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CONNECTIONS, NOT CONVICTIONS: Prosecution of People with Substance Use Disorder in the Age of America's Behavioral Health Crisis

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Abstract

Substance use disorder is a recognized medical condition that describes a compulsive use of a substance despite negative consequences. When the substance of abuse is also an illegal drug, a conflict arises between treating the patient through the most effective medically proven methods and enforcing state laws prohibiting personal possession or use of that substance. What really happens to people prosecuted for possession of small amounts of illegal drugs? What happens when the limited resources of a local government are spent on harm-reduction approaches to helping people with addiction, rather than arresting, jailing and prosecuting them in a court without treatment and support resources?

King County (WA) has embarked on the policy path of declining to prosecute most cases of possession of small amounts of illegal controlled substances and instead investing money in building connections between case managers and people with substance use disorder delivered through the model of the Law Enforcement Assisted Diversion (LEAD) program.

This Article will explore the legal, medical and ethical issues involved in treating substance use disorder as a disease instead of as a crime.

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Introduction

“The opposite of addiction is not sobriety. It’s connection.”¹

America is in the middle of a historic behavioral health crisis. Last year, more than 70,000 people died of drug overdoses, and 45,000 people committed suicide.² By the end of today, another 130 people will have died from a drug overdose.³ Some neighborhoods and communities are visibly fraying due to the volume of harmful drug use. With the national emergence of cheap, imported Fentanyl, and a marked upsurge in methamphetamine addiction following on the wave of opioid use in the past decade, public health and government officials fear that this is our “new normal.” There is an urgent need to find effective responses to this crisis. Overdose deaths are a hard metric to ignore, and the opioid crisis has reached into every segment of our population. But we must bear in mind that many in our country have long struggled with substance use disorder involving other drugs, and race has much to do with why that misery was not historically framed as a public health crisis. This is not a new problem, but the pervasive reach of the opioid and now methamphetamine crises provides a chance to form a new consensus about how our public institutions, including law enforcement and prosecutors, should handle these issues.

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1. Johann Hari, *Chasing the Scream* 293 (2015).
 2. Centers for Disease Control and Prevention, *WISQARs Fatal Injury Data 1981–2017*, (last updated Jan. 18, 2019), <https://webappa.cdc.gov/sasweb/ncipc/mortrate.html>.
 3. Lawrence Scholl et al., *Drug and Opioid-Involved Overdose Deaths—United States 2013–2017*, Centers for Disease Control and Prevention (Jan. 4, 2019), <https://www.cdc.gov/mmwr/volumes/67/wr/mm675152e1.htm>.

Is the answer to our national crisis to be found in the courtroom or a jail cell? We should hope not.

For most of the past fifty years, we have treated drug possession as a moral and criminal failure, and prosecutors have held people to answer for low level drug activity in court, and sent them to jail and prison. As a career prosecutor and a career public defender, we join together in agreement that the national experiment of punishing people with behavioral health disorders is ineffective, expensive, and inequitable in its application. The “War on Drugs” has done long-term damage to relationships between the police, the courts, and communities of color, such that those communities are reluctant to report crime—even violent crime—to the authorities.

It is common to hear public officials say that substance use disorder is a medical issue, and to agree that we cannot arrest our way out of this problem. Yet in most communities throughout America, law enforcement’s behavior does not match our rhetoric. An important first step to align our resources and priorities and address drug addiction and related behavioral health disorders is to stop prosecuting people for possession of personal use amounts of drugs, and instead invest in a community-based public health response. When delivery of small amounts is due to addiction or to meet an individual’s subsistence needs, we similarly should address those through community-based care, rather than prosecution, whenever possible.

Importantly, we are not proposing this approach just for marijuana. Like a growing number of states, Washington State has regulated the production and sale of marijuana and stands to collect more than \$300 million in new taxes on the sale of cannabis this year.⁴ Further, we are moving to vacate old convictions for possession and sale. Clearly, we have moved beyond the criminalization of marijuana. But what should state and local governments do about more dangerous substances if we really want people to stabilize, heal, and reduce their harmful behavior?

I. Criminal Justice Reform Requires Building New Responses

The essence of criminal justice reform is to examine and question the use of punitive sanctions as a way to change human behavior, and to build sustainable alternatives to the courthouse and jail in response to behavior that is primarily motivated by maladaptive trauma response or a brain disease. Many matters of public order wind up in the criminal justice system not because it is the best option, but because it is the only response we have to certain behavior. Nowhere is this truer than in the prosecution of people for possession or delivery of small amounts of drugs.

4. Wash. St. Govt. Off. of Fin. Mgmt., *All Budgeted Funds—Table 11-New Law*, <https://ofm.wa.gov/budget/state-budgets/gov-inslees-proposed-2019-21-budgets/summary-tables/11/nl>.

Science tells us that many people develop an addiction to substances as a way to cope with trauma and pain (although substance use disorder eventually compounds their suffering and imposes yet more trauma and pain). This is a familiar story to anyone who has watched a friend or family member struggle with addiction and slowly dig themselves into a hole that becomes difficult to climb out of. “Particularly, the link between trauma exposure and substance abuse has been well-established. For example, in the National Survey of Adolescents, teens who had experienced physical or sexual abuse/assault were three times more likely to report past or current substance abuse than those without a history of trauma. In surveys of adolescents receiving treatment for substance abuse, more than 70 percent of patients had a history of trauma exposure.”⁵

“Early trauma also has consequences for how human beings respond to stress throughout their lives, and stress has everything to do with addiction. Stress is a physiological response mounted by an organism when it is confronted with excessive demands on its coping mechanisms, whether biological or psychological.”⁶

Clearly drug use is an integral part of the human condition, and it is one way people cope with overwhelming trauma and stress. The tools society traditionally uses to respond—police, jails, courtrooms, and prisons—are ill-equipped to make things better; indeed, if we were intentionally trying to compound trauma and exacerbate dysfunctional trauma coping responses, we could scarcely design a system more likely to do so. If the goal is to offer help to people with addictions so that they do less harm to themselves and less harm to the community, then we should be designing a public response to do just that.

II. Therapeutic Courts—Successes and Limitations

Credit is due to the drug courts and mental health courts for embracing lifesaving goals rather than punitive objectives within the judicial system. For example, Washington’s King County Drug Diversion Court provides structured treatment programs for people battling addiction, most of whom are facing prison for drug-related property crimes. King County’s Drug Diversion Court has been in operation for more than twenty years and has the capacity to help up to 350 people at any one time. But the capacity of even the largest therapeutic courts cannot begin to meet chronic needs in our communities, where many times that number engage in chronic use of illegal substances daily. Approaches in which an individual is charged with a crime as a precondition to obtaining help are inherently costly, due to the lawyer costs on both sides and the apparatus of the court. This expensive response must be reserved for

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5. Lamaya Khoury, Yilang L Tang, Bekh Bradley, Joe F Cubells and Kerry J Ressler, *Substance use, childhood traumatic experience and Posttraumatic Stress Disorder in an urban civilian population*, 27 *DEPRESSION AND ANXIETY* 12, 1077–86 (2010).
 6. Gabor Mate, *Addiction: Childhood Trauma, Stress and the Biology of Addiction*. 1 *J. OF RESTORATIVE MED.*, 2012 (1):57–63.

those cases and individuals that are not well-suited to intervention outside the court system. Moreover, drug courts appear to be most successful with higher-functioning people, who respond rationally to incentives and can succeed in a compliance-based system. King County studied a cohort of “Familiar Faces,” consisting of several thousand people with substance use disorder or other mental illness who are frequently booked into our jails. The study concluded that almost none of those people are served by our therapeutic courts, because they are simply unable to succeed there.⁷ We need an alternative response for the large number of people who will fail in the therapeutic court setting, and who in any event exceed the capacity our court system will be able to serve unless we prioritize judicial spending over other pressing social goods and needs—the opposite direction from one a healthy community would go if it had an alternative. Fortunately, we do.

III. The Prosecution of People for Possession of Small Amounts of Drugs

There are of course stories, from Malcolm X⁸ to Macklemore,⁹ of individuals who “hit rock bottom” in jail or prison and later say that the experience helped them turn their life around. These approaches may prove effective for a small and mostly higher-functioning group. However, just as teaching techniques that work for the minority of students who process information in what is termed a neurotypical fashion, are not the optimal way to engage most students,¹⁰ the punitive approach that has prompted some individuals to regroup and gird themselves for the difficult climb to stability and health is not the best way to set most on that path. Insights about trauma and how it is compounded, and the experience of the now-enormous group of individuals reentering after incarceration with heavy stigmas and liabilities that they often cannot shake, teach that the “prison saved me” narrative is likely the exception rather than the rule. For most, it is probable that humiliation, shaming, and the many employment, housing and benefits barriers caused

7. Familiar Faces Data Packet, KING COUNTY: FAMILIAR FACES INITIATIVE (May 2016) at 7, https://www.kingcounty.gov/~media/elected/executive/constantine/initiatives/hhs-transformation/documents/familiar-faces/Population_analysis_combined_6_26_16.ashx?la=en [<https://perma.cc/6Z9K-6CH3>].

8. See, e.g., Zoe Colley, “‘All America Is A Prison.’” The Nation of Islam and the Politicization of African American Prisoners, *Journal of American Studies* 48 (2014) 2, 393–394 n.1.

9. “Macklemore Speaks at 20 Year Celebration of King County Drug Court,” *Seattle Times*, October 14, 2014, available at <http://blogs.seattletimes.com/today/2014/10/macklemore-speaks-at-20-year-celebration-of-king-county-drug-court>.

10. See, e.g., David H. Rose & Anne Meyer, “Teaching Every Student in the Digital Age: Universal Design for Learning,” *Educational Technology Research and Development* 55(5): 521–25 (October 2007).

by justice system involvement, do more harm than good in the struggle to recover.¹¹

If the type of “accountability” found in a courtroom—a conviction and a sentence—actually does more harm than good, the question becomes: What should we envision instead? For we cannot stop at a critique of past practices. Too much criminal justice reform rhetoric focuses solely on ending old failed approaches. It is imperative to step away from current practices that are counterproductive or damaging, such as prosecuting addicted people for drug crimes in most cases. But it isn’t viable to simply stop what we have been doing wrong. We need to pay at least as much attention to replacing those old responses with well-funded, robust alternatives that have the potential to provide sustainable responses to the real problems of addiction. The problem with the War on Drugs and the Broken Windows law enforcement paradigm isn’t that they take low-level drug issues seriously; we take these issues seriously too (and any sustainable policy framework in this area will have to, or it will face massive backlash). The problem is that these paradigms respond to real problems with solutions that tend to make the problems worse.¹² If we remove those wrong answers, we still need answers—and the public will rightly demand that reformers have a better plan to fill that void.

We urge a systematic and large-scale redirection of public resources from the courtroom to the community; from convictions to connections; and from handcuffs to help.

People found to be in possession of small amounts of drugs face a unique path in most of America’s criminal justice systems. The huge number of small cases overwhelms any one jurisdiction’s capacity to provide treatment resources. Dealing with these cases instead becomes an exercise in fruitless due process at best. There is no offer of clinical or medical help, while the system greatly compounds the trauma and liabilities the person must then overcome.

Due to resource limitations similar to those faced in most jurisdictions, King County prosecutors have, for the past ten years, filed cases of possession of under three grams of heroin, cocaine, or methamphetamine in District Court (the County’s misdemeanor court). These cases are technically felony crimes and could send a person to the state prison system upon their 6th conviction. The King County Prosecuting Attorney has sought instead to resolve these cases with a gross misdemeanor

11. See, e.g., Tanya Saraiya & Teresa Lopez-Castro, “Ashamed and Afraid: A Scoping Review of the Role of Shame in Post-Traumatic Stress Disorder,” *J Clin Med* 5(11): 94 (Nov 2016).

12. The approach we champion has been thoughtfully contrasted to Broken Windows, as an alternative way to take public order issues seriously and yet not compound the harm done by mass incarceration. See, Katherine Beckett, *The Uses and Abuses of Police Discretion: Toward Harm Reduction Policing*, 10 *HARV. L. & POL’Y REV.* 77 (2016).

conviction to avoid sending people to prison for having a substance use disorder.¹³

Though less costly than felony prosecution, however, prosecution in the lower courts still inflicts harm on individuals. First, even short stays in jail can be tremendously destabilizing. Most damage to a person's outcomes in employment, housing, child custody,¹⁴ and public benefits occurs after just a short time in local jails.¹⁵ Thus, cutting the length of incarceration doesn't proportionately reduce the harm and disruption caused by incarceration itself (this is the limitation of the model of reform that emphasizes reduction in sentences without a fundamental paradigm shift away from the court system entirely in appropriate cases). Second, it is dubious whether the gains achieved by this approach are sufficient to justify the known harms. The down-ratcheting approach is still costly. An average of 1000 such prosecutions were conducted each year in King County, with most resulting in a plea to solicitation to possess a controlled substance, a gross misdemeanor. The police took an average of three months to send the case to the prosecutor, who took four-to-six months to file it—proving that these cases are no one's priority. Next, a summons would then be mailed to the last known address to let the person know that charges had been filed against them. But this occurs after six-to-nine months, and many people struggling with serious drug addictions are not at a stable address for that long. This meant that an arrest warrant would be ordered by the court when the person who never received the summons fails to appear for arraignment.

The King County Prosecuting Attorney's office evaluated the outcomes of the prosecution of simple possession cases in the courts of limited jurisdiction and found that, on average, this due process path entailed more than three court appearances before the plea was entered and the issuance of 1.4 warrants per case. This means that police officers arrested and booked each defendant more than once for failing to show up to court for a hearing that, in fairness, the defendant may have known nothing about. To make matters worse, each person prosecuted spent an average of fifteen days in the County jail—this time was not spent serving a sentence imposed by a judge, but instead waiting for a court hearing to be scheduled so that the person could plead guilty after being arrested and booked on outstanding warrants. Moreover, despite our estimate that handling these 1,000 cases in this manner cost the taxpayers

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13. Today, the number of prison inmates serving time for drug possession or delivery has dropped to 7 percent, thanks to policies like King County's, that keep these cases in courts of limited jurisdiction and avoid sending people to prison. Wash. St. Dept. of Corr., *Facts about Offenders Fact Card*, (Dec. 31, 2018), <https://www.doc.wa.gov/docs/publications/reports/100-QA001-1812.pdf>.
 14. Nell Bernstein, *All Alone In the World: Children of the Incarcerated* (2007).
 15. Martha R. Plotkin & Alex Blandford, "Critical Connections: Getting People Leaving Jail & Prison the Mental Health Care & Substance Use Treatment They Need," Bureau of Justice Assistance (Nov 2017), available at <https://www.bja.gov/publications/Critical-Connections-Full-Report.pdf>.

more than \$3 million per year, there was no offer of medical or psychological treatment for people suffering from what we now know to be a trauma response or brain disease. It is true that strictly enforcing the maximum available penalties and prosecuting these cases as felonies with prison sentences attached rather than as misdemeanors in courts of limited jurisdiction would multiply that price tag several times over, yet neither option offers real help to the person struggling with addiction, or much likelihood of their behavior or situation improving upon return to the community.

One possible response to this sobering realization might be to try to load extensive court-based treatment or case management resources into the criminal justice system. But there is no research to support the idea that court-based care is more effective than community-based care.¹⁶ Moreover, the latter can be sustained beyond the limits of a court's jurisdiction and can be provided in an environment that is much less likely to compound trauma. There is an emerging consensus among researchers that intensive court-based supervision tends to be counterproductive.¹⁷ And court-based responses to health issues wind up allocating a disproportionate share of available resources to lawyers (judges, prosecutors, and defense counsel), when we need every penny to expand community-based systems of care.

IV. Do No Harm

The principle “First, do no harm,” is not actually a part of the Hippocratic Oath, but a related concept is said to be found in Book I, of the Hippocratic school: “Practice 2 things in your dealings with disease: either help or do not harm the patient.”¹⁸

If we believe that substance use disorder is a disease and/or a natural response to trauma and that our first responders are police and prosecutors, then how do we ensure that we do no harm to the people suffering with this affliction? Equally important—and paramount for prosecutors and police charged with improving public safety and order—how do we use those roles to respond to this phenomenon in a way that makes our communities healthier and safer?

Under the First Law of Holes, the first step is to stop digging. There is no good case to be made for prosecuting people found in possession of

16. National Institute of Drug Analysis, *Principles of Drug Abuse Treatment for Criminal Justice Populations*, NATIONAL INSTITUTE OF HEALTH (April 2014) https://d14rmgtrwzf5a.cloudfront.net/sites/default/files/txcriminaljustice_0.pdf [<https://perma.cc/6XEG-DSZF>].

17. Jennifer Doleac, *Study After Study Shows Ex-Prisoners Would be Better Off Without Intense Supervision*, BROOKINGS INSTITUTION: UP FRONT (July 2, 2018) <https://www.brookings.edu/blog/up-front/2018/07/02/study-after-study-shows-ex-prisoners-would-be-better-off-without-intense-supervision> [<https://perma.cc/M67B-GX2B>].

18. Ludwig Edelstein, *THE HIPPOCRATIC OATH: TEXT, TRANSLATION AND INTERPRETATION* 56 (1943).

small amounts of drugs intended for their personal use. In King County we proved that individuals who receive community-based care do better and commit fewer future offenses than people who are prosecuted.¹⁹ Colleagues in our own system, including both public defenders and some deputy prosecutors, then asked the logical question: Why was the Prosecuting Attorney ever pursuing the old approach, since it performs so poorly? It was a valid point, and led to the King County Prosecuting Attorney's current policy of declining to file charges for possession of up to one gram (absent exceptional circumstances).

But discontinuing old mistakes, while necessary, isn't sufficient. We can't simply walk away from people in the throes of addiction and the harm they cause to themselves or others. If we just decline charges—pointing out that “we can't arrest our way out of this problem”—without building an alternative, we demonstrate an indifference, not only to the suffering of those with substance use disorder, but also to the harm to the community that so often accompanies compulsive daily drug-seeking. Property crimes will necessarily be a survival technique for many people who can only support an expensive daily habit through illegitimate income. Equally important to consider is the harm within families when they lose connection with, and support from, fathers, mothers, siblings, and children. As the founder of Seattle's Mothers for Police Accountability, Rev. Harriett Walden, once observed, though we know prison and punishment isn't the right way to heal people, we also can't just leave people to struggle and suffer, and to harm others, and feel that we've discharged our responsibility to them, their families, or to public order and safety.²⁰

V. Building A Community Health Response—The LEAD Model

Step 1 is to stop prosecuting where it is counterproductive. In King County, we took that first step in the fall of 2018 when the Prosecuting Attorney's Office changed its filing standards: we presumptively no longer file criminal charges in cases of possession of under one gram of heroin (or Fentanyl), cocaine, or methamphetamine. This policy was announced after several focus groups conducted with the police officers whom our community like others has tasked to be the first responders to our drug epidemic. Not all officers were happy with this change, and some still worry that the new policy reflects a justice system that has abandoned the officers who are called to respond to the real problems caused by addiction. We intend not to abandon those officers and the community

19. Susan E. Collins et al., *Seattle's Law Enforcement Assisted Diversion (LEAD): Program Effects on Recidivism Outcomes*, 64 EVALUATION & PROGRAM PLAN. 49(2017) (individuals referred to community-based care in Seattle's LEAD program committed fewer future offenses than a similarly-situated cohort arrested by the same officers and referred for prosecution).

20. Personal conversation with Lisa Daugaard in 2004, prompting the development of the LEAD model.

members they are responding to, but to offer them new and more effective tools with which to respond.

Step 2 is simultaneously building the diversion alternative, which must be a more, not less, meaningful response than jail booking and prosecution. Law Enforcement Assisted Diversion (LEAD) is an approach which offers a meaningful option to first responders to address law violations due to substance use issues without overuse of jail and prosecution, with greater impact and at less cost than if a charge had been filed. In LEAD, individuals who commit law violations due to behavioral health struggles and/or extreme poverty can be referred, via law enforcement, to community-based care. Case management is provided in a harm reduction framework that meets this highly marginalized population where people are, physically and psychologically, and offers sustained engagement until participants are stabilized and behavior changed, a process that may take years.

Officers who have been trained to make LEAD referrals understand that calling a case manager when working with a person who is addicted to drugs is often a better option than booking that person into jail.²¹ Individuals whose violations appear to be related to behavioral health conditions or extreme poverty can be referred to LEAD in two ways: upstream, before there is probable cause for an arrest, on a social contact basis, or at the point of arrest for divertible charges (in King County, these include low-quantity drug offenses, prostitution, trespass, misdemeanor theft and property destruction/malicious mischief, transit conduct offenses, parks violations, and obstructing an officer). LEAD is not a civil commitment model—participation is voluntary—but, because the program delivers high-quality services in a nonjudgmental atmosphere, and meets people where they are—literally under bridges and in tents, as well as psychologically, at the stage of change where participants find themselves—there is a very high rate of acceptance. Over 98 percent of those diverted to LEAD in lieu of arrest accept the offer of diversion over adjudication, and over 90 percent of those people complete the intake requirements within thirty days.²² This is a remarkable acceptance rate, especially given the prevalence of untreated mental health issues and trust challenges with this population, as well as this population's high incidence of homelessness (over 70 percent of Seattle participants are homeless at the point of referral).²³

Diversion to LEAD is not the end, but the beginning of a different way to respond to problems caused by addiction. Participants are paired with a “guerrilla” case manager with a low case load. We describe this

21. Comments of Seattle Police Department Captain Sean O'Donnell and Sergeant Rob Brown, and Burien Police Chief Ted Boe, at LEAD informational panel, January 25, 2019, available at <http://www.seattlechannel.org/videos?videoid=x-101771&jwsourc=cl>.

22. Seattle LEAD program data on file with the Public Defender Association.

23. *Id.*

as guerrilla case management because the case manager's job is about outcomes, and these case managers have to do whatever it takes to actually turn things around for participants, which can include sitting with clients in hospital rooms, transporting them to court, tracking them down in alleys and encampments, and patiently helping them deal with new losses and process past traumas. LEAD case management doesn't have a predetermined end point; it goes on as long as necessary, which means until the participant no longer needs the resource (though the aim is always self-sufficiency).

LEAD case managers are incredible—described by one police officer as “the SWAT of social work”—but social work is only one component of LEAD. The other crucial parts of the program are (1) justice system coordination, and (2) community engagement.

A. *Justice System Coordination*

LEAD participants commit fewer new crimes than similarly-situated nonparticipants.²⁴ This is not to say that, as a group, LEAD participants commit no future law violations. Decades of maladaptive coping skills don't give way overnight, and LEAD doesn't have the resources to meet every participant's housing, emotional, and economic needs instantly.

When LEAD participants are encountered by police and found to have committed additional offenses, officers have the authority to either redivert or book and refer the individual for prosecution (and in any event, some new charges are not divertible). Additionally, past cases that have languished in a filing queue for months, old warrants, or probation supervision may still be lingering from a participant's pre-LEAD life and may pop up after the participant joins LEAD and has begun to do better. LEAD entails coordination among police, prosecutors, and case managers to handle all of these cases and encounters in a way that best supports the individual's plan for stabilization and recovery. This may mean refraining from booking someone on a nonextraditable warrant from another state who just got a job because an arrest would actually be counterproductive to public safety interests if it caused the individual to lose her job. Coordination may mean not filing new cases, or moving to quash warrants in old cases, because the participant is doing better than they have for decades and it would be counterproductive to interrupt that progress. Prosecutors also dialogue with victims in old or new cases to make sure they understand and support this alternative response to the harm they experienced—and we find that many do.

B. *Community Engagement*

LEAD project managers are in constant dialogue with the constituency that has traditionally advocated for jail and prosecution, which communities see as a means of validating the losses they experience when people suffering from addiction do damage. Community members

24. *Id.*

can initiate referrals to the program, rather than calling 911 or deluging City Hall with “See It, Send It” complaints. Communities also receive rich and nuanced information back about the progress of participants and system-level impediments to LEAD efficacy, such as a lack of housing for a population with criminal conviction history or active drug use. As a result, neighborhoods where LEAD operates have become a strong and consistent base of support for this new policy, including by supporting elected officials who are willing to champion our approach.

We are writing as partners to support a new paradigm for responding to our County’s behavioral health crisis, but we do not claim that it is perfect or nearly finished. For the time being, we have a sequencing problem: Due to resource constraints, LEAD isn’t available in all communities that fall under the jurisdiction of the King County Prosecutor. But after evaluation of the impact of reduced of prosecution of drug users, we have a moral obligation to avoid inflicting harm on the vulnerable people in our community. Now that the King County Prosecuting Attorney has determined that prosecution of most possession cases is an expensive and harmful exercise in futility,²⁵ we cannot justify filing charges in these cases. There is, then, great urgency to push local, state, and federal officials to invest at scale in evidence-based alternatives like LEAD, an effort we are both deeply committed to seeing through.²⁶

C. *LEAD Success Stories*

“M.M.” is a LEAD client who was referred to the LEAD program by law enforcement due to persistent criminal activity and constant drug use. In August 2013, law enforcement identified M.M. as someone visibly present in the community and constantly engaged in drug activity. M.M. had a number of felony and misdemeanor convictions prior to her LEAD referral, as well as several outstanding warrants from other

25. This stance evokes Justice Harry A. Blackmun’s announcement in 1994 that “[f]rom this day forward, I no longer shall tinker with the machinery of death,” when he decided to vote to reverse capital convictions as a general principle. Justice Blackmun concluded that “the death penalty experiment has failed” and that it was time to discard the “delusion” that “no sentence of death may be constitutionally imposed under our death penalty scheme.” Linda Greenhouse, *Death penalty is denounced by Blackmun*, NEW YORK TIMES (Feb. 23, 1994), <https://www.nytimes.com/1994/02/23/us/death-penalty-is-renounced-by-blackmun.html> [<https://perma.cc/UFQ8-37TS>].

26. Of all large U.S. jurisdictions, Seattle and King County are the closest to taking this approach to scale, and yet we estimate that at most 1/10 of all appropriate LEAD referrals in the County are presently being referred to community-based care. The Washington State legislature is now considering several proposals to fund LEAD-aligned police diversion programs across the state, and other states (California, Colorado, Hawaii and North Carolina) have already committed state-level funding to multisite LEAD pilots. In the federal Comprehensive Addiction and Recovery Act (CARA) in 2018, bipartisan congressional efforts led by Rep. Pramila Jayapal (D-WA) and Rep. Jim Sensenbrenner (R-OH) resulted in a small first-time grant program for LEAD initiatives. There are efforts to increase funding in the current federal budget cycle.

jurisdictions that had not been addressed. M.M. was deep in the throes of her addiction and taking care of outstanding criminal cases was not at the top of her priority list. Once M.M. was referred to the LEAD program, the LEAD case manager began to work with M.M. to address and identify some strategies to reduce the visible drug use and contact with the police. Success for M.M. did not happen overnight. In fact, M.M. was rearrested (even after the LEAD referral), and her two new felony cases were sent to the King County Prosecutor's Office and received by the prosecutorial liaison assigned to LEAD. The LEAD case manager continued with intensive case management, and less than a year after being rearrested, M.M. completed a long-term inpatient treatment that utilized equestrian therapy to address chemical dependency. M.M. began to stabilize after completing treatment, and she was able to access housing resources, engage in aftercare chemical dependency treatment, and address her outstanding warrants. The LEAD case manager continued to communicate with the prosecutorial liaison regarding M.M.'s treatment and law enforcement communicated to the prosecutorial liaison that they had not seen M.M. in the area for almost a year. Based on this information, the Prosecutor's Office decided to dismiss the two new felony drug possession cases.

"T.W." is a LEAD client with an extensive criminal history—most recently, on Violation of the Uniform Controlled Substance Act (VUSCA) delivery charges. When T.W. started working with the Vital Team, he was not interested in services and felt that since he was a high functioning individual, he didn't need much help. T.W. had been low-level dealing to support his chemical dependency. Even after being enrolled with Vital, he continued dealing and not engaging with his case manager. When the Prosecutor's Office accordingly filed a new VUSCA delivery charge, T.W. faced a potential prison sentence due to his criminal history. Once the case was filed, the Vital Team started seeing improvement with T.W.'s engagement. He began going to intensive outpatient chemical dependency treatment and avoiding his usual hangouts. T.W. got a job and started looking for housing. The Prosecutor monitoring T.W.'s case agreed to continue his case for four months to see whether T.W. could maintain all the new positive aspects of his life. During that four-month period, T.W. continued to improve—even obtaining transitional housing which later helped him obtain permanent housing. The Prosecutor's office and T.W.'s defense attorney came up with a resolution that allowed T.W. to keep his job, attend treatment, and stay in the community. Since completing his sentence, T.W. has not been booked into the King County Jail or picked up any new charges and is now saving money for permanent independent housing.

D. Elements of The New Paradigm

Eight years of practice with the flagship LEAD program has allowed operational partners to identify key components²⁷ of a new par-

27. LEAD core principles are available at www.leadbureau.org/resources.

adigm to replace our failed experiment of stigma and punishment as a response to traumatized and ill people.

Since we launched the nation's first LEAD program in 2011, we've learned a great deal. There is hunger for alternatives to the War on Drugs in local jurisdictions nationwide, and once proof of concept for LEAD was shown through independent evaluations in 2015–16,²⁸ replication efforts exploded around the country.²⁹ Through trial and error, by hosting learning collaboratives with colleagues across the country struggling with this question, and through application of research-based principles on trauma and human behavior, we've been able to distill key components of the new paradigm. Diversion programs need to be:

- *Effective* (meeting actual needs of individuals affected by substance use disorder; culturally competent; applying harm reduction concepts to engage the most marginalized and to connect with people not ready to start treatment)
- *Pleasing* (capable of commanding widespread popular support by meeting the actual legitimate needs of neighborhoods and public safety groups)
- *Sustainable and scaled* (the alternative needs to be as robust and available as jails and courts are. Jails are always open; courts don't have filing limits. We have to make the alternative approach as accessible and capable of receiving all potential participants as the jail and court systems are.)

Diversion or deflection is not the goal, but the entry point. It is critically important to do more than “deflect” cases from the formal justice system. Excessive focus on the diversion or deflection aspects of new approaches make criminal justice reform seem to be about a one-time transaction in which the system lets go of someone it would previously have handled poorly. In fact, the new paradigm must be about not just letting go, but stepping up again and again. We always describe LEAD as “more, not less.” It is not enough to decline to file. We must instead explain what we are doing and acknowledge the real problems neighborhoods encounter. What we offer in place of the old system needs to be sustained, individually-crafted, and measured by its actual success in reducing recidivism and improving individual and community wellbeing.

Beyond “treatment.” It's also important to define the support needed by individuals who struggling with substance use disorders as more broad than just “treatment.” Very often, drug use is a response to trauma,³⁰ which is exacerbated by conditions like homelessness and humiliation, and thus have to be addressed outside of standard “treatment” approaches. And treatment for opioid addiction, while crucial, is a more

28. LEAD National Support Bureau, evaluations page, www.leadbureau.org/evaluations [https://perma.cc/VA7C-U3FW] (last visited Feb. 25, 2019).

29. *LEAD: Advancing Criminal Justice Reform in 2019*, LEAD NATIONAL SUPPORT BUREAU (2019) www.leadbureau.org [https://perma.cc/3HLF-D3PE].

30. *E.g.*, Gabor Maté, *IN THE REALM OF HUNGRY GHOSTS* (2010).

straightforward matter than treatment for use of other drugs. Medication Assisted Treatment (MAT) has expanded and improved in recent years and is the gold standard for medical response to opioid addiction. However, many people who commit crimes related to substance use disorder are using alternative drugs rather than (or in addition to) opioids—other drugs for which there may be no tidy, prescribed course of treatment. Even for opioid users, conditions that lead to the impulse to use illegal drugs (trauma and loss, exacerbated by ongoing stresses and stigma) tend to range beyond what can be readily addressed by traditional treatment programs. A public health response to substance use disorder requires going well beyond the confines of what is normally understood under the rubric of “treatment,” and must include consideration of trauma recovery, housing, and mental health.

Harm reduction framework. Finally, the alternative approach needs to be framed in harm reduction terms, not abstinence. At any given time, perhaps 90 percent of those who use drugs compulsively and harmfully are either not willing to try to end their drug use or are failing in their attempts to do so. Even as we recognize that most people ultimately need to end their problematic drug use in order to achieve optimal outcomes, we need a public policy response that is thoughtful of, rather than counterproductive for, the majority who will have some ongoing use at any given time. For this reason, we designed the LEAD approach to embrace a wider field of participants than the PAARI or Angel programs, which involve law enforcement accepting individuals who are ready to enter treatment and responding nonpunitively to indicators of past use, while instead connecting these individuals to treatment. A stance that embraces only those ready and able to try abstinence is a welcome development, but doesn’t answer the problem of how police and prosecutors should respond to those who continue to use illicit drugs in the interim. These two approaches can operate side by side, but it’s important to make provisions for a new paradigm that embraces those who continue to use or fall back into use after attempts at abstinence.

These core principles are a matter of pragmatism and efficacy, not ideology. We would both prefer to see people in our communities stop using drugs harmfully. The question is how to accomplish that. Harm reduction and attention to all of the circumstances that individuals struggling with harmful drug use confront is just the beginning of a road that does often lead to abstinence and recovery. The goal is the same, but the success rate is greater when we meet people where they are. It’s important not to leave them there, however; this is why the success of LEAD and similar initiatives is measured in terms of actual reduction in problematic behavior. Though treatment is not a required component of LEAD participation, more than 50 percent of those who enter LEAD with substance use issues do engage in treatment. Many of these participants end up free of any illicit drug use, which is an amazing accomplishment for people who officers and community members expected to find dead on the streets.

These initiatives have been launched as a community response to behavioral health problems, but the general principles of the approach (do no harm; equity; and efficacy) may also support reconsideration of our approach to crimes of violence against individuals. Survivors of violence often share some key demographic characteristics with LEAD participants. We would do well to consider interventions and support for victims of violence based on their status as crime victims, whether or not criminal charges have resulted from their experience.

Conclusion

At this point in the movement to end the War on Drugs, we must pivot from discussion of what needs to *stop* and instead take seriously what needs to *start* in order to make this paradigm shift. This honors one of the recognized principles of the harm reduction movement³¹—not to minimize the harm done by use of licit and illicit controlled substances. We should stop pushing any new people into the maw of a destructive stigma and punishment cycle because it doesn't generally help and it often makes things worse. People should not be prosecuted, except in exceptional circumstances, for possession of small amounts of illicit drugs. To ensure that policy can be widely supported, all energy should be mobilized to create and sustain an alternative response to the real harms caused by substance use disorder, one that is research-based and employs what we know about how people recover from trauma and let go of counterproductive behavior. LEAD is an attempt to embody these principles in a growing number of jurisdictions around the country.

31. *Principles of Harm Reduction*, HARM REDUCTION COALITION (2019) <https://harmreduction.org/about-us/principles-of-harm-reduction> [<https://perma.cc/53GD-SLZS>].