

# The Uses and Abuses of Police Discretion: Toward Harm Reduction Policing

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## INTRODUCTION

Although discretion is an unavoidable and ubiquitous feature of police work, it is also the subject of significant controversy and debate. In this essay, I first provide a brief overview of the history and evolution of police discretion from the 1960s to today and explain how its exercise has been impacted in recent decades by the war on drugs and the adoption of “broken windows policing.” These policy initiatives encouraged a more muscular police response to low-level offending and had important consequences, including the flooding of U.S. prisons and jails and the disproportionate incarceration of people of color. Although many of those targeted in the campaigns against drugs and disorder do not pose a significant threat to public safety, many do contend with multiple challenges such as homelessness, addiction, and mental illness, and, as a result, cycle repeatedly into and out of jail. Incarceration, including short-term jail spells, often has deleterious and destabilizing effects, which increase the likelihood that arrest and incarceration will continue to occur with some regularity.

In the second half of this essay, I argue that since police discretion cannot be eradicated, and the destructive nature of mass incarceration is increasingly well-understood, municipalities would be well-advised to implement alternatives to the war on drugs and broken windows policing. Ideally, these alternative approaches would encourage the police to respond to “disorderly” behaviors that do not pose a significant public safety problem in ways that reduce the harm that results from low-level crimes and from criminal justice involvement itself. To illustrate what such a policy framework might look like, I describe Seattle’s Law Enforcement Assisted Diversion (LEAD) Program, which relies on police discretion to channel people suspected of minor forms of criminal wrongdoing out of the criminal justice system and toward services with the aim of reducing human suffering at both the individual and community levels. I conclude that programs like LEAD that use harm reduction principles to guide the exercise of police discretion enable municipalities to respond to low-level crimes in a way that alleviates rather than exacerbates individual and community suffering associated with those behaviors.

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## I. POLICE DISCRETION: AN OVERVIEW

The inevitability of police discretion was “discovered” by social scientists in the 1960s. Prior to this time, the scholarly literature on policing focused mainly on administrative issues such as staffing levels and the extent to which police organizations complied with prescribed policing standards.<sup>1</sup> As leading police scholar Egon Bittner later put it, the surveys that were standard through the 1950s provided little insight regarding “literal” police work, that is, how police officers actually spent their time, the kinds of situations they most commonly encountered, and how they responded to those situations.<sup>2</sup>

This window on the nature of police work began to change in the 1960s as a result of the design and implementation of an observational study by the American Bar Foundation (ABF) that focused much more on “law in action” than on the “law on the books.” The ABF study employed ethnographic methods in three field settings (Kansas, Michigan, and Wisconsin), and its findings transformed the field of police studies. The results showed that discretion is not aberrational; rather, criminal justice actors, including police, exercise it at all levels of criminal justice organizations. Moreover, the police routinely encounter both non-criminal situations and serious public safety problems, both of which require considerable judgment beyond the application of criminal law. Indeed, police officers were found to consider a number of factors in addition to probable cause, including departmental needs and practical implications, when deciding whether to make an arrest.<sup>3</sup> Moreover, findings from the ABF study indicated that even well-developed police guidelines could not anticipate the complexity of the situations officers often encounter; responding to these multifaceted and varied encounters therefore requires that police officers exercise considerable discretion in the course of their everyday activities.

Although evidence of the ubiquity and importance of discretion in everyday police practices may seem unsurprising today, these findings opened up new ways of studying and understanding criminal justice processes generally and police behavior specifically. As one police scholar put it,

The “discovery” of discretion, beginning in the late 1960s and gaining momentum over the 1970s, was perhaps the single most important event in the history of criminal justice studies. It served to trigger a watershed of descriptive research on all aspects of the

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<sup>1</sup> GEORGE L. KELLING, NAT'L INST. OF JUSTICE RESEARCH REPORT, *BROKEN WINDOWS AND POLICE DISCRETION* 22 (1999).

<sup>2</sup> EGON BITTNER, *ASPECTS OF POLICE WORK* 4 (1990).

<sup>3</sup> Lloyd E. Ohlin, *Surveying Discretion by Criminal Justice Decision-Makers*, in *DISCRETION IN CRIMINAL JUSTICE: THE TENSION BETWEEN INDIVIDUALIZATION AND UNIFORMITY* 1–22 (Lloyd E. Ohlin & Frank J. Remington eds., 1993).

system and served to stake out law as a subject matter both suitable to, and in need of, social scientific analysis.<sup>4</sup>

Indeed, contemporary police scholarship places discretion at the heart of social scientific and legal studies of police work.<sup>5</sup> Many such studies explore whether and how officer and organizational characteristics affect the exercise of officers' discretion;<sup>6</sup> others seek to identify the situational factors (such as the race and demeanor of the suspect, location of the stop, and other contextual factors) that may influence police decision-making.<sup>7</sup> Still others seek primarily to assess how frequently police officers violate constitutional standards, and why they do so.<sup>8</sup> Whereas quantitative studies typically seek to identify the situational, individual, and organizational factors that have a statistically significant impact on policing outcomes, qualitative studies attempt to understand how officers interpret the situations they encounter and describe the thought-processes that shape officers' responses to those situations.

In addition to exploring the nature and consequences of police discretion, police scholars have also debated whether and how police discretion might be effectively regulated to reduce the influence of illegitimate considerations such as suspect-race on police behavior.<sup>9</sup> Researchers have also explored how police officers and organizations should be held accountable when problems such as excessive use of force and biased policing exist. Some such scholars emphasize the limited capacity of regulators to anticipate the complexity of the situations officers will encounter, and argue for a more carrot-oriented approach to police regulation that draws on officers' expertise and experience to develop flexible guidelines.<sup>10</sup> Others emphasize the need to develop robust and independent accountability systems in order to ensure that officers who engage in such practices are identified and sanctioned. In this approach, the hope is that such systems will not only enable detection of police officers who engage in systematic wrong-doing, but by eradicating such behavior, will also reform police culture over time.<sup>11</sup>

Unfortunately, many researchers have concluded that existing studies shed little light on how police organizations might effectively control police

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<sup>4</sup> Ernest L. Nickels, *A Note on the Status of Discretion in Police Research*, 35 J. CRIM. JUST. 570, 570 (2007).

<sup>5</sup> See, e.g., BITTNER, *supra* note 2; SAM WALKER, *TAMING THE SYSTEM: THE CONTROL OF DISCRETION IN CRIMINAL JUSTICE, 1950–1990* (1993); WILLIAM A. WESTLEY, *VIOLENCE AND THE POLICE: A SOCIOLOGICAL STUDY OF LAW, CUSTOM AND MORALITY* (1970).

<sup>6</sup> See, e.g., Jeffrey S. Nowacki, *Organizational-Level Police Discretion: An Application for Police Use of Lethal Force*, 61 CRIME & DELINQ. 643 (2011).

<sup>7</sup> See, e.g., Jeffrey Fagan & Amanda Geller, *Following the Script: Narratives of Suspicion in Terry Stops in Street Policing*, 82 U. CHI. L. REV. 51 (2015); Tammy Rinehart Kochel, David B. Wilson & Stephen D. Mastrofski, *Effect of Suspect Race on Officers' Arrest Decisions*, 49 CRIMINOLOGY 473 (2011).

<sup>8</sup> See, e.g., Jon B. Gould & Stephen D. Mastrofski, *Suspect Searches: Assessing Police Behavior Under the U.S. Constitution*, 3 CRIMINOLOGY & PUB. POL'Y 315 (2004).

<sup>9</sup> See, e.g., WALKER, *supra* note 5.

<sup>10</sup> See, e.g., KELLING, *supra* note 1, at 33–45.

<sup>11</sup> See Walker, *supra* note 5.

discretion.<sup>12</sup> Despite this lack of scientific consensus about how problematic exercises of police discretion such as racial profiling are best deterred, recent years have witnessed two major policy efforts to steer police discretion in particular ways. The first of these was the federal war on drugs, which emanated from national-level politicians but included a number of incentives aimed at encouraging state and local police departments to place greater emphasis on drug law enforcement and to employ proactive methods to identify and arrest drug law violators. Similarly, advocates of “broken windows policing” successfully urged police departments to encourage officers to react strongly to low-level (potentially) criminal behaviors such as panhandling or lying on sidewalks. Below, I briefly describe how these policy initiatives shaped the exercise of police discretion in recent years and describe the consequences of these shifts. I then advocate the adoption of an alternative policy framework that seeks to redress the human suffering that underlies most low-level criminal behavior, and to steer the homeless, drug users and sellers, sex workers, and others who spend their time on the streets toward services and away from the criminal justice system.

## II. POLICY EFFORTS TO SHAPE POLICE DISCRETION: TWO RECENT EXAMPLES

### A. *The War on Drugs*

Because anti-crime efforts are largely a state and local affair, national politicians who campaign on their anti-crime credentials often turn their attention to drugs (over which the federal government has comparatively great authority) once in office.<sup>13</sup> This was certainly true for the Reagan Administration, which assumed office in 1981 and quickly advocated increased federal involvement in the war against drugs.<sup>14</sup> But the fight against drugs also involves state and local authorities to a significant degree. Recognition of this led crime fighters in the 1980s and 1990s to use legislation to encourage police departments around the country to target drug law violators. The 1984 Omnibus Crime Bill, for example, authorized police departments to confiscate any assets—including cars, boats, houses, and bank accounts—they believed were acquired with drug monies, regardless of whether their (former) owners were ever convicted of, or even charged with, a drug crime.<sup>15</sup> A few years later, Congress revised the program through which the federal government provides grants to state and local law enforcement agencies, renaming

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<sup>12</sup> See NAT'L RESEARCH COUNCIL, COMM. TO REVIEW RESEARCH ON POLICE POLICY AND PRACTICES, FAIRNESS AND EFFECTIVENESS IN POLICING: THE EVIDENCE (Wesley Skogan & Kathleen Frydl eds., 2004); Stephen D. Mastrofski, *Controlling Street Level Police Discretion*, 593 ANNALS AM. ACAD. POL. & SOC. SCI. 100 (2004).

<sup>13</sup> See KATHERINE BECKETT & THEODORE SASSON, *THE POLITICS OF INJUSTICE: CRIME AND PUNISHMENT IN AMERICA* 56–61 (2004).

<sup>14</sup> *Id.* at 60.

<sup>15</sup> *Id.* at 162.

it the Byrne Memorial State and Local Law Enforcement Assistance Program. This program was specifically designed to incentivize local law enforcement agencies to develop and expand the narcotics task forces that have served as the foot soldiers in the war on drugs.<sup>16</sup> Over the years, the federal government also offered other important forms of support to local drug warriors, including resources, equipment, and training.<sup>17</sup>

The federal government's effort to encourage drug law enforcement was remarkably successful, and had important and measurable consequences. Specifically, the number of drug arrests occurring in the United States nearly quadrupled, from just over a half of a million in 1981 to a peak of nearly 1.9 million in 2006.<sup>18</sup> This development most significantly affected people and communities of color. Between 1980 and 2000, for example, the national black drug arrest rate increased from roughly 6.5 to 29.1 (per 1,000 persons), while the white drug arrest rate increased much more modestly, from approximately 3.5 to 4.6 (per 1,000 persons).<sup>19</sup> Since 2006, the number of drug arrests taking place each year has dropped modestly, from 1.9 million in 2006 to roughly 1.5 million in 2012.<sup>20</sup> While this change represents a decline from the height of the drug war, it also signifies an enduring commitment to channeling significant local police resources toward drug law enforcement.

At first glance, the tenacity of the local commitment to drug law enforcement is surprising, as the war on drugs has become increasingly controversial and many states have enacted legislative reforms aimed at reducing the number of drug offenders sent to prisons and jails.<sup>21</sup> Ongoing federal support and incentives for drug law enforcement may help to explain why so many police departments continue to wage war on drugs despite the growing bi-partisan consensus that the drug war has been a failure.<sup>22</sup> Interestingly, though, another recent and controversial effort to channel police discretion has thrived even in the absence of such strong federal support: the call for broken windows policing.

<sup>16</sup> See MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 73 (2010).

<sup>17</sup> *Id.* at 73–74.

<sup>18</sup> BUREAU OF JUSTICE STATISTICS, *DRUG AND CRIME FACTS* (2015), <http://www.bjs.gov/content/dcf/tables/arrtot.cfm> [<http://perma.cc/E69M-6AJ2>].

<sup>19</sup> *THE REAL WAR ON CRIME: THE REPORT OF THE NAT'L CRIMINAL JUSTICE COMM'N* (Steven R. Donziger, ed., 1996).

<sup>20</sup> FED. BUREAU OF INVESTIGATION, *CRIME IN THE UNITED STATES* (2013), [https://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2013/crime-in-the-u.s.-2013/tables/table-29/table\\_29\\_estimated\\_number\\_of\\_arrests\\_united\\_states\\_2013.xls](https://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2013/crime-in-the-u.s.-2013/tables/table-29/table_29_estimated_number_of_arrests_united_states_2013.xls) [<https://perma.cc/TSY9-SRBG>].

<sup>21</sup> See RAM SUBRAMANIAN & REBECCA MORENO, *VERA INST. OF JUSTICE, CENTER ON SENTENCING AND CORRECTIONS, DRUG WAR DÉTENTE: A REVIEW OF STATE-LEVEL DRUG LAW REFORM, 2009–2013* 5 (2014), <http://www.vera.org/sites/default/files/resources/downloads/state-drug-law-reform-review-2009-2013.pdf> [<http://perma.cc/7SPB-GAYK>].

<sup>22</sup> See, e.g., David Dagan & Steven M. Telles, *Locked In? Conservative Reform and the Future of Mass Incarceration*, 651 *ANNALS AM. ACAD. POL. & SOC. SCI.* 266, 273–74 (2014); Joan Petersilia & Francis T. Cullen, *Liberal but not Stupid: Meeting the Promise of Downsizing Prisons*, 2 *STAN. J. CRIM. L. & POL'Y* 733 (2015).

*B. Broken Windows Policing*

The debate over broken windows policing has been simmering for decades, and was renewed again in the aftermath of the NYPD shooting of Eric Garner during his 2014 arrest for selling loose cigarettes. Broken windows policing was first articulated by James Q. Wilson and George Kelling in a short *Atlantic Monthly* article in 1982,<sup>23</sup> and became wildly popular in U.S. urban police departments in the intervening years.<sup>24</sup> Proponents argue that neighborhoods that fail to fix broken windows or address other manifestations of “disorder” display a lack of informal social control, thus inviting serious criminals into the neighborhood.<sup>25</sup> Advocates of broken windows policing therefore call for a fundamental reorientation of policing, one that offers city governments a broad and flexible means of regulating public spaces and removing those deemed “disorderly” from contested public spaces, often through arrest. Although the name of the theory calls attention to the built environment, it focuses in practice primarily on unwanted human behavior—particularly that which is engaged in by “disreputable or obstreperous or unpredictable people: panhandlers, drunks, addicts, rowdy teenagers, prostitutes, loiterers, the mentally disturbed.”<sup>26</sup> Problematic behaviors exhibited by these groups are seen not as a manifestation of poverty or other social ills, but rather as a sign of “disorder,” a cause of diminished quality of life for other urban residents, and as a precursor of serious crime. Where departments have embraced broken windows policing, police department officials encourage officers to consider potentially misdemeanor offenses such as public drunkenness and panhandling as very serious matters. Unsurprisingly, this focus has also contributed to racial disproportionality in jail populations, as well as fueling the incarceration of the homeless and mentally ill.<sup>27</sup>

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<sup>23</sup> James Q. Wilson & George F. Kelling, *The Police and Neighborhood Safety*, ATLANTIC MONTHLY, Mar. 1982, at 29.

<sup>24</sup> See STEVE HERBERT, CITIZENS, COPS AND POWER: RECOGNIZING THE LIMITS TO COMMUNITY (2006).

<sup>25</sup> See Wilson & Kelling, *supra* note 23.

<sup>26</sup> *Id.* at 32.

<sup>27</sup> KATHERINE BECKETT & STEVEN HERBERT, BANISHED: THE NEW SOCIAL CONTROL IN URBAN AMERICA 32–35 (2009). George Kelling recently argued that “broken windows was never intended to be a high-arrest program. Although it has been practiced as such in many cities, neither Wilson nor I ever conceived of it in those terms.” George Kelling, *Don’t Blame My ‘Broken Windows’ Theory for Poor Policing*, POLITICO (Aug. 21, 2015), <http://www.politico.com/magazine/story/2015/08/broken-windows-theory-poor-policing-ferguson-kelling-121268.html> [<http://perma.cc/DS8M-EPYW>]. However, as Bernard Harcourt contends, this argument is specious, as Kelling and other advocates of broken windows policing often use their position as consultants to urge local governments to expand the police authority to arrest through statutory reform, and because “George Kelling himself measures broken-windows policing by the number of misdemeanor arrests performed by the police.” Bernard E. Harcourt, *Broken-Windows Policing is a High Arrest Problem*, THE HUFFINGTON POST (Aug. 17, 2015), [http://www.huffingtonpost.com/bernard-e-harcourt-/broken-windows-policing-i\\_b\\_8000250.html](http://www.huffingtonpost.com/bernard-e-harcourt-/broken-windows-policing-i_b_8000250.html) [<http://perma.cc/6Z4G-SNB5>].

Despite numerous empirical studies challenging the efficacy of broken windows policing,<sup>28</sup> the theory of crime that underpins broken windows policing has achieved the status of common sense in police departments across the United States<sup>29</sup> and in many other countries as well.<sup>30</sup> The reasons for its widespread popularity are somewhat unclear, but may have to do with the congruence of broken windows policing with the “tough” anti-crime zeitgeist that prevailed in the late twentieth century, as well as the affinity between the assumptions and effects of broken windows policing with the social dynamics associated with neoliberalism.<sup>31</sup>

In addition, advocates of broken windows policing actively promoted its adoption and implementation across the globe through their connections to, and involvement in, consulting firms.<sup>32</sup> Several of the most prominent of these firms—including Giuliani Partners and The Bratton Group L.L.C.—have aggressively promoted the “New York model” for decades. For example, after being declared America’s “top cop” by *Time Magazine* in 1996, New York Police Chief Bratton stepped down from public office and formed his own private consulting company, The Bratton Group, L.L.C. This consulting group worked for departments throughout the United States and extensively in South America, where it has advised officials on both crime policy and urged the adoption of broken windows policing.<sup>33</sup> Similarly, upon retiring from the mayor’s office, Rudy Giuliani formed Giuliani Partners, a consulting organization staffed by many of his top aides from City Hall and former police commissioner Bernard Kerik, which actively promoted the broken windows philosophy.<sup>34</sup> Media stories linking the crime drop in New York City and the adoption by the NYPD of a particularly aggressive version of broken windows policing appear to have generated substantial international interest in securing the advice of these and other consulting firms.<sup>35</sup>

In sum, recent decades have witnessed the emergence of (at least) two pronounced efforts to shift police organizations’ focus toward what were for-

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<sup>28</sup> See John E. Eck & Edward R. Maguire, *Have Changes in Policing Reduced Violent Crime? An Assessment of the Evidence*, in *THE CRIME DROP IN AMERICA*, 224–28 (Alfred Blumstein & Joel Wallman eds., 2000); David Greenberg, *Studying New York City’s Crime Decline: Methodological Issues*, 31 *JUST. Q.* 15 (2014); Bernard E. Harcourt & Jens Ludwig, *Broken Windows Policing: New Evidence from New York City and a Five-City Social Experiment*, 73 *U. CHI. L. REV.* 271, 282–87 (2006); Robert J. Sampson & Stephen W. Raudenbush, *Systematic Social Observation of Public Spaces: A New Look at Disorder in Urban Neighborhoods*, 105 *AM. J. SOC.* 603, 626–36 (1999).

<sup>29</sup> Steve Herbert & Elizabeth Brown, *Conceptions of Space and Crime in the Punitive Neoliberal City*, 38 *ANTIPODE* 755, 759 (2006).

<sup>30</sup> See Neil Smith, *Global Social Cleansing: Postliberal Revanchism and the Export of Zero Tolerance*, 28 *SOC. JUST.* 68, 70 (2001); Loic Wacquant, *Toward a Dictatorship Over the Poor? Notes on the Penalization of Poverty in Brazil*, 5 *PUNISHMENT & SOC’Y* 197, 198 (2003).

<sup>31</sup> Herbert & Brown, *supra* note 29, at 758–61.

<sup>32</sup> Katharyne Mitchell & Katherine Beckett, *Securing the Global City: Crime, Consulting, Risk, and Ratings in the Production of Urban Space*, 15 *GLOBAL LEGAL STUD.* 75, 76–80 (2008).

<sup>33</sup> See Marc Lifsher, *If He Can Fight Crime There, He’ll Fight It . . . Anywhere*, *WALL ST. J.*, Mar. 8, 2001, at A18.

<sup>34</sup> Mitchell & Beckett, *supra* note 32, at 96.

<sup>35</sup> *Id.*

merly considered relatively unimportant issues and to encourage a more aggressive response to them. The result has been a sharp increase in the arrest and incarceration of drug law violators and misdemeanants generally. And as is now well-known, both of these developments, especially the war on drugs, contributed importantly to the development of mass incarceration and to pronounced racial disparities throughout the criminal justice system.<sup>36</sup>

As a result of these and other policy developments, the U.S. penal system has expanded to unprecedented proportions. The U.S. incarceration rate is the highest in the world, and is five to fifteen times higher than those found in Nordic and Western European countries.<sup>37</sup> The massive expansion of the penal system has had important consequences with which scholars increasingly grapple. For example, mass incarceration has unparalleled demographic reach and implications, fundamentally altering the institutions with which key segments of the population come into contact over their life course.<sup>38</sup> Moreover, the expansion of penal institutions and populations has had profound implications for our understanding of social inequality. As punishment scholar Bruce Western puts it, “the penal system has emerged as a novel institution in a uniquely American system of social inequality.”<sup>39</sup>

Indeed, the growth of the criminal justice system has been so consequential that the study of punishment, urban poverty and social inequality are increasingly treated as over-lapping rather than distinct areas of inquiry.<sup>40</sup> Research in these areas indicates that the U.S. penal system is implicated in the accumulation of disadvantage and the reproduction of inequality for a number of reasons: the growing number of (mainly poor) people whose

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<sup>36</sup> See ALEXANDER, *supra* note 16. For the argument that Alexander and other “New Jim Crow” scholars have overstated the extent to which the war on drugs accounts for mass incarceration, see James Forman, *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 N.Y.U. L. REV. 101 (2012). Forman correctly observes that policies pertaining to more serious crime, especially violent crime, have contributed even more significantly to mass incarceration than has the war on drugs.

<sup>37</sup> See Tapio Lappi-Seppälä, *Why Some Countries Cope With Lesser Use of Imprisonment? Explaining Differences and Pondering the Remedies*, CRIMINAL JUSTICE ALLIANCE (Mar. 2015), <http://criminaljusticealliance.org/wp-content/uploads/2015/03/Tapio-Lappi-Sepp%C3%A4%C3%A4-presentation.pdf> [<http://perma.cc/M6VG-8JNF>].

<sup>38</sup> See Becky Pettit & Bruce Western, *Mass Imprisonment and the Life Course: Race and Class Inequality in U.S. Incarceration*, 69 AM. SOC. REV. 151, 164–66 (2004); Christopher Uggen, Jeff Manza & Melissa Thompson, *Citizenship, Democracy, and the Civic Reintegration of Criminal Offenders*, 605 ANNALS AM. ACAD. POL. & SOC. SCI. 281, 296–304 (2006).

<sup>39</sup> BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA 8 (2006).

<sup>40</sup> *Id.*; see also Megan Comfort, *Punishment Beyond the Legal Offender*, 3 ANN. REV. L. SOC. SCI. 271, 289 (2007); Holly Foster & John Hagan, *Incarceration and Intergenerational Social Exclusion*, 54 SOC. PROBLEMS 399 (2007); John Hagan & Ronit Dinovitzer, *Collateral Consequences of Imprisonment for Children, Communities and Prisoners*, 26 CRIME & JUST. 121 (1999); Alexes Harris, Heather Evans & Katherine Beckett, *Drawing Blood from Stones: Monetary Sanctions, Punishment and Inequality in the Contemporary United States*, 115 AM. J. SOC. 1753 (2010); Michael Massoglia & Jason Schnittker, *No Real Release: The Health Effects of Incarceration*, 14 CONTEXTS 38 (2009); Sara McLanahan, *Fragile Families and the Reproduction of Poverty*, 621 ANNALS AM. ACAD. POL. & SOC. SCI. 111 (2009); Becky Pettit & Bruce Western, *supra* note 38; JEREMY TRAVIS, ELIZABETH CINCOTTA & AMY SOLOMON, URBAN INST., JUSTICE POLICY CTR., *FAMILIES LEFT BEHIND: THE HIDDEN COSTS OF INCARCERATION AND REENTRY* (2005).



lives it touches; the negative impact of criminal convictions on employment and earnings; the adverse effects of confinement on inmates' mental and physical health; incarceration's destabilizing effects on families, children, and urban communities; and the widespread imposition of "collateral" or "invisible" sanctions, including the imposition of legal debt, many of which transform punishment from a temporally limited experience to a long-term status.<sup>41</sup>

In summary, mass incarceration is in part the result of policy-guided efforts to encourage a stronger and more arrest-oriented police response to behaviors and situations that, while potentially illegal, generally do not pose a significant public safety threat. The enactment of these policies notably enhanced levels of criminal justice involvement, thus fueling the imposition of significant harm, particularly on poor urban communities of color. Moreover, these policies do not appear to be responsible for recent notable reductions in crime. In this context, the harm reduction philosophy offers some ideas about how policy might be re-directed toward the goal of minimizing the harm associated with *both* crime and criminal justice involvement.

### III. TOWARD HARM REDUCTION POLICING

The harm reduction philosophy rests on the assumption that some people will always engage in behaviors, such as drug use, that are stigmatized and risky. Although efforts to reduce these behaviors are appropriate, it is important to recognize that no society has ever eradicated all unwanted behaviors. For this reason, "abstinence cannot be the only goal of drug policy or of [treatment providers]."<sup>42</sup> More generally, social policy aimed at lessening the negative consequences of risky behaviors may reduce human suffering more than policies aimed at eradicating such behaviors altogether. Harm reduction practitioners therefore emphasize that the path toward abstinence may often be long, and sometimes even non-existent.<sup>43</sup> Even in the absence of abstinence, though, meaningful reductions in human suffering can be achieved.

In addition, harm reduction advocates distinguish between the primary and secondary harms associated with risky behaviors. Primary harms are those caused by the behavior itself, such as liver damage caused by ex-

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<sup>41</sup> For overviews of the role of the penal system in the reproduction of poverty and inequality, see generally WESTERN, *supra* note 39; Harris, Evans & Beckett, *supra* note 40.

<sup>42</sup> Craig Reinerman & Harry G. Levine, *CRACK IN AMERICA: DEMON DRUGS AND SOCIAL JUSTICE* 356 (1997).

<sup>43</sup> For general overviews of harm reduction, see G. A. MARLATT, *HARM REDUCTION: PRAGMATIC STRATEGIES FOR MANAGING HIGH-RISK BEHAVIORS* (1st ed. 2002); Don C. Des Jarlais, Samuel R. Friedman & Thomas P. Ward, *Harm Reduction: A Public Health Response to the AIDS Epidemic Among Injecting Drug Users*, 14 ANN. REV. PUB. HEALTH 413 (1993); Robert J. MacCoun, *Toward a Psychology of Harm Reduction*, 53 AM. PSYCHOLOGIST 1199 (1998); Ethan A. Nadelmann, *Thinking Seriously about Alternatives to Drug Prohibition*, 121 DAEDALUS 85 (2002).

cessive alcohol consumption. Secondary harms are those that flow from the policy response to the behavior in question.<sup>44</sup> For example, an injection drug user who contracts HIV because clean syringes are not made available has suffered a secondary—and quite avoidable—harm. Similarly, the adverse consequences that flow from the incarceration of an addict are considered by harm reduction advocates to be both secondary and avoidable.

Indeed, from a harm reduction point of view, the active intervention of the criminal justice system is often counterproductive and a source of damage. For example, if policed aggressively, drug use and sex work may be pushed into more and more dangerous places. This may leave those who engage in those behaviors even more vulnerable to physical assault and other dangers.<sup>45</sup> Drug users may inject more quickly, or in darker locales, or with dirty needles, thereby endangering themselves and others.<sup>46</sup> A drug user who is convicted, incarcerated, and loses her ability to secure work and housing as a result of her conviction is more likely to relapse. Harm reduction advocates therefore argue that many forms of risky behavior should be defined not primarily as matters of criminal justice, but of public health.<sup>47</sup> Absent an immediate threat to public safety, arrest and punishment are, from the harm reduction point of view, inappropriate responses to these behaviors. Instead, priority should be placed on the provision of health care and social services to help reduce overall levels of harm.

These ideas serve as the foundation of an innovative new approach to policing underway in Seattle, Washington. The next section describes how this program emerged and has been implemented, as well as some of the ongoing challenges with which LEAD stakeholders wrestle.

#### IV. SEATTLE'S LAW ENFORCEMENT ASSISTED DIVERSION PROGRAM

Seattle's Law Enforcement Assisted Diversion (LEAD) program is believed to be the first pre-arrest diversion program for people arrested on drug and prostitution charges in the United States. Launched in October 2011, LEAD is the result of a collaborative effort between an unusually broad coalition of organizations, including the Defender Association's Racial Disparity Project, the Seattle Police Department, the ACLU of Washington, the King County Prosecutor's Office, the Seattle City Attorney's office, the King County Sheriff's Office, Evergreen Treatment Services, the King

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<sup>44</sup> See Robert J. MacCoun, *Toward a Psychology of Harm Reduction*, 53 AM. PSYCHOL. 1199, 1199 (1998).

<sup>45</sup> See Lisa E. Sanchez, *Boundaries of Legitimacy: Sex, Violence, Citizenship and Community*, 22 LAW & SOC. INQUIRY 543, 575–76 (1997).

<sup>46</sup> Lisa Maher & David Dixon, *Policing and Public Health: Law Enforcement and Harm Minimization in a Street-level Drug Market*, 39 BRIT. J. CRIMINOLOGY 488, 508 (1999).

<sup>47</sup> See generally Geoffrey Pearson, *Drugs and Criminal Justice: A Harm Reduction Perspective*, in THE REDUCTION OF DRUG-RELATED CRIME (Pat O'Hare et al. eds., 1992).

County Executive, the Washington State Department of Corrections, neighborhood leaders and advisory boards, and other organizations.

In 2013, two years into its operations, I conducted a process evaluation of LEAD to assess whether its implementation was proceeding smoothly and to identify any obstacles to implementation.<sup>48</sup> The following analysis draws on the research conducted as part of that evaluation and therefore focuses mainly on LEAD's first two years of operations. I also describe the results of a recent outcome evaluation and new developments regarding the scope and operations of LEAD.

I collected and analyzed a variety of data sources in the course of the process evaluation. These include: foundational documents, including LEAD's Memorandum of Understanding, protocol, concept paper, and others; observations of LEAD-affiliated SPD and Department of Corrections officers and sergeants and case managers as they conducted LEAD-related work; observation of the LEAD operations work group and policy group meetings; and interviews with LEAD stakeholders and participants. I collected and analyzed these data during the summer and fall of 2013.<sup>49</sup> Below, I draw on these data to describe LEAD's creation, operating principles, and outcomes. I also identify a number of challenges to the long-term viability and efficacy of LEAD.

#### A. *The Creation of LEAD*

The adoption of LEAD marks a dramatic shift in Seattle's approach to drug markets and associated problems. Like many urban police agencies, the Seattle Police Department (SPD) was actively engaged in the drug war in recent decades. In fact, the city's drug arrest rate was comparatively high,<sup>50</sup> and levels of racial disproportionality in drug law enforcement outcomes were quite pronounced. In 2006, for example, Seattle's black drug arrest rate was 13.6 times higher than its white drug arrest rate; for drug delivery arrests, the black arrest rate was 21 times higher.<sup>51</sup>

In response to the severity and persistence of these unusually high levels of racial disparity, attorneys at the Racial Disparity Project mounted a selective enforcement challenge on behalf of a consolidated group of nineteen criminal defendants in 2003. All of the defendants involved in this "criminal class action" case were either black, Latino, or both, and all had

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<sup>48</sup> KATHERINE BECKETT, SEATTLE'S LAW ENFORCEMENT ASSISTED DIVERSION PROGRAM: LESSONS LEARNED FROM THE FIRST TWO YEARS (2014), <http://www.seattle.gov/council/Harrell/attachments/process%20evaluation%20final%203-31-14.pdf> [http://perma.cc/4ALG-RQHW]. This process evaluation was funded by the Ford Foundation.

<sup>49</sup> One follow-up interview with an SPD sergeant was conducted in March of 2014.

<sup>50</sup> Although Seattle's white arrest rate was not unusually high, the black drug arrest rate was. See KATHERINE BECKETT, AM. CIVIL LIBERTIES UNION & THE DEFENDER ASS'N, RACE AND DRUG LAW ENFORCEMENT IN SEATTLE 9 (2008), [https://www.aclu.org/files/assets/race20and20drug20law20enforcement20in20seattle\\_20081.pdf](https://www.aclu.org/files/assets/race20and20drug20law20enforcement20in20seattle_20081.pdf) [https://perma.cc/NRD7-8256].

<sup>51</sup> *Id.* at 56.

been arrested for delivering drugs in the downtown area. Many were addicts who sold small amounts of drugs to support their habit. As a group, the defendants were alleged to have delivered narcotics weighing the equivalent of six plain M&M's. Collectively they faced the prospect of well over 100 years in prison.

Perhaps unsurprisingly, the litigation that ensued proved to be lengthy, complex, and time-consuming. At the same time, the SPD's aggressive enforcement tactics failed to eradicate open-air drug markets, and the persistence of visible drug activity continued to generate significant community pressure on authorities to "do something" about drugs. By the late 2000s, all of the main actors were dissatisfied with the status quo, including the SPD itself.

Eventually, litigation-fatigue and the persistence of significant public concern about Seattle's still-active drug markets inspired SPD personnel, the King County Prosecutor, and Racial Disparity Project staff to work together to identify an alternative approach that avoided reliance upon jail and prison but also took the harm associated with untreated addiction and drug market activity seriously. The result, eventually, was the creation and implementation of Seattle's Law Enforcement Assisted Diversion program. LEAD seeks to reduce the neighborhood and individual-level harm associated with Seattle's drug and sex markets—as well as the criminal justice expenditures and human injury associated with conventional enforcement practices—by diverting low-level drug and sex offenders into intensive, community-based social services that are guided by harm reduction principles.

### *B. LEAD Principles and Operations*

LEAD took several years to develop. In 2008, staff from the Racial Disparity Project sought input from a broad range of organizations about what an alternative approach to low-level drug enforcement might look like. Representatives of these institutions comprise LEAD's Policy Coordinating Group, and LEAD remains an independent program that is not housed in any particular agency. LEAD stakeholders (many of whom were former adversaries) often had diverse reasons for participating in these conversations, but they nonetheless developed consensus around a set of fundamental principles. Stakeholders laid these principles out in a Memorandum of Understanding in 2010, which specifies that LEAD seeks primarily to improve public safety and reduce crime; that traditional drug war tactics such as booking, prosecuting, and jailing individuals for low-level drug offenses do not meaningfully improve public safety and public order; and that connecting low-level drug law violators with services may be a less expensive and more efficacious way to improve public safety than conventional law enforcement tactics.

Stakeholders sought and obtained grant support to fund LEAD operations as well as independent research that evaluated LEAD's capacity to reduce recidivism and save public monies. The hope was that this evidence

would provide the rationale for public (city and county) funding of LEAD. LEAD stakeholders also selected a particular neighborhood—Belltown—to be the site of LEAD’s initial two-year pilot program. Located on the north end of Seattle’s downtown core, Belltown is a mixed residential and commercial neighborhood in which many homeless and unstably-housed people commingle with increasingly large numbers of condominium owners, high-end shoppers, and nightlife patrons. Initially, officers in proactive units working in Belltown were trained to make LEAD referrals; at the time of this writing, King County Sheriffs in proactive units working in the Skyway area and for King County Metro, and SPD officers working in proactive units throughout the West Precinct (which encompasses the entire downtown area) had also been trained in LEAD operations. Stakeholders are developing a plan for training officers in Seattle’s East Precinct.

Early in the process, stakeholders expanded the potential client population to include sex workers in order to ensure significant participation by women who suffer from addiction or extreme poverty,<sup>52</sup> and spent significant time developing a protocol to guide program operations. This protocol lays out the procedures by which police officers refer people to LEAD and by which LEAD clients are engaged by social service providers. These procedures are described below.

### C. *Police Referral to LEAD*

When an eligible individual is arrested on drug charges (either possession of a controlled substance or sale of small amounts of drugs for “subsistence purposes”) or for prostitution, a LEAD-trained police officer may elect to refer that individual to a LEAD case manager rather than booking him or her into jail. Although several criminal background exclusions may apply, these exclusions are presumptive rather than mandatory, and participating officers retain a high degree of discretion over the referral process. That is, people with more serious criminal records *can* be referred to LEAD after booking if the arresting officer so recommends. In addition, SPD officers may elect *not* to refer those who are presumptively eligible to the program.<sup>53</sup> Stakeholders granted officers this degree of discretion because they 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 and can safely work with case managers in relatively private settings.<sup>54</sup> Early on, some stakeholders expressed concern that officers might be more inclined to refer white people to LEAD. To en-

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<sup>52</sup> Since that time, approximately half of all LEAD clients have been female.

<sup>53</sup> See LEAD Referral and Diversion Protocol (June 2015), <http://static1.1.sqspcdn.com/static/f/1185392/26595193/1444410613677/June-2015-Seattle-LEAD-Referral-and-Diversion+Protocol.pdf?token=5WGzNMMvCrobqqrnW8FTTOVJDf0%3D> [http://perma.cc/UU5B-UTW7].

<sup>54</sup> See BECKETT, *supra* note 48, at 10 (citing Interview with Ian Goodhew, Deputy Chief of Staff, King Cty. Prosecuting Attorney’s Off. in Seattle, Wash. (Jun. 28, 2013)).

sure that this is not the case, data regarding the racial and ethnic composition of LEAD clients are collected and monitored. The evidence to date shows that sixty percent of all LEAD clients are black and roughly one-fourth are white.<sup>55</sup>

In an arrest referral, a police officer makes an arrest, transports the arrestee to the precinct and contacts a LEAD case manager, who then goes to the police precinct to conduct an initial screening with the potential LEAD client. In most cases, the officer relinquishes custody of the referred person as soon as a caseworker arrives. Although the arrested individual has been referred to LEAD rather than booked into jail, the arresting officer nonetheless sends the arrest record to the Seattle City Attorney's office (which is responsible for prosecuting misdemeanor crimes) or to the King County Prosecutor (responsible for prosecuting felony offenses). These offices maintain the authority to charge the arrested person. However, the presumption is that charges will *not* be filed as long as the individual completes both an initial screening and a full intake assessment with LEAD case managers within thirty days of the referral. Stakeholders agree that prosecutors have complied with this expectation.

Early on, LEAD stakeholders elected to also allow officers to refer people to LEAD via a "social contact" rather than an arrest. A social contact referral occurs when officers identify someone who, based on past experience, they believe to be engaged in drug or prostitution activity, and offer that person a chance to participate in LEAD. Absent authorization of these social contact referrals, officers would have had to wait until they had sufficient evidence to arrest such individuals in order to refer them to the program. But because officers indicated that they would prefer to be able to make referrals to LEAD even if they did not have the evidence required to make an arrest, stakeholders authorized these social contact referrals.<sup>56</sup>

Interestingly, stakeholders are currently revising the social contact referral process to simplify and expedite the social contact referral process.<sup>57</sup> Previously, officers constructed a list of persons they knew from past experience to be involved in drug or sex market activity and whom they believed would benefit from LEAD; officers then attempted to locate those people in order to verbally refer them to LEAD case managers. However, in some cases, officers were unable to find people on the "social contact" list for

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<sup>55</sup> See SUSAN E. COLLINS, HEATHER S. LONCZAK & SEEMA L. CLIFASEFI, LEAD PROGRAM EVALUATION: CRIMINAL JUSTICE AND LEGAL SYSTEM UTILIZATION AND ASSOCIATED COSTS 12 (2015), <http://static1.1.sqspcdn.com/static/f/1185392/26401889/1437170937787/June+2015+LEAD-Program-Evaluation-Criminal-Justice-and-Legal-System-Utilization-and-Associated-Costs.pdf?token=yLjNRQP6FWqSn9bvqxVdl28WnWc%3D> [<http://perma.cc/69TH-7Z4H>].

<sup>56</sup> 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 48, at 11 (citing Interview with Lisa Daugaard, Dir., Racial Disparity Project, in Seattle, Wash. (Jun. 21, 2013)) (Daugaard is no longer in that role).

<sup>57</sup> Interview with Lisa Daugaard, Dir., Racial Disparity Project, in Seattle, Wash. (Oct. 1, 2015).

extended periods of time, and a backlog ensued. To remedy this, LEAD organizers are currently modifying the referral protocol such that case managers, public defenders, social service providers, and others can offer to connect persons identified by law enforcement as potential social contact referrals with LEAD case managers, thus obviating the need for officers to physically locate those individuals.<sup>58</sup>

#### D. Social Service Provision

Shortly after a referred person agrees to participate in LEAD, they meet with a LEAD case manager. Case managers hired by LEAD are accustomed to working in an intensive and “hands on” manner with their clients, an orientation LEAD stakeholders refer to as the “guerilla approach” to social work. In this approach, case managers do not simply supply their clients with a “to-do” list, but actively seek out recalcitrant clients; visit newly housed clients; accompany others as they complete paperwork, keep appointments, and apply for services and housing; and engage in a myriad of other behaviors aimed at helping their clients achieve their stated goals.<sup>59</sup> LEAD case managers must also be comfortable with the program’s harm reduction philosophy and familiar with motivational interviewing. Due to this, LEAD trains case managers to meet clients “where they are at,” to assist clients in identifying individual goals through techniques such as motivational interviewing, and to support their clients as they work toward those goals.

In their first meeting, LEAD case managers conduct an initial intake assessment and connect the client with services that address his or her most acute needs. Upon completion of this assessment, the referred person is free to leave but is asked to return to the LEAD office to complete the second part of the intake interview. Once the referred person does so, she or he is a LEAD “client.” In the following weeks, case managers work with their clients to create an individual intervention plan that is tailored to the client’s particular needs and goals, and may include “assistance with housing, treatment, education, job training, job placement, licensing assistance, transportation, small business counseling, child care or other services.”<sup>60</sup> Funds dedicated to LEAD are generally used to pay for these services, but public assets can be used in addition to this so long as this is possible without harming other disadvantaged individuals.<sup>61</sup>

Several core operating principles guide LEAD’s provision of social services. First, LEAD adheres to a non-displacement principle, which means that LEAD clients do not move to the top of a waiting list for social services

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<sup>58</sup> *Id.*

<sup>59</sup> See BECKETT, *supra* note 48, at 11 (citing Interview with Lisa Daugaard, Dir., Racial Disparity Project, in Seattle, Wash. (Jun. 21, 2013)).

<sup>60</sup> See *id.* at 12 (citing Telephone Interview with Ron Jackson, former Exec. Dir., Evergreen Treatment Servs. (Jun. 24, 2013)).

<sup>61</sup> *Id.*

simply because they are a LEAD client. For example, if a LEAD client seeks methadone treatment, LEAD monies will be used to pay for that treatment until the LEAD client emerges at the top of the waiting list for publicly funded methadone treatment. This non-displacement principle differentiates LEAD from many therapeutic courts,<sup>62</sup> and was adopted to increase the likelihood that LEAD will benefit the community as a whole, not just individual program participants.

Second, consistent with the harm reduction philosophy, LEAD case managers focus “on individual and community wellness, rather than an exclusive focus on sobriety, by immediately addressing the participant’s drug activity and any other factors driving his or her problematic behavior, even if complete abstinence from drug use is not immediately achieved.”<sup>63</sup> That is, case managers expect setbacks and emphasize that meaningful improvements may occur even in the absence of abstinence. Particularly at the outset, abstinence may not be among their clients’ objectives, and clients are welcome to participate in LEAD regardless of whether they identify abstinence as a goal. Furthermore, case managers assist clients in identifying their own goals and supporting them as they work to meet those goals.<sup>64</sup> The hope is that by engaging clients; helping them to identify and articulate their own goals; and providing emotional, practical and financial support as they work toward those goals, LEAD clients will reduce or cease their use of drugs, and cause less harm to themselves and to others than they would absent LEAD’s intervention.

A few other features of LEAD’s operations are novel and hence noteworthy. First, LEAD participants’ eligibility for services and benefits are not time delimited. According to the LEAD protocol, individual intervention programs are “designed to maximize the odds of a participant being able to achieve self-sufficiency independent of program funding at some point in the relatively near term.”<sup>65</sup> Second, the LEAD protocol does not authorize any sanctions for “non-compliance.”<sup>66</sup> Although the King County Prosecuting Attorney and the Seattle City Attorney retain their authority to file

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<sup>62</sup> The therapeutic justice movement takes various forms, such as drug courts, mental health courts, and community courts. Although they differ in their particulars and vary from jurisdiction to jurisdiction, these courts emphasize treatment rather than punishment: courtroom encounters are used to work with the defendant to craft a care plan and to monitor compliance with that plan. See David Rottman & Pamela Casey, *Therapeutic Jurisprudence and the Emergence of Problem-solving Courts*, NAT’L INST. JUST. J. 12, 13 (1999); David Wexler, *Reflections on the Scope of Therapeutic Jurisprudence*, 1 PSYCHOL. PUB. POL’Y & L. 220, 220–24 (1995). In many jurisdictions, a trip to therapeutic court essentially means a chance to skip ahead in line for access to scarce social services, but the total number of treatment slots is not increased. See BECKETT & HERBERT, *supra* note 27, at 130.

<sup>63</sup> THE DEFENDER ASS’N—RACIAL DISPARITY PROJECT, LAW ENFORCEMENT ASSISTED DIVERSION (LEAD): A PRE-BOOKING DIVERSION MODEL FOR LOW-LEVEL DRUG OFFENSES, NAACP, <http://action.naacp.org/page/-/Criminal%20Justice/LEAD%20concept%20paper.pdf> [<http://perma.cc/5UKU-7F52>].

<sup>64</sup> BECKETT, *supra* note 48, at 12 (citing Telephone Interview with Ron Jackson, former Exec. Dir. of Evergreen Treatment Services in Seattle, Wash. (Jun. 24, 2013)).

<sup>65</sup> See *id.* at 4.

<sup>66</sup> *Id.* at 13.



charges against LEAD participants for crimes committed in the past or while participating in LEAD, prosecutors have committed to working in cooperation with LEAD, which means exercising their discretion to *not* bring charges against LEAD participants where refraining will enhance LEAD clients' therapeutic progress. At regularly held work group meetings, law enforcement officers, case managers, and prosecutors share information about LEAD clients so that each of these actors can make informed decisions in matters pertaining to them. These meetings are especially useful to prosecutors weighing whether to file charges acquired by LEAD clients subsequent to their enrollment in LEAD, and are indicative of a sharp break with traditional practices in which prosecutors make filing decisions absent input from other agencies.

*E. LEAD's Success: Reduced Recidivism and Transformed Institutional Relationships*

LEAD seeks to improve public safety by reducing drug use, drug selling, and the quality-of-life problems associated with open-air drug and sex markets. By enabling police officers to refer clients to case managers rather than book them into jail, and by providing intensive case management services and resources that create meaningful opportunities for those struggling with addiction and extreme poverty, LEAD also seeks to prevent arrests from leading to additional criminal justice intervention. The hope is that the program will not only reduce the individual and community harms associated with drug activity, criminal conviction, and incarceration, but will also provide an alternative model for social service provision which, by virtue of being more cost effective than the formal justice system, has the potential to reach more people.

A recent outcome evaluation suggests that LEAD has been remarkably effective in achieving these goals. The study compared the recidivism rates of approximately 200 LEAD clients with 115 others who, by virtue of the time or place of their arrest, did not participate in LEAD but had similar criminal records. The results were significant. Specifically, LEAD clients were nearly sixty percent less likely to be re-arrested than their non-LEAD counterparts. Similarly, the odds that a LEAD client was sentenced to prison in the first year after their enrollment in LEAD were eighty-seven percent lower than for non-LEAD clients. LEAD clients also spent thirty-nine fewer days in jail than similarly situated arrestees who did not enter LEAD. Some of these reductions may have resulted from prosecutors' willingness to not file charges for misdemeanor or drug offenses where they believe doing so would imperil LEAD clients' therapeutic progress. However, prosecutors have indicated that they are likely to file charges against LEAD clients if the behavior in question involves direct harm to victims.

In short, the fact that LEAD clients have significantly less criminal justice contact than others with similar criminal records likely reflects reductions in offending behavior as well as the tendency of prosecutors not to file

charges for minor offenses where LEAD clients are actively engaged with their treatment program. These reductions in criminal justice contact and incarceration mean significant cost savings: the findings reveal “statistically significant reductions for the LEAD group compared to the control group on average yearly criminal justice and legal system utilization and associated costs.”<sup>67</sup> Specifically, criminal and legal systems costs associated with LEAD clients decreased by roughly thirty percent relative to the year prior to their enrollment in LEAD, while those costs for non-LEAD clients more than doubled in that same time period.<sup>68</sup>

In addition to achieving these remarkable reductions in criminal justice contact and costs, LEAD has had a number of other positive effects. For stakeholders, one of the most meaningful of these was the process of coming together, despite diverse motivations and lingering, litigation-induced resentment, to find common ground. As one SPD Lieutenant put it, “Traditionally we have definitely been on opposite side[s] of most issues . . . . In the process of talking to people we realized we have the same goals and desires in what we wanted to accomplish.”<sup>69</sup>

LEAD’s collaborative model ultimately transformed institutional relationships in ways that create exciting opportunities for collaboration and reform. Indeed, many stakeholders credited LEAD with fundamentally transforming their assumptions about, and relationships with, other organizations. In the words of one supervisor at Evergreen Treatment Services,

I think I talked about last time my first experience meeting with SPD, where we did a training . . . . When they all walked in, I just thought, “Oh, no, this is not going to be pretty.” They were all big and tall and angry looking and mostly white and male and they all had guns strapped to their sides. And I just thought, “Whoa.” Especially thinking—we’re dealing with issues of racial disparity here. I mean, over half of our clients at this point are African American. And I’m thinking, “And we’re developing a relationship with these people? This is going to be a challenge.” And it has been challenging in many ways. But, the distance that we’ve come is enormous.<sup>70</sup>

In fact, stakeholders often came to adopt the position of their former adversaries, much to their surprise. Ian Goodhew of the King County Prosecuting Attorney’s Office explained it this way:

Whatever you think about LEAD as a program, by doing it what we’ve managed to do is cause policy makers who used to think

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<sup>67</sup> SUSAN E. COLLINS, HEATHER S. LONCZAK & SEEMA L. CLIFASEFI, *supra* note 55, at 2.

<sup>68</sup> *Id.* at 20. A future evaluation by the same authors will assess changes in psychosocial, housing, and quality of life among LEAD clients.

<sup>69</sup> JEREMY KAPLAN-LYMAN, LAW ENFORCEMENT ASSISTED DIVERSION, SEATTLE, WASH. 22–23 (2012).

<sup>70</sup> BECKETT, *supra* note 48, at 41 (citing Focus Group Interview with LEAD Supervisors in Seattle, Wash. (Sep. 22, 2013)).

they never agreed on anything to talk to each other and realize that . . . we do agree on a few things. And as [then-Interim SPD Chief] Pugel always says in his talk on LEAD, it's not only the fact that he or SPD has a relationship with the defender association now or the Racial Disparity Project or the ACLU. It's that he has a relationship with me now . . . . But it will create odd alliances. It will create odd relationships. It will bolster what should be strong relationships that may be [sic] aren't. And it will make you think about another person or agency or institution's perspectives on the issues. And once people start talking with each other instead of talking about each other, anything is possible.<sup>71</sup>

The institutional shifts described above fostered in LEAD stakeholders a new willingness to consider and implement other significant criminal justice reforms. Lisa Daugaard, an attorney affiliated with the program, recounted how Kris Nyrop (LEAD Program Director at the Public Defender Association) and SPD Lieutenant Deanna Nollette traveled together to an international policing conference. While there, Lieutenant Nollette learned about safe injection sites, and swiftly became a convert. Similarly, Dan Satterberg, King County Prosecuting Attorney, explained that LEAD prompted his office to pursue other reforms, especially The 180 Program aimed at diverting juveniles from the justice system. Dan concluded that “there are a lot of complicated issues in our society and they're not all solved by a trip to the courtroom or prison.”<sup>72</sup>

In short, many stakeholders reported that LEAD dramatically reframed their perspectives on problems and their relationships with each other. Such transformations increased the stakeholders' openness to other possible reforms. At the same time, a number of stakeholders identified significant implementation and structural challenges. These are described below.

#### *F. Obstacles to Implementation: Effectively Channeling Police Discretion and Overcoming Structural Challenges*

One of the most significant challenges for LEAD stakeholders in Seattle has been finding “common ground” with street-level officers and eliciting officer buy-in. This is in large part because LEAD's model asks officers to exercise their discretion quite differently—to refrain from arresting people who appear to be violating drug or prostitution laws and to instead refer them to a program that does not require abstinence. Moreover, officers who do make referrals are often confronted with the sight of LEAD clients “on the streets.” The idea that LEAD clients could continue to “hang out”

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<sup>71</sup> *Id.* at 41–42 (citing Interview with Ian Goodhew, Deputy Chief of Staff, King Cty. Prosecuting Attorney's Off., in Seattle, Wash. (Jun. 28, 2013)).

<sup>72</sup> *Id.* at 43–44 (citing Interview with Dan Satterberg, King Cty. Prosecuting Attorney, in Seattle, Wash. (Jun. 28, 2013)).

downtown and actively use drugs was frustrating and incomprehensible to many officers. As Lieutenant Nollette explained,

It was an interesting conversation, in that [the service providers] were saying no, that [relapse] is part of recovery . . . . We are not going to force people to stop using. They can continue to use. We are looking at reducing their illegal behavior. That is a really hard thing for cops to get their head around.<sup>73</sup>

In an effort to secure the support of the relevant officers, especially those known to be “hard chargers,” LEAD stakeholders conducted a focus group with officers from the relevant units. LEAD stakeholders used officer feedback from the focus groups to revise the LEAD protocol. For example, as mentioned previously, officers expressed a strong preference for having the referral option that came to be known as “social contract referral,” and this feedback ultimately led organizers to revise the LEAD protocol.

On the other hand, police officers’ accounts of the utility of these focus groups ranged from mixed to sharply critical. Some officers and sergeants agreed that the focus group provided a useful opportunity for dialogue and the exchange of information, and noted that some of their suggestions had resulted in concrete changes to the protocol. In other focus groups, however, officers complained bitterly about organizers’ decision to allow command staff to observe the discussion from behind a one-way mirror, the fact that they were not “primed” for the discussion, and shared their perception that their feedback was not taken seriously. Officers in these focus groups also expressed a great deal of skepticism about the rationale for LEAD and concern that it would function as a “get out of jail free card” for people with no intention of getting clean.

In short, as of 2013, the degree to which officers “bought-in” to LEAD and were willing to exercise their discretion in a notably new way varied significantly across units. In response to the sharply critical tenor of some of the focus group conversations, I requested and received officers’ permission to share their concerns with LEAD organizers. In follow-up meetings, the officers, LEAD organizers, and then-Interim SPD Chief Jim Pugel had an extended conversation about the officers’ concerns. I later asked to speak with the unit’s sergeant to learn whether this conversation had changed the officers’ attitudes toward LEAD. In our interview, the sergeant explained that the officers “were pleasantly surprised” by the LEAD organizers’ candor and receptiveness to new ideas.<sup>74</sup> Officers remained troubled by LEAD’s willingness to permit clients to return to the area in which they were arrested. Eventually, however, they realized that the spatial concentration of social services in the downtown area dictated this result.

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<sup>73</sup> See JEREMY KAPLAN-LYMAN, *supra* note 69, at 20.

<sup>74</sup> BECKETT, *supra* note 48, at 26 (citing Interview with SPD sergeant, in Seattle, Wash. (Mar. 17, 2014)).

The sergeant also praised LEAD organizers for directly clarifying several misunderstandings about LEAD. For example, a number of officers initially believed that prosecutors *never* charged LEAD clients with criminal offenses after entering the program. In effect, these officers viewed LEAD as a “get out of jail free” card for its clients. LEAD organizers directly addressed this concern and explained that while prosecutors generally do not bring charges for the initial arrest that prompted diversion to LEAD, they sometimes do bring charges against LEAD clients for subsequent misconduct if they determine that doing so will benefit, rather than thwart, the individual’s therapeutic progress. As the sergeant explained, this clarification was valuable in helping officers recognize that the time and energy they spend completing the paperwork on such arrests is not pointless.

Nonetheless, securing police referrals to LEAD remained a challenge through the spring of 2014, when referrals had slowed to a trickle and, as a result, LEAD was “twisting in the wind.”<sup>75</sup> A variety of other developments, such as a change in SPD leadership and the departure of key LEAD supporter, Interim Chief Pugel, had further undermined SPD support for LEAD.<sup>76</sup> But in April of 2014, a wide range of public officials and stakeholders held a press conference to announce their renewed commitment to LEAD. Since that time, the program has expanded to cover the entire downtown area, and police referrals have increased notably.<sup>77</sup> City officials are currently planning to expand the program further east to the Capitol Hill neighborhood.<sup>78</sup> Interestingly, a majority of the police referrals are now made by newly-trained officers in King County Metro Transit, a unit of the King County Sheriff’s Office.<sup>79</sup> This appears to reflect both the active support and involvement of key leaders in the King County Sheriff’s Office as well as the reduced availability of proactive police units within the SPD.<sup>80</sup>

Developing consensus around LEAD, and getting officers to exercise their discretion in a novel way, was thus a difficult and time-consuming process. Moreover, although many now believe that the LEAD model holds significant promise, stakeholders readily identified a number of structural challenges that also threaten to undermine its efficacy absent a shift in the social-structural environment. For example, even with adequate funding, caseworkers often struggled to find housing for their clients. Although having resources did create some housing opportunities, money did not solve all housing-related dilemmas. Affordable housing for unemployed addicts who

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<sup>75</sup> See Nina Shapiro, *How the Much Lauded LEAD Program was Revived After Near Collapse*, SEATTLE WEEKLY (Apr. 14, 2014), <http://www.seattleweekly.com/home/957881-129/how-seattles-much-lauded-lead-program-almost> [http://perma.cc/3ZCZ-9MPF].

<sup>76</sup> *Id.*

<sup>77</sup> As of fall 2015, LEAD case managers are working with approximately 350 LEAD clients. Interview with Lisa Dugaard, Dir., Racial Disparity Project, in Seattle, Wash. (Oct. 1, 2015).

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

are not disabled is limited, and other LEAD clients find themselves barred from housing by their criminal histories.

More generally, as LEAD stakeholders with a background in service provision explained, existing capacity constraints can undermine the success of any social service intervention.<sup>81</sup> Ron Jackson of Evergreen Treatment Services put it this way:

We could employ an army of case managers, but when it's all said and done if those case managers are not getting their clients access to the services that are going to have positive influence on their life, they're not going to be affected. It's not just being good at building therapeutic alliance with the homeless person . . . they've still got to deliver something.<sup>82</sup>

#### CONCLUDING THOUGHTS

The exercise of discretion is an inherent feature of police work. Contemporary scholarship shows that this discretion is the inevitable result of the ambiguous, multi-faceted and unpredictable nature of the situations officers encounter, as well as of the complexity and indeterminate nature of the law itself. Contemporary scholarship also makes plain that this discretion is too often exercised in ways that violate constitutional protections against the excessive use of force, racial bias, and unreasonable searches, and that deterring and redressing the problematic exercise of police discretion is no simple matter.

These complexities aside, policymakers and advocates have in recent decades successfully altered the incentive structure and ideological climate in ways that have encouraged an aggressive police response to low-level offenses. Indeed, advocates of both the war on drugs and broken windows policing were remarkably successful in directing police attention toward behaviors that were historically seen as a low priority by many police officers, and in encouraging a more forceful response to those behaviors. Channeling the exercise of police discretion in this manner resulted in a significant rise in misdemeanor and drug arrests, which in turn has increased court caseloads and expanded prison and jail populations. These shifts contributed importantly to the emergence of mass incarceration, an unprecedented carceral experiment. A significant body of social scientific research docu-

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<sup>81</sup> Demand for drug treatment has long-outstripped supply across the country. See J. Gryczynski et al., *Treatment Entry Among Individuals on a Waiting List for Methadone Maintenance*, 35 AM. J. DRUG & ALCOHOL ABUSE 290; see also Adi Jaffe & Tariq Shaheed, *Can't Get In: Barriers to Addiction Treatment Entry*, PSYCHOL. TODAY (Mar. 20, 2012), <https://www.psychologytoday.com/blog/all-about-addiction/201203/cant-get-in-barriers-addiction-treatment-entry> [<https://perma.cc/5AB8-GWPS>]. Similarly, criminal records and substance abuse issues pose formidable barriers to access to housing nationally. See Marah A. Curtis et al., *Alcohol, Drug and Criminal History Exclusions in Public Housing*, 15 CITYSCAPE 37 (2013).

<sup>82</sup> BECKETT, *supra* note 48, at 48 (citing interview with Ron Jackson, former Exec. Dir., Evergreen Treatment Servs., in Seattle, Wash. (Jun. 24, 2013)).

ments the individual, family, and community level harms that result from very high levels of incarceration and from the cycling of medically and socially vulnerable populations into and out of jail.

In recognition of these harms, which have very disproportionately affected people and communities of color, and of the inevitability of police discretion, LEAD organizers in Seattle, Washington, developed and implemented a novel program that relies upon the exercise of police discretion *to steer those who might otherwise end up in jail away from, rather than toward, the criminal justice system*. LEAD operations in Seattle show that a broad range of stakeholders (who may well include former adversaries) can collaborate to institutionalize local policy reforms that rely on a shift in the exercise of police discretion in order to meaningfully address the individual and community level harm associated with addiction, extreme poverty, and criminal punishment. By reducing the number of people booked on drug and prostitution-related charges, LEAD has also reduced the number of people of color in the criminal justice system. Moreover, the evidence from Seattle suggests that the collaboration required to develop such a program is itself a transformative and productive experience, one that appears to yield a variety of dividends, including reduced criminal justice involvement and expenditures as well as a new openness to additional reform ideas.

Inspired by Seattle's example, city officials in Santa Fe, New Mexico; Huntington, West Virginia; and Albany, New York, have established, or are in the process of establishing, LEAD in their cities.<sup>83</sup> Authorities in Baltimore, Maryland; Los Angeles, California; and two Kentucky counties are also in the beginning stages of implementing LEAD in their jurisdictions. Expanding LEAD in Seattle and successfully institutionalizing it elsewhere will require careful attention to several challenging tasks. In particular, securing the support and involvement of line officers in LEAD has proven to be quite challenging, and may continue to be in the future. In addition, LEAD case managers continue to wrestle with structural problems such as the lack of appropriate treatment options and affordable housing for people with addiction histories and criminal records.

These substantial long-term challenges notwithstanding, the first years of LEAD's operations provide compelling evidence that local policy initiatives that rely upon police discretion but steer potentially arrestable people away from rather than toward the criminal justice system are, in fact, in the

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<sup>83</sup> Aaron Cantu, *What Happens When a City Decides to Offer Addicts Services, Not Prison Sentences?*, THE NATION (Oct. 15, 2014), <http://www.thenation.com/article/what-happens-when-city-decides-offer-addicts-services-not-prison-sentences/> [http://perma.cc/T3ES-DSNX]; see also Interview with Lisa Daugaard, Dir., Racial Disparity Project, in Seattle, Wash. (Oct. 1, 2015). According to Cantu, "The LEAD programs in Santa Fe and Seattle specifically target criminal offenses as ways to sidestep the criminal justice process. New York's plan, however, is designed only for those who have committed non-criminal violations; people charged with misdemeanors will not be eligible. The result is that thousands of people who might benefit from the program will be excluded, because in New York only one drug offense—marijuana possession at the lowest level—is considered a violation and not a criminal offense." Cantu, *supra*.

realm of possibility. As research on the human costs associated with concentrated poverty and mass incarceration makes abundantly clear, cities across the United States desperately need such programs. Through the development and implementation of programs that use harm reduction principles to guide the exercise of police discretion, municipalities may be able to transform the police response to low-level crime from one that exponentially increases the harm associated with those behaviors to one that notably reduces individual and community suffering.