39R].

256. In recognition of the opioid overdose crisis, nearly all states have enacted “Good Samaritan” laws, which permit or mandate legal amnesty for individuals who themselves would otherwise be exposed to criminal liability when they seek emergency assistance for people using drugs. NAT’L CONFERENCE OF STATE LEGISLATORS, DRUG OVERDOSE IMMUNITY AND GOOD SAMARITAN LAWS (June 5, 2017), http://www.ncsl.org/research/civil-and-criminal-justice/drug-overdose-immunity-good-samaritan-laws.aspx [https://perma.cc/8HRV-SXSV].

257. See supra notes 24–26 and accompanying text.

258. Scholars argue that along with derogation of people of color, preferential treatment of white Americans helps drive the stark disparities that define America’s criminal justice system. See, e.g., Robert J. Smith, Justin D. Levinson & Zoë Robinson, Implicit White Favoritism in the Criminal Justice System, 66 ALA. L. REV. 871 (2015) (citing examples including the comparatively benign response to the methamphetamine epidemic as compared with the crack epidemic).

opioids purchase and use them in their own homes or cars; they escape the police surveillance that would occur if they needed to purchase drugs in public spaces. The lethality of contemporary opioid use exists in part because of ignorance among users about the contents of the drugs they are using. Without knowing, for example, if the heroin they are purchasing contains fentanyl, people are likely to use a more potent and frequently deadly amount. Unlike such countries as Belgium and Portugal, nowhere in the United States are there free, anonymous drug-purity testing services, which could provide this potentially life-saving information.

Much of what officers do in areas where the opioid crisis is the most severe is akin to social work—making referrals to treatment, providing grief counseling, and managing the removal of children from parents who have overdosed. As the following section demonstrates, many departments have begun to move away from providing these services on an ad hoc basis and instead systematically to shape officers’ discretion toward non-arrest mechanisms for responding to alleged drug-law offenders.

C. Shaping Police Discretion

Officers have broad discretion when deciding how to handle the myriad situations they encounter during a shift: obvious and serious violations of the criminal law that require arrest; acts that are criminal but that an officer may decide to respond to with a citation or warning rather than an arrest; and non-criminal issues—a mentally ill person not taking her medication or a person under the influence of drugs or alcohol and not acting in ways perceived as rational—that may nonetheless present as public safety problems and thus within the purview of law enforcement. While the crack

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262. Id.

263. Id.


265. Beckett, supra note 29, at 78 (noting that police officers “routinely encounter both
cocaïne crisis of the 1980s and 1990s resulted in large numbers of arrests of drug users, such a result was not inevitable. It was, instead, the result of deliberate policy choices flowing from state and federal incentives.266

Competing theories about discretion—how to police, how much to police, and the proper aims of policing267—have preoccupied policymakers and scholars since the American Bar Foundation “discovered” the concept in the 1950s.268 Shaping police discretion involves not only forbidding certain acts but also providing guidance to officers as to which one from among several permissible options is most appropriate.269

In the wake of grassroots activism,270 criticism from scholars,271 and successful class-action lawsuits,272 some police departments have slowly begun to reconsider the deployment of discretion toward encouraging arrest for minor criminal offenses, including drug offenses.273 The police killings of Eric Garner and Michael Brown—

non-criminal situations and serious public safety problems, both of which require considerable judgment beyond the application of criminal law”); Stoughton, supra note 81, at 611 (noting the wide variety of tasks officers perform).


267. See, e.g., Harmon, supra note 41, at 762 (noting that questions about police discretion “depend on empirical assessments, theoretical interpretations, and normative judgments that are widely contested”).

268. Wesley G. Skogan, Preface, 593 ANNALS AM. ACAD. POL. & SOC. SCI. 6, 6(2004) (noting that while practitioners always knew discretion was an important component of policing, researchers had not previously focused on it); see also JEROME H. SKOLNICK, JUSTICE WITHOUT TRIAL: LAW ENFORCEMENT IN DEMOCRATIC SOCIETY 72–74 (1966) (discussing police discretion).


272. See, e.g., Floyd v. City of New York, 959 F. Supp. 2d 540 (S.D.N.Y. 2013) (finding discriminatory intent in NYPD practices, including the department’s “stop and frisk” practices).

both of which occurred in the context of broken-windows policing—illustrate the potential deadliness of the tactics.274 Because the linchpin of the argument for broken-windows policing has been undermined by precipitous drops in crime in municipalities where it featured most prominently, even some conservative commentators have joined the critique.275

The reconsideration of broken-windows policing is apparent in the 2015 Final Report of the President’s Task Force on 21st Century Policing (Report).276 It argues for building trust and legitimacy as “the foundational principle [of] the nature of relations between law enforcement agencies and the communities they serve.”277 In particular, the Report exhorts law enforcement agencies to “consider adopting preferences for seeking ‘least harm’ resolutions, such as diversion programs or warnings and citations in lieu of arrest for minor infractions.”278 This exhortation reflects the groundswell of activism against the racially disproportionate deployment of this kind of policing.279

Historically, officers have sometimes looked the other way when confronted with illegal drugs—often because the suspected offender was a person with perceived social capital, typically white and middle or upper-middle class.280 What the Report does is recommend institutionalizing and systematizing individual diversionary practices officers long have employed.281

The evolution in the policing of drug users urged by the Report and seen in the current opioid crisis reflects a shift from the warrior mindset of the War on Drugs to one that “prioritizes service over crime fighting.”282 For some time, policing scholars

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274. See generally K. Babe Howell, The Costs of “Broken Windows” Policing: Twenty Years and Counting, 37 CARDOZO L. REV. 1059, 1061 (2016) (“[E]very police encounter that arises out of a minor offense has the potential to end in tragedy, making unnecessary policing under zero-tolerance policies dangerous.”).


277. Id. at 1.

278. Id. at 3.


281. See President’s Task Force on 21st Century Policing, supra note 276.

282. Seth Stoughton, Law Enforcement’s “Warrior” Problem, 128 HARV. L. REV. F. 225,
have argued for such a shift toward what they refer to as a “guardian” mentality, in which citizen-officer interactions are characterized by mutual respect. Observing the on-the-ground reality of police work in the opioid crisis, one commentator hints at the opportunism that may lie below the surface of the changes observable in opioid policing: “If there’s anything that could change the perception that law enforcement officers have moved from protecting and serving to soldiering and bullying, it just might be the opioid epidemic raging across the United States.” This on-the-ground reality, along with recent political and scholarly currents, have combined such that police departments can recognize in the complaint of police officers—“we can’t arrest our way out of this”—the need for a new approach. Opioid policing constitutes an effort to systemically shape discretion to reflect a normative position for officers—that they shouldn’t arrest their way out of drug possessory offenses.

D. New Practices

In a small but growing number of jurisdictions, police departments have systematized the deployment of discretion toward a non-arrest mindset. The first approach, discussed in subsection one, is a program that encourages officers to refer low-level alleged offenders to community-based services, avoiding jail and prosecution. The second form of opioid policing, discussed in subsection two,
allows individuals to receive priority access to a detoxification program in exchange for relinquishment of their illicit drugs.\textsuperscript{288}

1. Law Enforcement Assisted Diversion

After years of litigation initiated by racial justice advocates over racially disproportionate War on Drugs policing, community stakeholders in Seattle convened in 2011 to address their shared perception that change was needed.\textsuperscript{289} Drug sale and use were rampant, and individuals cycled in and out of the criminal system—serving short sentences and receiving no resources to assist with addressing the issues that may have brought them to the attention of the police in the first place.\textsuperscript{290} Out of these convenings, law enforcement officials, defense attorneys, prosecutors, and those community members identified as public safety leaders designed the Law Enforcement Assisted Diversion (LEAD) program.\textsuperscript{291}

LEAD contains two distinct components. The first is a pre-booking diversion program for people who could otherwise be arrested for violations of drug or prostitution laws.\textsuperscript{292} Prostitution crimes are included because of data indicating that women who are dependent on drugs are more likely to come to the attention of police for that offense than for drug offenses.\textsuperscript{293} In this first version of LEAD, an officer

\textsc{Seema L. Clifasefi & Susan E. Collins}, \textit{LEAD Program Evaluation: Describing LEAD Case Management In Participants’ Own Words} (2016) (qualitative social science evaluation). For a list of all jurisdictions replicating all or some of the LEAD elements, see \textsc{Lead Nat'l Support Bureau}, https://www.leadbureau.org [https://perma.cc/6KGP-EHY8].

\textsuperscript{288} No evaluations of this second form of opioid policing exist in the legal literature. For a short evaluation of the program’s placement rate, see Davida M. Schiff, Mari-Lynn Drainoni, Megan Bair-Merritt, Zoe Weinstein & David Rosenbloom, \textit{A Police-Led Addiction Treatment Referral Program in Massachusetts}, 375 New Eng. J. Med. 2502 (Dec. 22, 2016).

\textsuperscript{289} Beckett, \textit{supra} note 29, at 86.

\textsuperscript{290} \textit{Id.} at 93.

\textsuperscript{291} \textit{Id.} at 86.

\textsuperscript{292} Diversion from formal criminal justice system processing typically involves five goals: avoidance of negative labeling, reduction of unnecessary social control, reduction of recidivism, reduction of justice system costs, and provision of service. \textsc{Ctr. of Juvenile & Criminal Justice}, \textit{Widening the Net in Juvenile Justice and the Dangers of Prevention and Early Intervention} 3 (Aug. 2001). While diversion exists in the criminal system, typically it is a process dependent on prosecutors after arrest or judges after adjudication, rather than on police officers. \textsc{Model Penal Code} § 6.02A (\textsc{Am. Law Inst.}, Proposed Final Draft 2017) (defining deferred prosecution as “the practice of declining to pursue charges against an individual believed to have committed a crime in exchange for completion of specified conditions”); \textsc{Model Penal Code} § 6.02B (\textsc{Am. Law Inst.}, Proposed Final Draft 2017) (defining deferred adjudication as “any practice that conditionally disposes of a criminal case prior to the entry of a judgment of conviction”).

\textsuperscript{293} Sara Jean Green, \textit{LEAD Program for Low-Level Drug Criminals Sees Success}, \textit{Seattle Times} (Apr. 8, 2015, 11:05 AM), https://www.seattletimes.com/seattle-news/crime/lead-program-for-low-level-drug-criminals-sees-success [https://perma.cc/9QT4-ANBB] (“While men are more likely to be arrested for using or selling drugs, women involved with drugs are most often arrested for prostitution, which made the misdemeanor offense also a qualifying crime for participation in LEAD.”).
makes an arrest, transports the arrestee to the precinct, and contacts a LEAD case manager for an initial screening; the officer typically relinquishes custody of the referred person upon the caseworker’s arrival. The arresting officer sends the arrest record to the misdemeanor or felony prosecutor—these offices maintain the records and the authority to charge the arrested person. However, the presumption is that charges will not be filed if the individual completes both the initial screening as well as a full intake assessment with LEAD case managers within thirty days of the referral.

The second component is aimed not at situations in which probable cause exists for arrest but at individuals believed by police officers to be at risk of future arrest.

This so-called “social-contact” component of LEAD enables officers to target people believed to engage in drug-related crime, or sex work, within the program’s catchment areas. Added at the request of police officers, the social-contact component expands the scope of the program beyond one that is strictly created for diversion. LEAD architects view the social-contact component as critical to ensuring and maintaining buy-in from officers who are part of the program.

Without the ability proactively to engage people believed to be involved in criminal activity, LEAD proponents presumably believe officers will otherwise ignore the relevant policy directives.

In order to participate in either version of LEAD, an alleged offender must meet certain eligibility criteria. Typically, anyone suspected of a low-level drug or prostitution offense is eligible. While the sale of a small amount of drugs is not an automatic disqualifier, program administrators must believe that the sale was for subsistence or to support a drug habit, rather than to make a profit. A prior criminal record of serious or violent offenses presumptively disqualifies a person. A final eligibility criterion is “amenability to diversion.” This phrase is not defined in

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294. Id.

295. Professor Katherine Beckett, who conducted a process evaluation of LEAD as well as an outcome evaluation, states that the LEAD stakeholders report that prosecutors have complied with this expectation. Beckett, supra note 29, at 90.

296. Id. at 92.

297. As of 2013, these “social-contact referrals” can only be made for individuals with prior documented involvement in drugs (possession or selling) or prostitution. See Beckett, supra note 29, at 90, 96.

298. CLIFASEFI & COLLINS, supra note 287, at 4.

299. LEAD NAT’L SUPPORT BUREAU, CORE PRINCIPLES FOR POLICING ROLE (2017), https://docs.wixstatic.com/ugd/6f124f_05aef9c2db0b4c1db815cac96e54368b.pdf [https://perma.cc/X7GH-B7DS].

300. CLIFASEFI & COLLINS, supra note 287, at 4–5.


302. Id. (noting that people suspected of exploiting minors, possessing an amount of drugs exceeding three grams, or promoting prostitution are ineligible).

303. CLIFASEFI & COLLINS, supra note 287, at 7.

304. Id. (listing prior criminal convictions that presumptively render people ineligible).

305. Id. The jurisdictions certified by LEAD have similar caveats for admission to the program. See id. at 18–19.
the program literature and its interpretation appears entirely to be left to program administrators.

LEAD participants have access to a panoply of social services. Case managers work closely with LEAD-involved individuals to assist them in attaining housing, a job or job training, other community services, and treatment. They also offer personal encouragement and support—all with an aim of staying out of the criminal system. If LEAD participants are arrested for a subsequent alleged offense, officers and prosecutors are encouraged to coordinate with LEAD case managers and social workers in lieu of initiating criminal proceedings. Assuming the LEAD team believes participants are making progress toward the goal and can convince the prosecutor of the same, criminal proceedings will not ensue.

Initially developed as a pilot project, LEAD is now a permanent part of Seattle policing, receiving approximately $1 million in public funding. Approximately twenty additional jurisdictions have replicated LEAD. Dozens more have developed pilot projects or are exploring other forms of diversion. In 2016, the National Institute of Justice rated LEAD a “promising” program. The presidential election does not appear to have dampened federal enthusiasm for LEAD; the

306. LEAD NAT’L. SUPPORT BUREAU, supra note 299.
307. Id. (“Case managers will link diverted individuals to housing, vocational and educational opportunities, treatment, mental and other health services, and community services.”).
308. LEAD NAT’L. SUPPORT BUREAU, ESSENTIAL PRINCIPLES FOR SUCCESSFUL LEAD IMPLEMENTATION (2017), https://docs.wixstatic.com/ugd/6f124f_552d331f637f436189a38d14f9b823ad.pdf [https://perma.cc/R5X3-U7DL] (“The goal should be to address the participant’s drug activity and any other factors driving his/her problematic behavior – even if abstinence from drug use is not achieved – and to build long-term relationships with participants without employing coercion or shame.”).
309. LEAD NAT’L. SUPPORT BUREAU, LEAD FACT SHEET, https://docs.wixstatic.com/ugd/6f124f_535679df78e2541dafa433d983cb2a31.pdf [https://perma.cc/UG4-RHXJ].
310. Green, supra note 293 (describing this philosophy and explaining that “[i]f LEAD participants backslide or commit new felony drug crimes, they are held accountable. But because police and prosecutors are familiar with their life situations, they are able to use their discretion so as not to interrupt the progress being made. For instance, the [King County senior deputy prosecutor] may not write an arrest warrant for someone if she knows that person has an upcoming appointment to get into stable housing”). For the impact that this coordinated approach may have on subsequent re-arrest rates, see infra note 357 and accompanying text.
312. LEAD NATIONAL SUPPORT BUREAU, https://www.leadbureau.org/ [https://perma.cc/XFQ7-7MX6].
313. Id.
314. NAT’L INST. OF JUSTICE, supra note 301. For Obama White House July 2015 national convening on the LEAD program, and praise of the program in a White House blog post, see Roy L Austin, LEAD-ing the Way to a More Efficient Criminal Justice System, OBAMA WHITE HOUSE (July 2, 2015, 5:54 PM), https://obamawhitehouse.archives.gov/blog/2015/07/02/leading-way-more-efficient-criminal-justice-system [https://perma.cc/V5JD-TEST].
President allocated $2.5 million for LEAD expansion in 2017. While a comparatively small amount when contrasted with earlier funding for War on Drugs programs, the continued funding for the program at any level is notable given the otherwise tough-on-crime rhetoric issuing from the Department of Justice.

2. Legal Amnesty and Drug Detoxification

The second form of opioid policing is a program that promises drug-addicted users priority access to a detoxification program and a commitment not to arrest or initiate criminal proceedings in exchange for their voluntary relinquishment of illicit drugs and paraphernalia. Known as the Angel Initiative, it began in 2015 in Gloucester, Massachusetts.

Unlike LEAD, the Angel Initiative was spurred directly by the high rate of overdose-related deaths from opioids. The program is structured such that users who walk into a police station or to an officer in the community and turn over illicit drugs can then request immediate entry into drug detox programs. On-duty officers contact treatment centers to identify a facility with an opening; they then arrange for transportation—by ambulance, if necessary. If the officer determines that the process will take more than a few hours, they assign the drug user to a civilian who has volunteered to provide emotional support and to wait with the person until the program has a treatment bed.

The ideological premises and resources of the Angel Initiative are different from those of LEAD. The Angel Initiative focuses entirely on obtaining detoxification treatment for users. It has not adopted a harm-reduction framework. It is not set up to assist drug users with problems other than addiction. Reminiscent of drug courts, the Angel Initiative rests on the one-dimensional notion that addiction causes criminal behavior. As a Connecticut sheriff overseeing an Angel Initiative puts it: “Rather than focus on arrests, if we can put 100 people in treatment, then we are preventing crime.”

In its structure and rhetoric, the Angel Initiative seems to presuppose that the difficult life circumstances that frequently accompany drug addiction—homelessness, mental health issues, and unemployment—are its result rather than its cause or even its correlative. Presumably, once treatment is received, the former user is expected to embark upon a law-abiding life.

316. See infra note 444 and accompanying text.
317. Schiff et al., supra note 288.
318. Id.
319. Id.
320. Id.
321. Id.
Angel Initiatives have spread quickly; similar programs currently exist in 200 departments in twenty-eight states.\(^{323}\) They exist in some of the states hardest hit by the opioid crisis, no matter the political orientation of the state’s elected leadership.\(^{324}\)

III. THE PROMISE OF OPIOID POLICING

This Part analyzes the promise of opioid policing, identifying and exploring ways in which the two forms improve upon both War on Drugs policing and specialized drug courts. Section A considers the practical benefits of LEAD’s harm-reduction framework—specifically, enabling alleged drug offenders to stay out of the criminal system and attain personal stability—as well as the way in which both programs work to reduce the risk of overdose. Section B summarizes recent preliminary and positive evaluations of each of the two forms of opioid policing.

A. Toward a Public-Health Lens on Drug Crimes

1. Avoidance of Arrest

Each of the two forms of opioid policing is structured so that alleged drug offenders have a better opportunity to avoid criminal justice involvement than they would in either War on Drugs policing or drug courts. LEAD offers services prior to an arrest; the alleged offender need not enter a guilty plea or be prosecuted in the first instance, as drug court participants must.\(^{325}\) The Angel Initiative provides access to medical treatment and drug detoxification upon request, and it accepts drugs and paraphernalia without imposing criminal consequences.\(^{326}\)

In diverting alleged offenders from the criminal system and into an array of services, LEAD recognizes the futility and harm of arrest—apparent since the heyday of the War on Drugs and brought into focus with the opioid crisis.\(^ {327}\) That is, in addition to the typical harms attendant to arrest, a person in the throes of opioid dependence is particularly at risk from detention.\(^ {328}\) Similarly, as one proponent

\(^{323}\) See, e.g., Brian MacQuarrie, ‘Angel’ Opioid Initiative Thrives Despite Exit of Gloucester Police Chief, BOSTON GLOBE (Feb. 21, 2017), https://www.bostonglobe .com/metro/2017/02/21/angel-opioid-initiative-thrives-despite-exit-gloucester-police-chief /hvH14GgG0dRXTJOpGEswO/story.html [https://perma.cc/Y2JH-Q7FJ] (describing that in 200 police agencies in twenty-eight states, departments have adopted an approach through which people who come to the police department and ask for help for drug addiction will be taken to a hospital and later placed in a recovery program and noting that some, but not all, of these departments also adopt a “no-arrest” policy).


\(^ {325}\) See supra note 295 and accompanying text.

\(^ {326}\) See supra notes 320–23 and accompanying text.

\(^ {327}\) See supra notes 113–19 and accompanying text.

\(^ {328}\) For a discussion of the harms of arrest for an opioid-addicted person, see supra notes 111–17 and accompanying text. For an analysis of collateral consequences of arrest, see generally Harmon, supra note 41; Roberts, supra note 41.
explains of the Angel Initiative, “It puts police in the lifesaving business instead of the spin-drying business of arresting and releasing.”

This program encourages officers to see drug users not, or not only, as criminals—but instead as people suffering from the disease of addiction.

2. Harm Reduction over Abstinence

Harm reduction also distinguishes LEAD from the specialized drug courts. Recall that drug courts require participants to abstain from drugs and alcohol; failure to do so will result in short periods of incarceration and eventually imposition of a jail or prison sentence. One justification for jailing drug-court participants for relapse is that the threat of incarceration can “propel a defendant through treatment.” A harm-reduction philosophy rejects this justification as inaccurate and misguided. Given that the rate for relapse hovers between forty and sixty percent, programming for drug users should anticipate it. LEAD embodies the notion that it is possible to reduce the harm to and by drug users without either demanding abstinence or utilizing jail as a treatment mechanism.

While many LEAD enrollees likely want to achieve sobriety—and may ultimately succeed—LEAD does not insist on abstinence as a precondition for being accepted into or remaining in the program. Instead, LEAD program materials make clear

329. MacQuarrie, supra note 323 (quoting John Rosenthal, a Boston-area developer and supporter of the Angel Initiative).


332. See supra note 148 and accompanying text.


336. Id. Other forms of harm reduction for drug users include needle exchanges and safe injection sites, where drug users can inject drugs under medical supervision. While no such sites currently exist in the United States, Philadelphia recently approved one. Elana Gordon, What’s Next for ‘Safe Injection’ Sites in Philadelphia?, NPR (Jan. 24, 2018, 3:43 PM), https://www.npr.org/sections/health-shots/2018/01/24/580255140/whats-next-for-safe-injection-sites-in-philadelphia [https://perma.cc/CSG6-HBKX] (quoting Dr. Thomas Farley, Philadelphia’s health commissioner and co-chair of the city’s opioid task force, arguing “[t]here are many people who are hesitant to go into treatment, despite their addiction, and we don’t want them to die”); see also Leo Beletsky, Grace E. Macalino & Scott Burris, Attitudes of Police Officers Towards Syringe Access, Occupational Needle-Sticks, and Drug Use: A Qualitative Study of One City Police Department in the United States, 16 INT’L J. DRUG POL’Y 267, 268 (2005) (noting that thirty percent of officers surveyed have been stuck by needles
that “[p]articipants will be engaged where they are . . . they will not be penalized or
denied services if they do not achieve abstinence.”

Since the threat of arrest works to push illicit drug users and people engaged in
sex work underground in ways that can exacerbate risk, a harm-reduction
paradigm conceptualizes arrest itself as a secondary harm. In directing
participating officers to view arrest as a “strategy of last resort for low-level drug
offenses and offenses related [to] behavioral health conditions and/or poverty,”
LEAD evinces an awareness of the health-impairing and criminogenic nature not
only of arrest but also of prosecution and incarceration.

LEAD also departs from the judicial-coercion model of drug courts. Its
counselors collaborate with the participant in designing a service plan that the
participant believes will work. LEAD case managers are trained to emphasize that
meaningful improvements may occur even in the absence of abstinence. The
group’s orientation is that an active and ongoing engagement with clients,
encouragement of goal-setting, and provision of emotional and financial support as
they work toward those goals is the best way to assist a client in diminishing harm
from drug use if not ceasing it altogether. In this respect, LEAD departs from the
drug court notion that the disease of addiction requires treatment and that involuntary
treatment is not only appropriate but more effective than treatment voluntarily
entered. Drug courts’ single-minded focus on abstinence from all illegal drug use
belie the fact that for many users, drug addiction is not necessarily the central risk
factor or problem in their lives. While not explicitly engaging in the debate over

and arguing that finding as part of the reason for law enforcement support for needle
exchanges).

337. LEAD NAT’L SUPPORT BUREAU, CORE PRINCIPLES FOR CASE MANAGEMENT ROLE,
[https://perma.cc/8GPC-V6K7].

338. Beckett, supra note 29, at 86 (noting that in efforts to avoid detection, for example,
drug users may well be more likely to inject more quickly, in darker places, or with dirty
needles, thus endangering themselves and others).

339. Id.

340. Id.

341. See Anne R. Traum, Mass Incarceration at Sentencing, 64 HASTINGS L.J. 423, 456
(2013).

342. One jurisdiction has developed a specialized opioid court. Located in Buffalo, New
York, the court requires daily reporting from participants for thirty consecutive days and
recognizes the likelihood of relapse and is less likely to punish it than the traditional drug
court. Nonetheless, it remains wedded to the idea that judicial coercion is effective. In any
event, the expense of the court suggests that it may be difficult to replicate. See generally
Timothy Williams, This Judge Has a Mission: Keep Defendants Alive, N.Y. TIMES (Jan. 3,
[https://perma.cc/6BW6-X6RK] (describing the first and only “opioid court” in the United States and
noting its mission is to “keep defendants alive” rather than to ensure that addicts remain drug
free).


344. Id. at 92.

345. Id. at 92 n.62.

346. TIGER, supra note 45, at 29.
how best to characterize addiction, LEAD’s agnosticism about the abstinence imperative for drug users and inclusion of a broad range of services to address overall well-being suggests a departure from the one-dimensional disease model on which the drug court is founded.  

Finally, LEAD participants do not “jump the line” in front of non-LEAD individuals waiting to access public services. This “nondisplacement principle” is aimed at ensuring equity among marginalized individuals and “increas[ing] safety and order for the community as a whole.” This principle also differentiates LEAD from drug courts, which are criticized for filling up scarce treatment placements with court-ordered individuals who do not need or want the care, but who accept it to avoid incarceration.

B. On-the-Ground Results

Two recent outcome evaluations suggest that LEAD has achieved some of its stated goals: reducing arrests and serving as a model for cost-effective social service provision for individuals who would otherwise be processed through the criminal legal system. The first study measured the recidivism rates of approximately 200 LEAD clients against a group of people with similar records who did not participate in LEAD. LEAD clients were nearly sixty percent less likely to be rearrested for additional crimes; the odds that a LEAD client was sentenced to prison in the first year after their enrollment in LEAD were eighty-seven percent lower. A second


348. The National Institute of Justice, Office of Justice Programs, which rates evidence-based, community-level crime prevention programs across the country, states that displacement “[o]ccurs when an intervention has the effect of moving the problem in question (such as crime) rather than producing an actual reduction in incidence” and negatively rates programs that produce displacement on the CrimeSolutions.gov Scoring Instrument. NAT’L INST. OF JUSTICE, Glossary, CRIME SOLUTIONS, https://www.crimesolutions.gov/Glossary.aspx?D [https://perma.cc/N7GG-ZZKP].

349. LEAD NAT’L SUPPORT BUREAU, supra note 299.

350. PHYSICIANS FOR HUMAN RIGHTS, supra note 148, at 2; see also Bowers, supra note 148, at 787.


352. Id.

353. Id. LEAD clients also spent thirty-nine fewer days in jail than similarly situated arrestees who did not enter LEAD. But see NAT’L INSTITUTE OF JUSTICE, supra note 348 (noting that while “[t]he intervention group was significantly less likely to have been arrested,
study yielded findings suggesting what LEAD architects hypothesized: namely, that the attainment of housing, employment, and some form of public benefits correlated with reduction in re-arrest. Of course, it may be the case that the reductions in re-arrest resulted only or mostly from the willingness of prosecutors not to bring charges when they could have, rather than from an actual reduction in criminal offending. Indeed, the Seattle group indicates a high degree of “buy-in” from prosecutors who believe prosecution will imperil participants’ progress. In any event, the cost savings from LEAD were significant. Criminal justice system costs associated with LEAD clients decreased by roughly thirty percent relative to the year prior to their enrollment in LEAD, while costs for non-LEAD individuals more than doubled in that same period.

Further, a qualitative evaluation produced similarly promising results. A 2015 set of interviews with a convenience sample of thirty-two LEAD participants revealed that all but one reported a positive experience with and perception of the program. The characteristics most valued were the program’s client centeredness, harm-reduction approach, and ability to follow through with commitments. In addition, participants appreciated that the program requested input and required involvement from them.

Preliminary results of evaluations of the Angel Initiative suggest that the program is succeeding in obtaining detoxification for its participants. In the first year of the Gloucester program, 376 people entered seeking help a total of 429 times. 83% of those had used opioids that day or the previous one; over 70% had injected heroin. Over half had previously been arrested for drug offenses. In 94.5% of instances in which a person presented for assistance and was eligible (394 of 417), direct placement was offered. That placement rate exceeds those reported for hospital-based initiatives.

compared with the control group, at the shorter- and longer-term follow ups . . . there was no significant impact on non-warrant arrests”.

354. Seema L. Clifasefi, Heather S. Lonczak & Susan E. Collins, Seattle’s Law Enforcement Assisted Diversion (LEAD) Program: Within-Subjects Changes on Housing, Employment, and Income/Benefits Outcomes and Associations with Recidivism, 63 CRIME & DELINQ. 429, 438–39 (2017) (demonstrating that achieving housing and employment was associated, respectively, with seventeen percent and thirty-three percent fewer arrests during the follow-up period).

355. Beckett, supra note 29, at 93–94 (noting that prosecutors have indicated that they are likely to file charges against LEAD clients if the behavior in question involves direct harm to victims).

356. Clifasefi & Collins, supra note 287, at 11 (as one participant phrased it, “LEAD helps you, but . . . I feel like I’m a part of helping also together with my counselor.” (alteration in original)).

357. Id. at 10.

358. Id. at 9–10.

359. Schiff et. al., supra note 288.

360. Id.

361. Id.

362. Id.

363. Id.
A team of doctors and public-health specialists evaluating the Gloucester Angel Initiative attributes the high placement rate to a confluence of factors, including the motivation of participants to enter treatment, as evidenced by their coming to the police station; the additional support provided by volunteers; the fact that officers searched for placements twenty-four hours a day; the relationship the police established with a local treatment center in which the majority of participants were placed; the provision of transportation; and the state-mandated insurance in Massachusetts, which covers drug detoxification.

In addition to the help provided to individuals seeking treatment, Angel Initiative materials claim additional benefits. Namely, communities in which its approaches are used have experienced up to a 25% reduction in crime associated with addiction, cost savings from placing drug users into treatment rather than the criminal justice system, and enhanced trust with community members.

In addition, the program costs roughly $55 per participant—significantly less than the $220 per day cost of holding them in jail—and is financed through funds obtained pursuant to drug seizures.

V. THE LIMITATIONS

The foregoing analysis of the promise of opioid policing simultaneously reveals the extent to which it remains firmly within the contours of the contemporary carceral state. Notwithstanding their comparatively benevolent intentions, each of the two forms of opioid policing functions to expand police surveillance. In addition, features of the two forms re-entrench rather than disrupt the distributive inequities of race and class that came to define War on Drugs policing. These issues are explored below.

A. Expansion of State Surveillance

Prominent political scientist Marie Gottschalk has described the late twentieth century phenomenon in the United States of decimating welfare programs in favor of creating law-and-order responses to social problems. This carceral state extends beyond the well-documented expansion in the jail and prison population over the last four decades; it encompasses “the far-reaching and growing range of penal punishments and controls that lies in the never-never land between the prison gate and full citizenship.” Such punishments and controls include probation, parole, community sanctions, drug courts, and immigrant detention. The carceral state also

364. Id.
366. Id.
367. Marie Gottschalk, Bring It On: The Future of Penal Reform, the Carceral State, and American Politics, 12 OHIO ST. J. CRIM. L. 559, 580 (2015) (examining how money ostensibly meant to fund alternatives to incarceration is going to jail expansion and law enforcement budgets, instead of mental health or other social services).
extends beyond those personally affected by these consequences and includes the more than eight million children who have had an incarcerated parent and whose life outcomes are negatively affected by that fact. Carceral-state practices also influence electoral politics, as six million people are disenfranchised either temporarily or permanently because of a criminal conviction. School districts increasingly rely on the terminology and tactics of the carceral state, employing exclusionary discipline as well as arrest for in-school misbehavior that in the past would have been handled within the school. As Jonathan Simon summarizes, “[t]he carceral state exercises permanent surveillance and control, not a single game of guilt or innocence.”

Each of the two forms of opioid policing, in different ways, functions to expand the police and prosecutorial surveillance that are hallmarks of the carceral state. Consider first the phenomenon of net widening, in which programs targeted for a limited population instead grow to encompass broader populations, thus losing their effectiveness. Specifically, efforts at reducing the arrests, detention, and incarceration of both juveniles and adults can often instead result in an increased overall number of people within the system. In San Francisco in the late 1990s, for example, the city received an unprecedented infusion of state and federal money designed to establish a new centralized intake system to assess and refer youths to community-based services, thereby reducing its long-established overreliance on custodial detention. Despite lowered rates of crime and a shrinking youth population, however, the number of youths in detention did not decrease. Instead, a group of lower-risk young people who might not have otherwise been charged at all were swept into the system, and the population of the city’s juvenile detention halls remained steady.

The “social-contact” component of LEAD—whereby police officers are empowered and even encouraged to reach beyond arrest situations to individuals believed to be heavy drug users, whether or not they are engaged in a criminal activity at the time—could implicate net-widening concerns. If LEAD officers confine their activities to situations in which they would otherwise arrest, then the program can truly be said to be keeping people who would otherwise be in the criminal legal system out of it. The social-contact component, however, potentially complicates this claim. Police officers who seek out and accost people whom they

369. Id.
370. Id. at 2.
374. CTR. ON JUVENILE & CRIMINAL JUSTICE, supra note 292, at 3-4.
375. Id.
376. Id.
377. See supra notes 299–302 and accompanying text.
believe to be drug users without the constitutionally required reasonable suspicion that crime is afoot\textsuperscript{378} are no longer engaged in an explicitly diversionary enterprise. However well-intentioned their motivations, these officers have begun a process that could result in criminal justice entanglement, whether for a drug offense or something else.

The social-contact component of LEAD also creates problematic policing incentives in ways that are reminiscent of drug courts. Critics argue that police officers in jurisdictions with the putatively rehabilitative option of drug courts feel incentivized to make arrests for low-level drug offenses.\textsuperscript{379} That is, when a drug court is operating successfully under its own terms—providing treatment to individuals who need it—officers can feel justified, even righteous, in aggressively policing drug buys. The problematic aspects of the Drug War do not even appear salient when officers can feel that they are doing social services work, which is the outcome created in jurisdictions with drug courts. The more effective the drug court, the more this incentive exists.\textsuperscript{380} One might legitimately worry that the benevolent aspirations of the LEAD program may create similar incentives for officers to aggressively police and accost individuals whom they might otherwise leave alone.

An additional problematic feature of opioid policing is the way in which it works to monitor and control marginalized populations. Issa Kohler-Hausmann describes this problem in a different context as “managerial justice,” arguing that in crowded, urban misdemeanor courts, the priority of prosecutors is as much to obtain data from arrested individuals useful for future monitoring by the state as it is to fairly prosecute criminal charges.\textsuperscript{381} In a managerial justice regime,\textsuperscript{382} prosecutors and judges record the fact of an encounter and rely on it at later decision points in deciding whether and how to impose criminal consequences in the event of an individual’s subsequent arrest.\textsuperscript{383}

The Angel Initiative implicates concerns about managerial justice. One of its key components is data collection regarding the individuals who participate.\textsuperscript{384} The stated goal for the collection is the benign one of evaluating program effectiveness.\textsuperscript{385} Nonetheless, police departments participating in the program are able to expand their database of potential suspects in drug and other crimes, subjecting a broader group

\textsuperscript{378} See generally Terry v. Ohio, 392 U.S. 1, 29 (1968).
\textsuperscript{379} Eaglin, supra note 147, at 635 (“Drug courts left untouched enforcement of increasingly punitive drug policies. In fact, drug courts may have incentivized police and prosecutors to expand the number of individuals processed within the system for drug offenses due to the well-meaning belief that the justice system would offer better treatment.”).
\textsuperscript{380} Id.
\textsuperscript{381} Kohler-Hausmann, supra note 42, at 668; see also Jain, supra note 36, at 818–19, 860 (noting the regulatory function of arrest, even in the absence of conviction, overwhelmingly and disproportionately on poor, black, and Latino individuals and communities).
\textsuperscript{382} Kohler-Hausmann, supra note 42, at 644 (arguing that “marking” by way of arrest and prosecution includes an expressive component—communication of the offender’s diminished status to others in the social community).
\textsuperscript{383} Roberts, supra note 41, at 6.
\textsuperscript{384} See Schiff et al., supra note 288.
\textsuperscript{385} See id.
to expanded surveillance and tracking than would be the case without the program.\textsuperscript{386} Even though no conviction or arrest befalls individuals who are the subject of opioid policing, the state nonetheless maintains oversight over their lives. This kind of state surveillance does not typically exist for upper-middle-class users of illicit drugs.\textsuperscript{387} These users have access to private homes and cars, along with drug dealers who will travel to them, such that they do not need to expose themselves to outdoor drug markets to buy drugs or to police departments to obtain treatment.\textsuperscript{388}

The delivery of social services through police officers raises issues of stigma and expertise. Feminist scholars critique the “hyperregulation” of poor women that characterizes provision of means-tested welfare benefits in the United States.\textsuperscript{389} In order to obtain needed benefits, poor women must undergo drug testing or fingerprinting, for example.\textsuperscript{390} When the drug treatment and other social services of opioid policing are delivered through police officers, rather than hospitals, schools, or community-based welfare offices, the receipt of the services becomes more than stigmatized—it is explicitly criminalized. In addition, when police officers become the primary vehicle through which the state responds to problems related to social and economic deprivation such as drug addiction, one might reasonably expect the response to be more punitive and controlling than if provided by a trained and

\textsuperscript{386} This form of tracking is similar to that which is possible pursuant to routine traffic stops. See Jordan Blair Woods, Decriminalization, Police Authority, and Routine Traffic Stops, 62 UCLA L. REV. 672, 739 (2015) (arguing that decriminalization efforts must focus not only on sanctions but on constraining police authority and discretion and noting that traffic stops can “pose serious dignitary and psychological harms to motorists, and especially stigmatize motorists of particular social groups who are identified as “suspicious” based on vague cues, such as their race/ethnicity or the neighborhoods in which they are driving”).

\textsuperscript{387} Theodore J. Cicero, Matthew S. Ellis, Hilary L. Surratt & Steven P. Kurtz, The Changing Face of Heroin Use in the United States: A Retrospective Analysis of the Past 50 Years, 7 J. AM. MED. ASS’N PSYCHIATRY 821 (2014) (discussing data showing that over the last fifty years “heroin use has changed from an inner-city, minority-centered problem to one that has a more widespread geographical distribution, involving primarily white men and women in their late twenties living outside of large urban areas”); see supra note 285 and accompanying text.

\textsuperscript{388} See supra note 260–61 and accompanying text.


\textsuperscript{390} See, e.g., Kaaryn Gustafson, Degradation Ceremonies and the Criminalization of Low-Income Women, 3 U. CAL. IRVINE L. REV. 297, 301–02, 313 (2013) (citing finger imaging and drug testing as examples of “ceremonial degradation” policies intended to degrade welfare recipients under the guise of process). Twitter user @nedmiller pointed out the inverse of this phenomenon, as illustrated by President Trump’s recent plan to give billions of dollars to farmers hurt by tariffs, stating “Midwest farmers are the new Welfare Queens. Will we drug test them? Will we make them attend skill building classes or go get their GED?” Ned Miller (@nedmiller), TWITTER (Aug. 5, 2018, 5:06 PM), https://twitter.com/nedmiller/status/1026258089799024640 [https://perma.cc/3W6Q-TES3].
experienced social worker. Instead of appropriately managing and administering social services, the state is engaged in a carceral-state practice of imposing criminal justice responses to social welfare concerns.

B. Moral Sorting and Bias

An additional potentially troubling feature of opioid policing is that each of its iterations leaves substantial room for what Erin Collins calls the “moral sorting” that characterizes other versions of criminal justice reform. Collins argues that proponents of two new forms of “problem-solving” courts—veterans’ courts and girls’ courts—invoke a “discourse of difference” to justify the creation of these new courts. Proponents point to the putatively unique needs and experiences of veterans and girls as justifying a different, more rehabilitative set of practices than other defendants. The primary relevant common characteristic that members of each of these groups is thought to share is significant trauma, which can be criminogenic. As Collins points out, however, a history of trauma is something that unites veterans and girls with, rather than distinguishing them from, other offenders. What is at work in these “status courts,” Collins argues, is not that veterans and girls uniquely experience trauma, but instead that their trauma simply matters more than that of other defendants. And the way in which it matters more is that it entitles them to a more empathetic, relational court experience. What the architects of these status courts are engaging in is what Collins refers to as “moral sorting.”

An analysis of each of the two versions of opioid policing reveals a similar kind of moral sorting. Recall that the aims of LEAD are to reduce the number of people entering the criminal justice system for low-level offenses; to undo racial disparities; as well as to make improvements in psychosocial, housing, and quality-of-life outcomes for participants. The original Seattle program and those that have emulated it recognize that arrests and prosecution do not help address underlying problems that lead to criminal justice involvement for drug users, and that people of color disproportionately are affected by Drug War tactics. The premise is that with the services offered by LEAD case managers, drug users will be able to obtain a level

391. See Bell, supra note 126, at 2147–48.
392. See generally Akbar, supra note 44, at 410 (advocating “shrinking the large footprint of policing, surveillance, and incarceration, and shifting resources into social programs in Black communities: housing, health care, jobs, and schools”).
394. Id. at 1500.
395. Id.
396. Id.
397. Id. at 1502.
398. Id.
399. Id. at 1504.
400. Id. at 1505.
401. CLIFASEFI & COLLINS, supra note 287, at 4.
of self-sufficiency that will keep them, long-term, from re-arrest. The eligibility criteria revolve around ensuring that those admitted to the program are people who truly deserve a different approach—meaning those whose criminal offending is driven by addiction or mental illness rather than cold economic calculations or antisocial personalities.

Yet, as with status courts, the moral sorting in opioid policing may not always lead to evidence-based programming or equitable practices. LEAD presumptively excludes from consideration individuals who have at any point been convicted of an enumerated set of violent crimes, as well as those who, within a shorter period within the past, have been convicted of less serious offenses. LEAD architects presumably believe, as do many employers and landlords, that serious criminal history is predictive of disruption or danger. However, there is considerable evidence that the “most risky” offenders in fact make the best use of rehabilitative interventions. Priorizing participation of offenders with the highest need for rehabilitative intervention would seem an appropriate course given LEAD’s goals. That is, since the program aims to undo or at least minimize the racial disparities of the War on Drugs, it ought not to rely so heavily on prior convictions as proxies for program suitability. Prior convictions, after all, may indicate less about the person than about the area in which she lives—and how heavily it is policed.

A further problematic feature of LEAD design is the fact that one of the criteria for eligibility is “amenability to diversion.” This phrase is nowhere defined. The ambiguous question of whether a person is amenable to diversion is left to the referring police officer. This conferral of discretion was deliberate and made because “[s]takeholders . . . believe that officers possess deep knowledge about the people they regularly encounter and are therefore best situated to determine if a potential client is in a position to benefit from LEAD.”

Yet the capacious category of “amenability to diversion” leaves room for the operation of a tremendous amount of bias—against people of color and against

403. See supra note 328 and accompanying text.
404. See supra notes 304–08 and accompanying text.
405. See supra note 307 and accompanying text.
408. See generally Angela J. Davis, Prosecution and Race: The Power and Privilege of Discretion, 67 Fordham L. Rev. 13, 37 (1998) (concluding that because of disparities in policing, “the existence or nonexistence of an arrest or conviction record may or may not reflect relative criminality in black and white defendants”).
409. See supra note 308 and accompanying text.
people with mental illness, among other variables. While initial evaluations seem to suggest that the selection of individuals for inclusion has not been racially biased, there are few mechanisms to ensure that this remains so. There is no obvious way to promote accountability among the various stakeholders. The agreements are contained only in memoranda of understanding and contain no provision for ensuring they are followed. As with most internal policing decisions, there is no meaningful legal accountability, either. Other than federal oversight through practice and pattern lawsuits and individual civil rights lawsuits, there are few claims that can be raised about any particular policing strategy.

The Angel Initiative’s design reflects and reinforces problematic notions of drug users as inherently manipulative, thus similarly exemplifying moral sorting. The requirement that drug users walk into the police precinct to ask for help exists in part because of a popular conceptualization of drug addicts as inherently manipulative. Describing this walk-in requirement, a Connecticut sheriff opined that a hypothetical patrol officer, upon encountering a motorist with heroin, was “not likely to believe a driver’s claim that he or she was heading at that moment to the police department for help.” Unlike LEAD, then, the Angel Initiative specifically excludes from its services individuals for whom probable cause exists to arrest, except for the drugs that they are intending to relinquish upon entering a precinct. In other words, it is not enough that an individual expresses a desire for detoxification and other medical treatment. If the officers believe that the user’s desire for treatment is expressed even in part as a means of avoiding arrest, her request for a detoxification program will likely be rejected.

Even measured against its own questionable premises—that detoxification will lead to abstinence, which will in turn reduce law-breaking behavior—the Angel Initiative appears to come up short. Preliminary data analysis indicates that a total of 81% of Angel Initiative participants had, at the time of admission, already received

412. See generally Anthony C. Thompson, Stopping the Usual Suspects: Race and the Fourth Amendment, 74 N.Y.U. L. Rev. 956, 987–91 (1999) (describing the effect of stereotypic judgments and biases on police officers’ perceptions of whether an individual’s behavior warrants police interaction). LEAD evaluation suggests that at least with respect to race, the operation thus far has been unbiased.

413. See LAW ENFORCEMENT ASSISTED DIVERSION, ABOUT LEAD, http://leadkingcounty.org/about (noting that participation of stakeholders is “entirely voluntary”).

414. Id.

415. Andrew Guthrie Ferguson, Policing Predictive Policing, 94 Wash. U. L. Rev. 1109, 1169 (2017) (noting that “[e]ven the NYPD stop and frisk lawsuits—one of the most prominent challenges to policing in recent memory—did not directly focus on the choice of police tactics, but on the racially disparate impact of the practices”).


417. Leavenworth, supra note 322.

418. Maia Szalavitz, Doctors Who Hate Drug Users Are Fueling the Opioid Crisis, VICE (Nov. 22, 2017, 12:30 PM), https://www.vice.com/en_us/article/43nzyq/doctors-who-hate-drug-users-are-fueling-the-opioid-crisis [https://perma.cc/4A2K-8VN8] ("No one deserves to be ‘treated like an addict,’ and it is outrageous that America’s medical and legal systems have created a situation in which once addiction is suspected, compassion is eliminated."
treatment for detoxification at least once—and 31% had more than six detoxification attempts. Detoxification alone appears unlikely, then, to be sufficient to ensure abstinence. Furthermore, most Angel Initiative participants do not gain access to long-term treatment programs after they go through detox.

The determination about who “deserves” a drug-treatment spot in a universe of severely constrained supply is necessarily a subjective one. Yet it requires a level of training, education, and experience that police likely lack. Law enforcement officers cannot necessarily determine who really wants treatment—or who most deserves it. Nor can they tell who can benefit most from the programming.

C. Distributive Inequities

Opioid policing implicates distributive equity issues. Consider the Angel Initiative, which arranges priority detoxification spots for those who present themselves to the police. On the one hand, ensuring detox for people struggling with drug dependency—and who may be at risk of overdose—seems a vast improvement over other forms of officer engagement with people who are ill. Examples abound of law enforcement officers mistreating seriously mentally ill people who are not properly medicated, including accounts of friends and family of mentally ill people seeking assistance from the police—only to have the encounter end with the mentally ill person arrested, tased, or shot. Shepherding people with drug addiction through hospitalization and detoxification suggests officers commendably acting as “guardians” rather than “warriors,” in marked contrast with War on Drugs policing tactics.

419. Stephen P. Wood, Addiction Treatment Referral Through Local Police, 376 NEW ENG. J. MED. 999, 999 (2017) (“A total of 81% of the participants had previously received treatment for detoxification at least once, and 31% had more than six detoxification attempts . . . [which] indicate[s] that the current method of detoxification is not effective.” Furthermore, “[f]ew patients in the Angel Program received long-term counseling or treatment.”).

420. Schiff et al., supra note 288, at 46 (noting that the program was not able to overcome a fragmented treatment system focused on acute episodic care which remains a barrier to long-term recovery).

421. Collins notes that status courts raise distributive equity issues as well. Collins, supra note 393, at 1484 (“Examination of the justifications offered for status courts reveals new insights about the distributive equity—or inequity—of the problem-solving court model itself. The claim that the populations [sic] status courts target are [sic] unique does not withstand scrutiny. And therein lies the danger of status courts: by invoking specious claims that the needs of these populations are unique, status courts obscure the connections between status court offenders and other offenders.”).

422. Schiff et al., supra note 288.

423. See, e.g., Camille A. Nelson, Frontlines: Policing at the Nexus of Race and Mental Health, 43 FORDHAM URB. L.J. 615, 655–59 (2016) (describing the process by which mentally ill people of color become “felonized” by the police).

424. Id.

425. Id. at 657.

426. See Stoughton, supra note 81, at 617.
On the other hand, it is problematic to create a program that prioritizes scarce treatment spots for people who feel comfortable walking into police precincts carrying illicit drugs. Providers who participate in Angel Initiative networks have already noted that the model is not sustainable on a long-term basis without additional treatment beds.\(^{428}\) While the program does not deny assistance to anyone, including people with criminal records, the fact remains that the mistrust between police and low-income communities of color built up over generations and exacerbated by the Drug War means that individuals from those communities have well-founded reasons to be apprehensive about claims that officers only want to help.\(^{429}\) The structure of the Angel Initiative necessarily privileges those individuals who historically have been beneficiaries of the deployment of individual police discretion not to arrest—namely, white people, and people without criminal records. Further, immigrants in need of drug treatment are likely to be unwilling to access it through approaching the police.\(^{430}\) As a result, while the engagement of officers with medical providers is a salutary development, the structure of the Angel Initiative recapitulates the racial and socioeconomic disparities of the War on Drugs.

If “opioid policing” is driven by the fact that the face of the opioid epidemic is white, and middle-class, and that many users became addicted after initially having

427. The scarcity in treatment spots is unlikely to improve any time soon. See, e.g., Greg Allen, Trump Says He Will Focus on Opioid Law Enforcement, Not Treatment, NPR (Feb. 7, 2018, 4:22 PM), https://www.npr.org/sections/health-shots/2018/02/07/584059938/trump-says-he-will-focus-on-opioid-law-enforcement-not-treatment [https://perma.cc/TQ3A-EC2T] (noting that the Trump Administration has dramatically cut the budget of the federal National Drug Control Policy as well as the Substance Abuse and Mental Health Services Administration and has failed to ask Congress for new spending for treatment).


429. Nelson, supra note 423, at 674–75 (“Especially given the heightened racial tensions in the United States following the killings of Trayvon Martin, Walter Scott, Eric Garner, Tamir Rice, and Freddie Gray, it would not be surprising, nor unreasonable, for Black people to be weary, or fearful, of interactions with police and security forces, which have been increasing in the last several decades.”); see also Janice Nadler, No Need to Shout: Bus Sweeps and the Psychology of Coercion, 2002 Sup. Ct. Rev. 153, 193 n. 128 (2002) (noting, in the context of bus sweeps by police that lead to suspicionless searches by police with the passengers’ consent, that race, socioeconomic status, and prior personal contact with the police factor into the likelihood that an individual will expect the police encounter to be hostile).

valid prescriptions, one must wonder whether the service-oriented response will remain as the nature and scope of the epidemic changes. As noted, heroin and synthetic fentanyl are continuing to outpace prescription painkillers as the prime source of addiction, overdose, and death. Users of these drugs are increasingly portrayed as the “junkies” we have been conditioned to respond to with something other than compassion—with, to be precise, arrest, prosecution, and incarceration.

CONCLUSION

The foregoing analysis of two law enforcement innovations responding to the opioid epidemic has engaged questions that have long preoccupied legal scholars of how officers police, and to what end. Specifically, it has considered how police departments that seek to institutionalize nonarrest responses to alleged drug offenders define their goals—and whether they accomplish them. If local stakeholders perceive that these efforts are reducing the incidence of overdose and reducing crime, we might reasonably expect to see even more replication.

Yet replication attempts will confront practical and political obstacles. The first and most obvious such obstacle is that each of the opioid policing programs relies on an ability to access social services and drug treatment. LEAD participants make use of Medicaid to access the different services they are offered. The cities implementing LEAD are primarily in states that have expanded Medicaid, which is critical to the program’s affordability. Where Medicaid is harder to obtain, so too

431. See Seelye, supra note 16.
432. David Rothman has noted the historical tendency of criminal justice innovations to emerge that appear humane and rehabilitation oriented, only to become institutionalized and ultimately stripped of their progressive intentions. DAVID J. ROTHMAN, CONSCIENCE AND CONVENIENCE (1980).
434. Acker, supra note 48.
435. See, e.g., Jamie Wood, An Innovative Drug Policy that Works, OPEN SOC’Y FOUND. (Apr. 20, 2015), https://www.opensocietyfoundations.org/voices/innovative-drug-policy-works [https://perma.cc/B2WD-VAP3] (“[T]he Affordable Care Act and Medicaid expansion mean that many services and costs that otherwise would have to be funded by state and local governments are now covered by Medicaid” so “[l]ocal jurisdictions should make sure they and their state is making the best possible use of this resource for the LEAD-eligible population.”).
are services. Yet the demand for treatment far outpaces its availability, even for drug users with Medicaid.\footnote{Vestal, supra note 242.}

Secondly, both LEAD and the Angel Initiative are heavily dependent on grants from foundations and individuals.\footnote{Flynn, supra note 365.} This fiscal situation is a microcosm of the fact that, as public health and addiction experts note, the federal government has committed but a fraction of the funding that is needed to address the widespread and growing harms from opioid misuse.\footnote{Lopez, supra note 138.} Instead, the current presidential administration seems eager to re-up aspects of the War on Drugs.\footnote{Memorandum from Jeff Sessions, Att’y Gen., Office of the Att’y Gen., to all Federal Prosecutors, Department Charging and Sentencing Policy (May 11, 2017), https://www.justice.gov/opa/press-release/file/965896/download [https://perma.cc/RA87-5F9Z] (instructing prosecutors to abandon Obama-era policies regarding mandatory minimums for nonviolent, low-level drug offenders and instead “charge and pursue the most serious, readily provable offense”).} In addition, states across the country are heightening criminal penalties for the sale and distribution of heroin, fentanyl, carfentanil, and other controlled substances, in addition to passing drug-induced homicide statutes.\footnote{See supra notes 10-12 and accompanying text.} Prosecutions under drug-induced homicide laws have increased by more than 300\% in just six years, from 363 in 2011 to 1178 in 2016.\footnote{Zachary A. Siegel, Despite “Public Health” Messaging, Law Enforcement Increasingly Prosecutes Overdoses as Homicides, APPEAL (Nov. 8, 2017), https://theappeal.org/despite-public-health-messaging-law-enforcement-increasingly-prosecutes-overdoses-as-homicides-84fb4ca7e9d7 [https://perma.cc/G6ZY-AGQD].} Praised by legislators and prosecutors as sending a strong message to dealers, drug-induced homicide cases may instead create a chilling effect among drug users, deterring them from calling 911 during an overdose.\footnote{Id. (“Of those who have witnessed an overdose, more than half reported they are reluctant to dial 911, citing fear of legal consequences.”).} Of those who have witnessed an overdose, more than half reported they are reluctant to dial 911, citing fear of legal consequences.\footnote{Id. (citing a 2017 study published in the International Journal of Drug Policy).} Rather than prosecuting upper-echelon drug distributors, these cases often target friends and romantic partners of the overdose victim.\footnote{Id. (citing Health in Justice, a policy institute out of Boston’s Northeastern School of Law tracking punitive drug policies such as drug-induced homicide and involuntary commitment for drug users. “Fewer than half of cases we analyzed involved a traditional buyer/seller relationship,” said Leo Beletsky, lead investigator at Health In Justice, and an Associate Professor of Law and Health Sciences at Northeastern University.”).} In one small community besieged with opioid use, individuals “referenced

\footnote{Case & Deaton, supra note 236. But see Malcolm Harris, The Death of the White Working Class Has Been Greatly Exaggerated, PACIFIC STANDARD (Mar. 28, 2017), https://psmag.com/news/the-death-of-the-white-working-class-has-been-greatly-exaggerated
the hopelessness of the area and its lack of opportunity as driving the use of heroin, with many explicitly suggesting the need for jobs and community reinvestment to reduce fatalities. One study found that overdose death rates correlate with lack of social capital; scholars argue that this relationship likely exists through some combination of mechanisms, such as the ability of social capital to prevent the drug use, aid in recovery, and reduce the fatality rate of drug overdose. While opioid policing moves in welcome ways beyond the War on Drugs and the specialized drug courts, ultimately policymakers must address these larger structural factors.

[https://perma.cc/6GJ5-MAQ4] (criticizing the Case and Deaton study for “lagged selection bias . . . an overemphasis on the ages 45 to 54, no attention to measures of lifespan, a questionable particular interest in white people, a focus on individual behavior that’s uncharacteristic for the discipline, and far too broad a brush in general,” along with the fact that the study was published prior to being subject to peer review).

447. McLean, supra note 200, at 19.