

Seton Hall University

eRepository @ Seton Hall

Law School Student Scholarship

Seton Hall Law

2023

Post v. Pre Arrest: A Diversionary Drug War

Angelica B. Manos

Follow this and additional works at: https://scholarship.shu.edu/student_scholarship



Part of the Law Commons

Abstract

This analysis considers the few diversionary models surrounding drug charges, and whether they are the correct solution to the overcriminalization of drug laws or just a new pseudo-carceral system. While diversion programs are meant to be a progressive push in order to move addicts away from the criminal justice system, these programs are not enough to make the change from a punishment regime to one of purely rehabilitation. This analysis expands on discretionary problems, surveillance issues, and social stigmas that continue under both the post-arrest and pre-arrest diversion models.

This analysis finds that a nation-wide decriminalization of drugs would be a superior solution to target rampant addiction rather than punish those suffering from a disease with overbroad criminal laws.

Table of Contents

INTRODUCTION 4

I. HISTORY OF DIVERSION SURROUNDING DRUG CHARGES7

A. Arrests Relating To Drug Charges 7

B. Beginning of Diversion Programs 10

II. POST-ARREST DIVERSION 11

A. Background11

B. Programs12

 i. Drug Courts 13

 ii. State/County Implemented Programs16

C. Problems With Post-Arrest Diversion17

 i. Increased Surveillance/Incapacitation17

 ii. Stigma19

 iii. Institutional Management of Drug Courts 20

III. PRE-ARREST DIVERSION25

A. Background25

B. Programs27

C. Police Discretion.....29

IV. **OVER CRIMINALIZATION OF DRUG USE** 30
 A. A Therapeutic Model Under Criminal Regime 30
 B. Decreasing the Substantive Criminal Footprint 32

V. **CONCLUSION** 35

Introduction

Drug possession is the crime of “willfully possessing illegal substances.”¹ This crime alone accounts for 80% of all drug-related arrests in the United States.² While the Supreme Court struck down a California statute which made the status of drug addiction a criminal offense, making it black letter law that no individual shall be prosecuted for their status including addiction, the country’s criminalization of drug use has continued.

Richard Wheeler was hopelessly addicted to the narcotic Vicodin for 15 years. After suffering from a lower back injury while working, he was prescribed Vicodin which led to a ruthless love affair with opioids. Because his tolerance for Vicodin continued to rise as he took it, he needed much more of the drug than he was prescribed. Richard tried previously to get help, participating in outpatient treatment before the disease ultimately won its fight. In the year 2004, as many addicts going through withdrawal do, Richard dropped off a prescription written to be filled for someone else in order to obtain his drug of choice rather than go to the streets for it. When the pharmacist was made aware of this false-prescription, the incident was reported to law enforcement officers who were waiting for Richard when he arrived to pick it up. After being questioned, Richard admitted to signing his friend’s name in order to pick up the script. Facing arrest, Richard pleaded with officers telling them he was severely addicted to Vicodin, taking up to 90 pills a month. An addict in desperation, Richard told police that he “would do anything to obtain these pills.”

After being arrested, Richard voluntarily entered outpatient treatment at the Skyway House, where he was determined to take control of his life and fight back against his addiction

¹ “Drug Possession,” Justia, October 16, 2021, <https://www.justia.com/criminal/offenses/drug-crimes/drug-possession/>.

² Wendy Sawyer and Peter Wagner, “Mass Incarceration: The Whole Pie 2020,” Mass Incarceration: The Whole Pie 2020 | Prison Policy Initiative, 2020, <https://www.prisonpolicy.org/reports/pie2020.html>.

which had been winning for so long. Unfortunately, because Richard had forged his friend's signature the underlying felony complaint he was charged with violated a health and safety code. Because of this charge, Richard's possession was no longer defined as a "nonviolent drug possession offense," and he was denied treatment under the Substance Abuse and Crime Prevention Act of 2000. Instead, Richard was sentenced to fight his disease on his own for two years in prison.

Addiction takes no prisoners. It targets those in big cities and small suburbs, those with white collar jobs or blue. This epidemic has run rampant under the guise of many names for decades- so why has nothing improved? Rather than normalize rehabilitation centers or clinical programs, individuals with the disease of addiction flood prison hallways and tiny jail cells. The slippery slope is drifted down by many, and what waits for them at the bottom is a record with felony charges, unpayable fines, and high rates of recidivism. Without getting to the core of the problem the system continues to eat people alive, aiming for the ones with the big red bullseye on their backs. The court in the Wheeler case had stated that the principal focus of the health and safety statute was actually aimed at forgery of a prescription for drugs,³ making it clear that the target of these criminal laws are the addicts themselves.

In an incarceration system set up to lock away those suffering under the name of public safety and the common good, diversion programs were created to alter the pattern that the American prison system has repeated for years. With overpopulated prisons and extreme rates of drug use continued throughout the country, diversion programs are meant to help those before they get in too deep- before hitting the bottom of that slippery slope. While progressive in

³ See People v. Wheeler, 127 Cal. App. 4th 873, 879 (3rd Cir. 2005).

thought, diversion programs seem to be a band-aid for the over criminalization of drug laws throughout the United States.

This analysis begins with the history of drug charges and how the War on Drugs pushed mass incarceration and a “tough on crime” regime. Starting with the beginning of diversion programs and how they came to rise, the second section takes a deeper dive into post-arrest diversion and their stated high success rates using programs such as drug courts. After acknowledging positives that surround post-arrest diversion, this analysis explains the flaws in the system which include: increased surveillance, social stigmas, and institutional discretion. Evaluating the post-arrest tactic helps to conclude that these diversionary models may be doing more harm than good to first-time drug offenders.

The third section of this analysis inspects the more progressive and upcoming system of pre-arrest diversionary models. While pre-arrest is a newer framework, there are a few influential programs taking the “lead” across the country, with hopes of taking arrest out of the situation for first-time offenders found with minor possession completely. Although these programs are exciting for youth and adult addicts never faced with the system previously, putting power in the hands of police discretion is a worrisome aspect. What comes with police discretion may also require an entirely new system of policing, with extreme reforms and training systems put into place. This analysis finds that pre-arrest diversion is plagued by the same issues as post-arrest diversion, just in different discretionary hands. Because of the blemishes plaguing diversionary programs, the fourth part of this analysis describes the overcriminalization of drug use, discussing why the therapeutic model under a criminal regime will never suffice.

This study concludes with an ultimate request: in order to improve diversion programs reformers must minimize cutting the broad overcriminalization of drug use. The controlling issue

are the excessive drug laws which target addicts despite the Robinson holding. So long as there is overcriminalization of drug laws, there will always be fatal flaws within diversion programs.

I. History of Diversion Surrounding Drug Charges

Diversion is typically defined as an agreement between an individual accused of an offense and the judicial system, whereby the individual agrees to fulfill certain conditions in lieu of being prosecuted.⁴ What began as a “tough on crime” stance to the War on Drugs era, soon became an overcriminalization of drug laws leading to overpopulated prisons filled with individuals charged with drug crimes.⁵ With hopes of reforming the system for those suffering from addiction, progressives pushed for diversionary programs with a focus on rehabilitation rather than incarceration.⁶ Created with good intentions and a desire for change within the prison system, diversion programs were born.

A. Arrests Relating To Drug Charges

The drug epidemic that has barreled through the United States for decades has had a devastating impact on every part of the country. The disease that is known as drug addiction does not discriminate against those based on race, gender, income, or religion, and the incarceration system is happy to greet those who are charged with drug offenses with open arms.

The United States has the largest prison population in the world, with over 2.3 million adults incarcerated.⁷ Out of the millions detained, 1 in 5 incarcerated people are locked up for a

⁴ Rev. Code Wash. § 13.40.080

⁵ See William J. Stuntz, *The Collapse of American Criminal Justice* (Cambridge, MA: Belknap Press of Harvard University Press, 2013), 274.

⁶ See Sally T. Hillsman, Pretrial Diversion of Youthful Adults: A Decade of Reform and Research, 7 Just. Sys. J. 361, 372 (1982)

⁷ See United States v. Gregg, 435 Fed. Appx. 209, (4th Cir. 2011).

non-violent drug offense.⁸ With over 1 million drug possession arrests every year, there are about six times as many arrests for drug possession as for drug sales.⁹ Today, drug offenses constitute the most prevalent ground for arrest in the country.¹⁰ The reason these numbers have continued to grow since the 1980's relates back to the War on Drugs, manufactured by the Nixon administration and further pursued by President Reagan. The President's intention to make drug use public enemy number one escalated quickly. While addiction was a reasonable concern, the media pushed scare tactics in order to convince the public that this problem could only be solved in one way: being tough on crime. While in the early 1970s the United States maintained a philosophical goal of rehabilitation, as the "war on drugs" made headlines, theories began to shift.¹¹ In order to completely skew the public's mindset, drugs were ultimately paired with violent crimes, both politically and in the mainstream media.¹² Many policymakers began to conclude that "nothing works," in rehabilitation and the narrative that treatment was ineffective as crime control became the growing principle.¹³ With this shift, there was an increase in sentence-lengths, an expansion of criminal offenses, and a decline in rehabilitation.¹⁴ In the decade of the 1980s, the number of arrests nationwide grew by 40%, with the largest increases in arrest rates being for violation of laws prohibiting drug sales, and possession.¹⁵ During this

⁸ Wendy Sawyer and Peter Wagner, "Mass Incarceration: The Whole Pie 2020," Mass Incarceration: The Whole Pie 2020 | Prison Policy Initiative, 2020, <https://www.prisonpolicy.org/reports/pie2020.html>.

⁹ Wendy Sawyer and Peter Wagner, "Mass Incarceration: The Whole Pie 2020," Mass Incarceration: The Whole Pie 2020 | Prison Policy Initiative, 2020, <https://www.prisonpolicy.org/reports/pie2020.html>.

¹⁰ See Mary Fan, Street Diversion And Decarceration, 50 Am. Crim. L. Rev. 165, 167 (2014).

¹¹ See Don Stemen, Beyond the War: The Evolving Nature of The U.S. Approach to Drugs, 11 Harv. L. & Pol'y Rev. 375, 386 (2017).

¹² See Shima Baradaran, Drugs and Violence, 88 S. Cal. L. Rev. 227, 243 (2015)

¹³ See Don Stemen, Beyond the War: The Evolving Nature of The U.S. Approach to Drugs, 11 Harv. L. & Pol'y Rev. 375, 386 (2017).

¹⁴ Id.

¹⁵ See Steven Belenko, The Challenges of Integrating Drug Treatment Into The Criminal Justice Process, 63 Alb. L. Rev. 833, 835 (2000)

period, arrests for drug law violations grew at four times the rate of arrests for violent felonies.¹⁶ While a majority of those incarcerated were drug offenders suspected of no other crimes, the laws controlling their punishment were created for violent offenders.¹⁷ Because of this, many nonviolent drug offenders were punished both for crimes they had committed and for the violence of the drug markets that they participated in.¹⁸ While the years went on and the administrations changed, the country has yet to see a decline in those arrested on drug charges. Because as we have come to learn, drug punishment does not actually deter violence, violence levels have remained high while drug punishment has only continued to grow.¹⁹ In fact, drug arrests have actually tripled since 1980, resulting in over 31 million people being arrested for drug offenses since the war on drugs began.²⁰

Drug addiction among the masses incarcerated is a clear common trait. Data on prison inmates in 1997 had 83% of the state prison population being substance-involved.²¹ While a law which makes a criminal offense of a disease would be thought to be an infliction of cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments,²² the majority of those in the prison system are suffering from the disease of addiction. Once in prison, according to data from 2004, only 14.1 percent of inmates who used drugs in the month before their offense had participated in treatment since their admission to prison.²³ While laws targeting status of a

¹⁶ Id.

¹⁷ See William J. Stuntz, *The Collapse of American Criminal Justice* (Cambridge, MA: Belknap Press of Harvard University Press, 2013), 274.

¹⁸ See William J. Stuntz, *The Collapse of American Criminal Justice* (Cambridge, MA: Belknap Press of Harvard University Press, 2013), 288.

¹⁹ Id.

²⁰ See Michelle Alexander, "The Rebirth of Caste," in *The New Jim Crow* (The New Press, 2020), 76.

²¹ See Steven Belenko, The Challenges of Integrating Drug Treatment Into The Criminal Justice Process, 63 Alb. L. Rev. 833, 835 (2000)

²² See Robinson v. California 370 U.S. 660, 676 (1962)

²³ See Leslie E. Scott, Drug Decriminalization, Addiction, and Mass Incarceration: A Theories of Punishment Framework For Ending The War on Drugs. 48 N. Ky. L. RRev. 267, 289 (2021)

person are discriminatory and not to be implemented, the rates at which the prison systems are filled with substance-addicted persons seems to have targeted a certain type of individual. An onerous problem when arresting substance-addicted individuals is that without the proper help after their sentence is completed, their addiction will only push them to continue pursuing criminal activities. Thrown back into the same environment with a new record and a severe addiction problem, recidivism is inevitable. The NCASA reported a high rate of recidivism among substance-involved inmates compared to the rest of the population, due to the failure to provide effective treatment.²⁴ Increased recidivism rates of inmates who are addicts proves that only relying on the incarceration system fails to focus on the main issue: drug addiction leading to criminal conduct, and a repetition of the same cycle.²⁵ While our criminal system deems addiction to be of one's own volition that must be punished through fines, probation, or jail time, the question further presents itself - is mass incarceration the answer to addiction, or is there another way to rehabilitate and restore our country and criminal justice system?

B. Beginning of Diversion Programs

Massachusetts Criminal law defines "diversion," as the practice of moving a case away from the criminal system to find effective alternatives.²⁶ Formal diversion programs were created in the 1960s, pushed by the discontent of reformers of the sixties in addressing deeper problems involved in criminal drug cases.²⁷ The prompt for change in the U.S. judicial system's approach to drug addicted offenders stemmed from the case of Robinson v. California, where the Supreme Court struck down a California statute which made the status of drug addiction a

²⁴ See Julie A. Warren, Defining the Opioid Crisis and the Limited Role of the Criminal Justice System Resolving It, 48 U. Mem. L. Rev. 1206, 1207 (2018)

²⁵ Id. at 1208.

²⁶ See 1 LNPG: Massachusetts Criminal Law §10.05

²⁷ See Sally T. Hillsman, Pretrial Diversion of Youthful Adults: A Decade of Reform and Research, 7 Just. Sys. J. 361, 372 (1982)

criminal offense.²⁸ The Court held that penalizing drug addiction is the same as criminalizing a disease, which would be cruel and unusual punishment under the Eighth and Fourteenth Amendments.²⁹ Following the judiciary’s lead, Congress passed the Narcotic Addict Rehabilitation Act of 1966, which gave courts the authority to sentence drug addicts who violated Federal criminal laws to treatment programs rather than imprisonment.³⁰ California began to pave the way for alternative programs, codifying sections 1000-1000.4 of the California Penal Code in 1972, which authorized the courts to “divert” from the normal criminal process when those charged met the requirements of not yet having gone to trial and found to be suitable for treatment at the local level.³¹ While states slowly began to follow suit, many differing programs came about and a post-arrest diversionary tactic was implemented around the country.

II. Post-Arrest Diversion

While diversionary programs have accumulated throughout the years under different names and different ideologies, the most typical type of diversion in the United States is known as post-arrest diversion. Post-arrest diversion as defined by the National Association of Pretrial Services Agencies is, “a voluntary option which provides alternative criminal case processing for a defendant charged with a crime that ideally, upon successful completion of an individualized program plan, results in a dismissal of the charges.”³² These traditional diversion programs occur after a person has already been arrested, and commonly have already had charges been filed against them.³³ Ranging from specialized problem-solving courts to state implemented

²⁸ See *Robinson v. California*, 370 U.S. 660, 668 (1962)

²⁹ *Id.*

³⁰ See Megan N. Krebbeks, *One Step at a Time: Reforming Drug Diversion Programs in California*, 13 *Chap. L. Rev.* 417 (2010).

³¹ *Id.* at 420.

³² See Christine S. Scott-Hayward, *Rethinking Federal Diversion: The Rise of Specialized Criminal Courts*, 22 *Berkeley J. Crim. L.* 47, 56 (2017).

³³ *Id.*

programs, eligible defendants apply for admission and aim for rehabilitation rather than incarceration. What seemingly began as a hopeful alternative to being placed in a prison system for minor drug charges, post-arrest diversion programs carries many negatives of its own. From abuse of discretion to continued stigma, post-arrest diversion tends to grapple with many of the same harms that come with incarceration itself.

A. Background

_____ Post-arrest diversion, or otherwise known as pre-trial diversion, is said to provide another avenue by which the incarceration process can be avoided. Usually, a decision to allow a defendant to enter a pre-trial diversion program is a decision not to prosecute under the scope of prosecutorial discretion.³⁴ While seemingly progressive, post-arrest diversion programs are selective in who it considers. Even though it is dependent on the program and the state, all programs have eligibility criteria and defendants chosen to participate in post-arrest diversion programs are typically first-time offenders with non-violent charges and would likely do well in a rehabilitative environment.³⁵ In California, a person is ineligible if they are charged with possession of small amounts of narcotics while in the possession of a loaded firearm, whereas in Florida, any person is eligible if they are charged with a non-violent felony of the third degree.³⁶ Most pre-trial programs require that the application be made by the defendant seeking admission to the program, where an investigation follows.³⁷ In New Jersey, consent to admission must be granted by both a program administrator and the prosecutor.³⁸ These programs require that the defendant be admitted into a period of supervision where the criminal charges are suspended for

³⁴ 3 Defense of Narcotics Cases § 6.02 (2021)

³⁵ 3 Defense of Narcotics Cases § 6.02 (2021)

³⁶ Id.

³⁷ Id.

³⁸ Id.

the time being.³⁹ In California, while the defendant is receiving treatment, the case is managed by the probation department which files reports with the trial court regarding the defendant's participation in treatment.⁴⁰ Only upon successful completion of the required conditions are the criminal charges then dismissed, resulting in no conviction.⁴¹ If the defendant does not finish the program or fails to overcome their addiction in the eyes of the State, criminal proceedings are reinstated.⁴²

B. Programs

i. Drug Courts

Drug Courts emerged as a direct response to the growing number of drug-related cases after the spike during the "War on Drugs."⁴³ The first modern drug court was opened in 1989 in Dade County, Florida.⁴⁴ What originally began as problem-solving courts taking on many issues within the incarceration system, the idea of drug courts soon grew rapidly.⁴⁵ In 1997, the National Association of Drug Court Professionals ("NADCP") defined drug courts as having ten key components, ranging from who is identified as an eligible participant to ongoing judicial interaction.⁴⁶ These courts operate at the pre-trial stage to instead divert offenders into drug treatment programs rather than the usual prison system.⁴⁷ In these systems, the judge takes on a

³⁹ Id.

⁴⁰ See Gregory A. Forest, Sealing the Record: Helping Rehabilitated First-Time Drug Offenders to Get Jobs, 35 McGeorge L. Rev. 597, 598 (2004)

⁴¹ Id.

⁴² Id.

⁴³ "National Institute of Justice- Update: The Drug Court Movement."
<https://www.ojp.gov/pdffiles/drgctmov.pdf>

⁴⁴ See Stephen Hunter, New Jersey's Drug Courts: A Fundamental Shift From The War on Drugs To A Public Health Approach For Drug-Related Crime, 64 Rutgers L. Rev. 795, 797 (2012).

⁴⁵ See Miller, Embracing Addiction: Drug Courts and the False Promise of Judicial Interventionism, 64 Ohio St. L.J. 1479, 1482 (2004)

⁴⁶ See Stephen Hunter, New Jersey's Drug Courts: A Fundamental Shift From The War on Drugs To A Public Health Approach For Drug-Related Crime, 64 Rutgers L. Rev. 795, 797 (2012).

⁴⁷ See Miller, Embracing Addiction: Drug Courts and the False Promise of Judicial Interventionism, 64 Ohio St. L.J. 1479, 1482 (2004)

direct role as a participant in the defendant’s rehabilitative process.⁴⁸ The drug court movement began by “a few hardworking and charismatic judges trying to find a way to provide valuable help to drug users, and to mitigate the severity of mandatory sentencing in drug cases.”⁴⁹ The original drug court model operated on a therapeutic treatment model, planning these courts around the idea of treating “a specific problem these defendants have which makes them contribute to criminal behavior.”⁵⁰ As of 2010, more than 2,500 drug court programs are operating across the country, becoming one of the most important decarceration innovations.⁵¹

New Jersey’s implementation of drug courts arose from an extremely draconian response to the war on drugs, despite it being a more moderate state.⁵² After enacting mandatory minimum sentences and excessive incarceration for drug offenses, these policies began to fail and target low income, minority communities, which led the State to begin to experiment with drug courts.⁵³ New Jersey decided to take on pilot programs in Camden, Essex, Union, and Passaic counties in the mid-1990s, modeling them after NADCP’s key components.⁵⁴ Because the programs were regarded as successful, nearly ten years later New Jersey moved forward with a statewide implementation of drug courts.⁵⁵ The state created “four progressive phases” of substance abuse treatment and probationary supervision: stabilization, positive change, relapse prevention, and commencement.⁵⁶ These four phases are tracked by a drug court team, which consists of court staff, probation officers, treatment counselors, substance abuse evaluators, and

⁴⁸ Id. at 1482.

⁴⁹ See Christine S. Scott-Hayward, Rethinking Federal Diversion: The Rise of Specialized Criminal Courts, 22 Berkeley J. Crim. L. 47, 57 (2017).

⁵⁰ Id.

⁵¹ See Mary Fan, Street Diversion And Decarceration, 50 Am. Crim. L. REv. 165, 180 (2014).

⁵² See Stephen Hunter, New Jersey’s Drug Courts: A Fundamental Shift From The War on Drugs To A Public Health Approach For Drug-Related Crime, 64 Rutgers L. Rev. 795, 797 (2012).

⁵³ Id.

⁵⁴ Id.

⁵⁵ Id.

⁵⁶ Id. at 810.

the prosecutor and defense attorney.⁵⁷ The goal of the team is to help the defendant through the process of recovery in a more personal, endearing way.⁵⁸ By 2010, the AOC had reported that New Jersey Drug Court graduates were “re-arrested for a new offense at only 16%, while the rate of incarceration in a state prison was 4%.”⁵⁹

Because of the claimed success rate of drug courts, the Legislature broadened the scope of admittance in 2012, permitting a court to sentence a qualified offender to Drug Court even if the offender does not seek admission and is a third-degree offender.⁶⁰ In the case of State v. Maurer, the Superior Court of New Jersey reversed a judgment finding the defendant ineligible for Drug Court, focusing on the different “tracks” offered to offenders in the state.⁶¹ In Maurer, the defendant was a twenty-five year old with a history of several controlled dangerous substance offenses.⁶² When defendant was found during surveillance of an area in Camden known for its drug activity, police detained him and found a stolen handgun in his vehicle.⁶³ While awaiting his sentence, defendant entered into a substance abuse counselling program and applied for admission to Drug Court in Gloucester County.⁶⁴ The district court denied defendant’s admission citing his prior offenses.⁶⁵ The appellate court focused on the two separate tracks for admission into Drug Court, set out by the Manual. Under the first track, the applicant must have committed a crime that is subject to incarceration, and the judge must find the applicant satisfies

⁵⁷ Id.

⁵⁸ Id.

⁵⁹ Id. (These numbers were compared with the rate of re-arrest for drug offenders released from prison at 54% and a re-conviction rate of 43%).

⁶⁰ See State v. Maurer, 438 N.J. Super. 402, 414 (2014).

⁶¹ See State v. Maurer, 438 N.J. Super. 402, (2014).

⁶² Id. at 406.

⁶³ Id. at 407.

⁶⁴ Id.

⁶⁵ Id.

nine factors.⁶⁶ Under this track, the judge imposes a five-year period of special probation.⁶⁷ Under track two, an applicant is eligible for Drug Court if the person has a substance dependence, has not been previously convicted for a serious violent crime, did not possess a firearm at the time of the offense, and is no danger to the community.⁶⁸ Because of the stringent terms of the Manual being at odds with the broadening of amendments by the Legislature, the court found a modification of the Manual's guidelines to be necessary in order to take affirmative steps to ensure fairness in sentencing.⁶⁹ While drug courts may have expanded the extremely stringent terms of eligibility, most of these specialized courts still operate only after a guilty plea is entered.⁷⁰

ii. State/County Implemented Programs

While most drug courts contain similar basic elements, such as intervention being immediate and the judge taking a hands-on approach,⁷¹ because of differing local community problems, some states take other diversionary approaches into their own hands. The Drug Treatment Alternative to Prison program, established by the Kings County New York District Attorney, Charles Hynes in 1990, was one of the first programs created to divert non-violent offenders with one or more prior felony convictions and a history of drug abuse.⁷² Those accepted into the program have their sentences deferred as they complete intensive drug

⁶⁶ Id. at 413.

⁶⁷ Id.

⁶⁸ Id.

⁶⁹ Id. at 418.

⁷⁰ See Christine S. Scott-Hayward, Rethinking Federal Diversion: The Rise of Specialized Criminal Courts, 22 Berkeley J. Crim. L. 47, 69 (2017).

⁷¹ See The Honorable Peggy Fulton Hora, Therapeutic Jurisprudence and The Drug Treatment Court Movement: Revolutionizing The Criminal Justice System's Response To Drug Abuse In America, 74 Notre Dame L. Rev. 439, 452 (1999).

⁷² See Steven Belenko, The Challenges of Integrating Drug Treatment Into The Criminal Justice Process, 63 Alb. L. Rev. 833, 847 (2000).

treatment for sixteen to twenty-four months.⁷³ Because of the original success of the program, in 1998 its population was expanded to also accept those who were motivated by their addiction to commit non-violent property offenses.⁷⁴ Soon after, the program changed from a deferred prosecution model to a deferred sentencing model, having defendants plead to a felony before being accepted into the program.⁷⁵ This shift in models raised the rate of retention from 64% to 74%.⁷⁶

Across the country, California, which we have seen take the lead in many ways when it comes to progressive diversionary tactics, enacted Proposition 36 in response to issues with existing diversion programs.⁷⁷ The main difference between California's other diversion programs and Proposition 36 is "the point in the judicial process at which the defendant is assigned to a treatment program."⁷⁸ This Proposition has participants enter a treatment program post-conviction.⁷⁹ A defendant is eligible for the program if they have a conviction for a nonviolent drug possession offense.⁸⁰ Although applicants are given this opportunity post conviction they have three chances at getting their case dismissed, specifically targeting "criminal recidivists."⁸¹

C. The Problems With Post-Arrest Diversion

While the once-progressive push has helped to focus on rehabilitation rather than incarceration for a select chosen few, diversion as a substitute has evils of its own. While post-

⁷³ Id.

⁷⁴ Id.

⁷⁵ Id.

⁷⁶ Id.

⁷⁷ See Megan N. Krebbeks, One Step at a Time: Reforming Drug Diversion Programs in California, 13 Chap. L. Rev. 417, 425 (2010)

⁷⁸ Id. at 425.

⁷⁹ Id.

⁸⁰ Id.

⁸¹ Id. at 431.

assert diversion helps to redirect a potential prison sentence, because most who go this route still plead guilty to charges, it could be seen as just an alternative form of social control for addicts.

i. Increased Surveillance/Incapacitation

While post-arrest diversion removes offenders from 24 hour surveillance in a prison facility, a constant watchful eye remains over these individuals. Drug courts see some form of incapacitation as necessary in order to remove individuals from social settings or unhealthy environments in order to treat their addiction.⁸² The question then becomes: does endorsing long periods of supervised diversion become a new way to incapacitate offenders rather than have them in shorter periods of incarceration. This model of criminal justice is sometimes referred to as “penal welfarism,” or a “rehabilitative ideal.”⁸³ David Garland, a theorist, considers penal welfarism to “combine due process and proportionate punishment with a correctionalist commitment to rehabilitation, welfare, and criminological expertise.”⁸⁴ While the goal of post-arrest diversion is rehabilitation for the disease of addiction, it creates a replacement model where “quasi-therapeutic disciplinary regimes” then take the place of traditional court.⁸⁵ In theory not being placed into a correctional facility sounds like the best route for many offenders, but these individuals soon become prisoners in a new way. Tracked by the system for potentially years on end, a usual participant is placed on probation and must follow strict requirements which include periodic drug and alcohol testing.⁸⁶ Ordinarily, most drug court programs also

⁸² See Miller, Embracing Addiction: Drug Courts and the False Promise of Judicial Interventionism, 64 Ohio St. L.J. 1479, 1487 (2004)

⁸³ Id. at 1510.

⁸⁴ Id.

⁸⁵ Id.

⁸⁶ Miss. Code Ann. § 9-23-3(1)

require a participant to attend appointments with probation officers, appear in court for in-person reviews, and attend substance abuse treatment as dictated by the drug court team.⁸⁷

Some see post-arrest diversion as a helpful tool when it comes to decarceration, in order to help the overflow of prison populations. While individuals may not be held in a jail cell, electronic surveillance is becoming more prominent in the role of rehabilitation and punishment. This wave of “e-carceration” has been criticized for presenting problems on the over-emphasis of control versus rehabilitation.⁸⁸ In this context, drug courts may be relying on “intensive judicial monitoring,” focusing on defendant accountability which expands judicial surveillance outside of the drug court context.⁸⁹ In this judicial monitoring model, because a judge is so integral to the defendant’s rehabilitation, the judge begins to play a surveillant role.⁹⁰ Allegra McLeod, a professor at Georgetown Law, argues that once a judge becomes the significant monitor of a defendant's compliance with court orders, “the judge’s role then becomes investigative supervision on behalf of the state.”⁹¹ This type of surveillance then presents potential liberty-infringing risks posed by courts,⁹² and incarceration may seem like a better alternative to many arrested for minor drug crimes.

ii. Stigma

A main contention for many offenders for not wanting to partake in jail-time is because of the stigma that will follow them for the rest of their lives. Having to check off on every school or job application that you have served jail time or been convicted of a felony substantially

⁸⁷ See Mangesh Duggal, Long May You Run: Drug Courts in The Twenty-First Century, 21 Berkely J. Crim. L. 126, 155. (2016)

⁸⁸ See Chaz Arnett, From Decarceration to E-carceration, 41 Cardozo L. Rev. 641, 688 (2019).

⁸⁹ See Allegra M. Mcleod, Decarceration Courts: Possibilities and Perils of a Shifting Criminal Law, 100 Geo. L.J. 1587, 1621 (2012).

⁹⁰ Id.

⁹¹ Id. at 1641.

⁹² Id.

minimizes your chance of getting that acceptance letter. Stigma comes from the Greek word that originally was used to denote the branding of slaves and people who were considered outcasts.

⁹³While post-arrest diversion may seem like a helpful alternative in avoiding stigma that comes from a criminal record, these programs still follow those who participate. In California, it is illegal for arrest records for drug possession, where the person was never convicted but has successfully graduated from a drug diversion program, to be used in employment screening. ⁹⁴

Despite this law being implemented, many employers have objected to this practice claiming that this erases the truth about a job applicant. ⁹⁵ Originally, individuals who completed drug diversion were supposed to have been exonerated of the charge, and the person could indicate that the arrest and probation “were deemed to have never occurred.” ⁹⁶ While this was the promise made, records of the arrest were part of a viewable record in the filing system of the court where the charges were filed. ⁹⁷ Many employers argue that this law would allow job applicants to misrepresent their past, deeming it important information before granting someone a job position. ⁹⁸ Therefore, although the charge may be dismissed, the stigma of being arrested for a period of time and having to complete a diversion program remains the same.

When it comes to youths and first-time possession charges, the young individual is immediately set up for failure in a system that is plagued with addiction and recidivism. Focusing on diverting youth post-arrest is still damaging when it comes to the experience of arrest and that youth being labeled with a record that will potentially follow them into adulthood.

⁹³ See W. David Ball, The Civil Case at the Heart of Criminal Procedure: In re Winship, Stigma, and the Civil-Criminal Distinction, 38 Am. J. Crim. L. 117, 146 (2011).

⁹⁴ See Gregory A. Forest, Sealing the Record: Helping Rehabilitated First-Time Drug Offenders to Get Jobs, 35 McGeorge L. Rev. 597, 598 (2004)

⁹⁵ Id.

⁹⁶ Id. at 600.

⁹⁷ Id.

⁹⁸ Id.

⁹⁹ Naomi Goldstein discussed certain features of “labeling theory” when discussing diversion programs, which assert that these youths will not be deemed “delinquent” because doing so can not only cause stigma, but increase their risk for recidivism. ¹⁰⁰ Labeling theory suggests that “individuals who were labeled as deviants internalized those labels and became the deviants they were branded to be.¹⁰¹” As Anna Roberts discusses reading the pre-arrest program “LEAD,” which is said to “avoid negative labeling,” there is still stigma that comes with the word “offender,” even if considered a “low-level offender,” or a “drug offender.” ¹⁰² Although many “offenders” are avoiding jail time and stigma that may come with that record, the stigma that comes with being arrested and pushed into these programs cannot be brushed over.

iii. Institutional Management of Drug Courts

While in most traditional courts we are used to the opinions of experts, prosecutors, defenders, and sometimes a jury, in drug courts the power sits with the discretion of both the judge and the prosecutor. The main difference between a traditional court and a drug court is that in drug court the judge becomes the expert. In these situations, the relationship between the judge and the offender becomes almost personal. ¹⁰³ The judge not only becomes head of this case, but plays almost an “interventionist role” while supervising the offender’s rehabilitation process. ¹⁰⁴ Before the judge can take on this role though, it is up to the prosecutor to decide who is eligible.

⁹⁹ See Naomi E.S. Goldstein, Preventing School- Based Arrest & Recidivism Through Pre Arrest Diversion: Outcomes On The Philadelphia Police School Diversion Program., 45 Law & Human Behavior, 165, 167 (2021).

¹⁰⁰ Id.

¹⁰¹ See W. David Ball, The Civil Case at the Heart of Criminal Procedure: In re Winship, Stigma, and the Civil-Criminal Distinction, 38 Am. J. Crim. L. 117, 146 (2011).

¹⁰² See Anna Roberts, LEAD Us Not into Temptation: A Response to Barbara Fedders’ “Opioid Policing.” 94 Ind. L.J. Supp. 91, 95 (2019).

¹⁰³ See Miller, Embracing Addiction: Drug Courts and the False Promise of Judicial Interventionism, 64 Ohio St. L.J. 1479, 1515 (2004)

¹⁰⁴ Id. at 1482.

Post-arrest diversion programs are usually operated and controlled by the DA, who has overall responsibility for determining eligibility, screening the cases, and monitoring treatment process.¹⁰⁵ According to Sean Flynn, who explains the data behind screening offenders, three decisions are the most critical when it comes to implementing prosecutor-led diversion: program choice; eligibility screening; and success metrics.¹⁰⁶ Most courts screen out offenders with a history of violent crime and many screen out offenders who have engaged in drug dealing rather than drug use.¹⁰⁷ There are usually two opportunities to engage in screening: either when the prosecutor decides to refer an offender to drug court, or when determining which treatment program is suitable for that offender.¹⁰⁸ Once a defendant has submitted an application for admission into a pre-trial program, in New Jersey the Criminal Division Manager is required to complete an evaluation and make a recommendation within twenty-days of the application being filed.¹⁰⁹ Although the Criminal Division Manager is completing an evaluation, the Supreme Court has acknowledged how important the prosecutor's participation is at this phase of the admission process.¹¹⁰ A determination of an applicant requires that a prosecutor make their own assessment of the defendant.¹¹¹ This was found to be necessary in the older case of State v. Leonardis, where the court took the case of two defendants, Leonardis and Rose, who sought admission to the pretrial intervention program of Bergen County.¹¹² The two defendants were arrested for possession of marijuana and both applied for admission to the PTI program where

¹⁰⁵ See Steven Belenko, The Challenges of Integrating Drug Treatment Into The Criminal Justice Process, 63 Alb. L. Rev. 833, 842 (2000)

¹⁰⁶ See Sean Flynn, Innovative Approaches to Diversion Data, 9 Crim. L. Prac 38 (2020)

¹⁰⁷ See Miller, Embracing Addiction: Drug Courts and the False Promise of Judicial Interventionism, 64 Ohio St. L.J. 1479, 1540 (2004)

¹⁰⁸ Id.

¹⁰⁹ See State v. Rizzitello, 447 N.J. Super. 301, 312 (2016).

¹¹⁰ Id.

¹¹¹ Id.

¹¹² State v. Leonardis, 71 N.J. 85, 90 (1976).

they were each automatically denied after their initial interviews.¹¹³ The denials were claimed to be because the crimes with which they were charged fell within the group of the program’s exclusionary criteria, without any individual consideration of the defendants.¹¹⁴ The court described the primary goals of the “PTI program,” as being “early identification and referral of defendants who are in need of treatment,” and to “dispose quickly and inexpensively of cases which are more effectively handled without full criminal disposition.” The court stated that having a narrow and inflexible set criteria may not be the best when looking at who should be granted admission to the PTI program.¹¹⁵ In order for individuals who are suffering to get the most out of these programs, there needs to be an individualistic approach that can “best identify those persons who require rehabilitation and whose diversion would prevent a minimal threat to the interests of society.”¹¹⁶ The court held that the exclusionary criteria misplaced an emphasis on the offense with which a defendant is charged thus failing to emphasize the defendant’s potential for rehabilitation.¹¹⁷

Because it is up to the prosecutor to decide if the criteria applies to a specific offender, it is purely in the prosecutor’s hands if this individual is allowed to enter rehabilitation or proceed through the usual criminal justice system. With all that power comes room for potential bias and cherry-picking. If prosecutors decide to admit non-addicts into treatment programs, the completion rate of the non-addict is more likely to be higher than the addict.¹¹⁸ Giving a non-

¹¹³ Id.

¹¹⁴ Id. at 96.

¹¹⁵ Id. at 98.

¹¹⁶ Id. at 102.

¹¹⁷ Id. at 108.

¹¹⁸ See Miller, Embracing Addiction: Drug Courts and the False Promise of Judicial Interventionism, 64 Ohio St. L.J. 1479, 1543 (2004)

addict a spot in these programs reduces the rate of relapse and recidivism, upping the numbers for drug courts while keeping addicts in the prison system.¹¹⁹

¹²⁰While prosecutor's may be using their own bias when determining whether an offender is a good candidate to succeed in diversion programs, the burden of over-turning the prosecutor's decision is extremely high. Trial courts may overrule a prosecutor's decision only if the circumstances "clearly and convincingly establish that the prosecutor's refusal to admit the offender into the program was based on a patent and gross abuse of discretion."¹²¹ The Court defined a "patent and gross abuse of discretion" as: if a defendant can show that a prosecutorial veto (a) was not premised upon a consideration of all relevant factors, (b) was based upon a consideration of irrelevant or inappropriate factors, or (c) amounted to a clear error in judgment.

122

In the case of State v. DiLuzio, defendant DiLuzio was convicted of possessing heroin, second-degree theft, and making a false statement.¹²³ Defendant had hoped he could get into a diversionary program, such as drug court, in order to treat his serious addiction.¹²⁴ When the prosecutor denied his eligibility, defendant petitioned for his admission into drug court which was ultimately denied.¹²⁵ When defendant appealed his denial he asked the Superior Court of Spokane County to consider the prosecutor's discretion, as the defendant had technically met all of the eligibility requirements in the manual to be admitted to drug court.¹²⁶ The court affirmed

¹¹⁹ Id.

¹²⁰ Id.

¹²¹ See State v. Roseman, 221 N.J. 611, 625 (2015).

¹²² Id.

¹²³ See State v. DiLuzio, 121 Wn. App. 822, 824 (2004).

¹²⁴ See State v. DiLuzio, 121 Wn. App. 822, 824 (2004).

¹²⁵ Id.

¹²⁶ Id.

the denial, holding that the prosecutor retains the power to refer a defendant to drug court.¹²⁷ When making their ultimate decision, the court looked to the Act enacted by the legislature in 1999, which enabled counties to establish drug courts.¹²⁸ While the legislature included the minimum requirements for participation which the defendant met, the Act also stated that the “drug court may adopt local requirements that are more stringent than the minimum.”¹²⁹ While the court acknowledged that Spokane County had not formally adopted any other requirements, the court found that the prosecutor’s reasoning of denying defendant because of a hold the Department of Corrections had on him was enough.¹³⁰

Here the court explained in detail that prosecutors are given an enormous deal of discretion in making these decisions.¹³¹ The court found that the purpose of drug court, “is best met when the prosecutor makes the initial eligibility determination.”¹³² While the judge may work closely with individuals who make it to drug court, it lies in the hands of the prosecutor if individuals may even get that chance. Perhaps the reason that the “purpose of drug court” is “best met” after prosecutor’s decisions is because prosecutors are careful to select those who they believe will provide drug courts the best recidivism numbers. While ranking and statistics are important when pushing for these programs to continue in the future, it is notable that these courts tend to be extremely small.¹³³ The Bureau of Justice Assistance reported that, “almost three-quarters of courts admitted fewer than 50 participants in 2012.”¹³⁴ Following, the BJA also

¹²⁷ Id.

¹²⁸ Id. at 826.

¹²⁹ Id.

¹³⁰ Id.

¹³¹ Id. at 828.

¹³² Id.

¹³³ See Christine S. Scott-Hayward, Rethinking Federal Diversion: The Rise of Specialized Criminal Courts, 22 Berkeley J. Crim. L. 47, 61 (2017).

¹³⁴ Id.

reported that fewer than half of all specialized courts track participants after program completion.

¹³⁵ The possibility that prosecutors tend to keep these programs small while relying on selective numbers that are only tracking drug use so far leads to the assumption that drug courts are not working in the ways they say they are.

While post-arrest diversionary programs seem to address the problems of mass incarceration and over-population, the problem of treatment being conditioned on arrest still locks these offenders up in a system of its own.

III. Pre-Arrest Diversion

In response to the expansion of criminal law unnecessarily entrapping individuals in the incarceration system, pre-arrest diversion was created. The idea of pre-arrest diversion is to recommend rehabilitation before introducing addicts to the judicial system at all. While seemingly great in theory, pre-arrest diversion may be too idealistic in actuality when digging into the realities of police discretion and success rates.

A. Background

Pre-arrest diversion is defined as the practice of law enforcement connecting individuals to substance use disorder as an alternative to arrest.¹³⁶ Rather than focus on punishment, the idea of pre-arrest diversion instead centers around a public health approach.¹³⁷ Because of a shift to a more health-centric perspective, these diversion efforts push non-judicial interventions in order to re-think social problems, such as addiction, in a new environment. While these models are new and slowly evolving, the country has begun to see pre-arrest diversion programs pop up with what seems to be higher success rates than expected. Taking the power out of the hands of the

¹³⁵ Id.

¹³⁶ See “Pre-Arrest Diversion,” SAFE Project, February 11, 2021, <https://www.safeproject.us/law-enforcement-pre-arrest-diversion/>.

¹³⁷ See Mary Fan, Street Diversion And Decarceration, 50 Am. Crim. L. Rev. 165, 167 (2014).

judicial system, pre-arrest is an opportunity for first offenders caught in low-rate, non-violent drug activity to be given another chance rather than be arrested or charged at all.

Diversory programs that target individuals who may need rehabilitation before being placed in the judicial system seems like a triumph on the part of all parties. What began as a response to the over-broad criminal law processing individuals for minor drug charges, has evolved into programs across the country which try to re-shape the arrest process. While hopeful and progressive, this type of diversion also means changing the relationship between police officers and their communities throughout the country.¹³⁸ Police discretion becomes the principal role in this type of diversory program, taking the power away from prosecution and putting it in the hands of the gate-keepers of the judicial system.¹³⁹ Giving police more power in these situations may not be the best answer in the current political climate. While certain states like Illinois have committed to efforts in order to rebuild the trust between law enforcement and community members by enacting legislation such as “The Police and Community Relations Improvement Act,¹⁴⁰” these building blocks would have to create real change and rapidly. In order to continue the spread of pre-arrest diversion around the country, mending the relationships between police officers and members of their community would have to be a requirement, which may be a bigger task than pre-arrest diversion is worth.

B. Programs

What started as an experimental role for police in 2010 soon became a program called “the first of its kind in the United States.”¹⁴¹ The police-community partnership program called

¹³⁸ See Mary Fan, Street Diversion And Decarceration, 50 Am. Crim. L. Rev. 165, 168 (2014).

¹³⁹ Id. at 170.

¹⁴⁰ See Tosha Childs, Building Police-Community Trust in Illinois: Will We Ever Get There? An Examination of The Illinois Police and Community Relations Act, 43 S. Ill. U. L. J. 675, 678 (2019).

¹⁴¹ See Mary Fan, Street Diversion And Decarceration, 50 Am. Crim. L. Rev. 165, 167 (2014).

Law Enforcement Assisted Diversion (“LEAD”) became one of the first pre-arrest diversionary programs that was created to break the cycle of churning addicts through the criminal justice system.¹⁴² LEAD was set to “help cut costs, reduce prison overcrowding, and promote long-term solutions to public health problems,” while allowing police to play a rehabilitative role.¹⁴³ After implementing the program, for the first time in three decades, Seattle saw the number of people incarcerated decline by 0.3 percent that year.¹⁴⁴ The program operates by giving a specially trained police officer discretion on whether to refer the offender to a designated case worker rather than booking the individual.¹⁴⁵ Unlike post-arrest programs, LEAD eliminates the stigmatizing consequences of being arrested, having “avoidance of negative labeling” one of its five primary goals.¹⁴⁶

Although LEAD presents many positives, there are some doubts within the program. While pre-arrest diversion is said to “cut out the criminal justice system,” there is still an arrest that takes place.¹⁴⁷ This type of arrest does not lead to a booking or a charge if the participant agrees to the rehabilitative and social support services, but there is still an element of criminal justice system involvement.¹⁴⁸ Upon successful completion of these programs a participant is not charged, but if there is not a successful ending, the officer who originally conducted the arrest sends the record to a prosecutor, “whose offices maintain the records and the authority to charge the arrested person.”¹⁴⁹

¹⁴² Id.

¹⁴³ Id. at 168.

¹⁴⁴ Id.

¹⁴⁵ Id.

¹⁴⁶ See Anna Roberts, LEAD Us Not Into Temptation: A Response to Barbara Fedders’s Opioid Policing., 94 Ind. L.J. Supp. 91, 94 (2019).

¹⁴⁷ Id. at 94.

¹⁴⁸ Id.

¹⁴⁹ Id.

Another program that focuses instead on the school-to-prison pipeline and youths funneled into the prison system, is the Philadelphia Police School Diversion Program. In Philadelphia, the state was beginning to see a link to higher rates of arrest of students with the increasing presence of police officers within schools.¹⁵⁰ Police contact has been linked to negative outcomes for young students, “including diminished school engagement, poorer academic performance, reduced participation in prosocial activities, exclusion from prosocial peers, and greater association with delinquent peers.”¹⁵¹ Because of these negative consequences, the Philadelphia Police School Diversion Program wanted to restructure their relationship between the Philadelphia Police Department and youths in school. The Diversion Program instead prohibits police from arresting students with no adjudication history who have been accused of only minor offenses, including marijuana possession, on school property.¹⁵² Instead, these students are referred to community-based prevention services.¹⁵³ The Diversion Program allows students to avoid arrest and stay in school throughout the process, while never being taken to a police station or being charged.¹⁵⁴ In order to check that these students are living a healthy home life, their families also receive a home visit from a DHS social worker and can refer the youth to voluntary services that include academic support and drug counseling.¹⁵⁵ After city police implemented the program across all Philadelphia schools, the data found that the annual number of school-based arrests declined annually with a 68% reduction from Year 1

¹⁵⁰ See Naomi E.S. Goldstein, Preventing School- Based Arrest & Recidivism Through Pre Arrest Diversion: Outcomes On The Philadelphia Police School Diversion Program., 45 Law & Human Behavior, 165, 167 (2021).

¹⁵¹ Id.

¹⁵² Id.

¹⁵³ Id.

¹⁵⁴ Id.

¹⁵⁵ Id.

to Year 3 and an 84% reduction to Year 5 in 2019.¹⁵⁶ The results suggest that these pre-arrest diversionary programs can lead to serious reductions in youth arrests without compromising public safety.¹⁵⁷ With these programs in place children and adults alike are given the opportunities to try again with a clean slate before having to forever be associated with a record.

Similar to Philadelphia’s program, Florida implemented a civil citation program which is a type of pre-arrest diversionary tactic.¹⁵⁸ Civil citation was created to divert first-time, low-level juvenile offenders from being arrested in order to limit low-risk youths’ contact with the judicial system.¹⁵⁹ In 2011 Florida legislature enacted a State Statute, defining civil citation and creating state guidelines for its use.¹⁶⁰ The most important part of the implementation is that civil citations would not result in an arrest record for the youth, unless the youth fails to complete the requirements of the referral.¹⁶¹

C. Police Discretion

A continuous problem we see with police in all regards of the job is a tendency for extreme bias and discrimination. While these issues have presented themselves time and time again throughout the country in thousands of cases, pre-arrest diversion takes the power away from the judicial system, instead placing it in the hands of officers. This may be a chance for reformation of policing and the way officers interact with the system, or it may give these officers more power than they can handle. In every case, police stand “at the gateway to criminal processing.”¹⁶² The power of whether to charge someone or not is always in the hands of

¹⁵⁶ Id. at 172.

¹⁵⁷ Id. at 173.

¹⁵⁸ See Melissa R. Nadel, Individual Characteristics and Community Context in Decisions to Divert or Arrest, 55 Law & Soc’y Rev. 320, 323 (2021).

¹⁵⁹ Id.

¹⁶⁰ Id.

¹⁶¹ Id.

¹⁶² See Mary Fan, Street Diversion and Decarceration, 50 Am. Crim. L. Rev. 165, 168 (2013)

officers on the street, but now the community is relying on these officers to make a judgment regarding an addict's suitability for treatment in a matter of mere minutes or hours.

When taking into account police discretion before an arrest, there may be an issue of an individual's fundamental Constitutional rights being disregarded. If police have the full discretion to not arrest an individual who may be under a lucid state of mind, this individual may not be fully aware of their rights. Because the right to counsel only begins once judicial proceedings have been initiated, individuals who are being given the choice to enter a diversionary program before being arrested are not presented with an opportunity to speak with counsel. Like in LEAD's program, where a failure by the individual results in arrest or some other consequence, the decision to accept diversion may lead to higher stakes for an individual who had not even had the immediate chance to speak with counsel.

IV. Overcriminalization of Drug Use

While acknowledging that diversionary programs may be well intentioned as compared to the prison system, diversion by any name is still only a bandaid so long as there is an overbroad criminal law. A pseudo carceral solution is ultimately not as rehabilitative as progressive systems should set out to be. Instead, the only way to deal with the problem of addiction is intervention that is centered around public health and offering non-criminal solutions to what is ultimately not a criminal problem.

A. A Therapeutic Model Under Criminal Regime

The therapeutic model that is said to be implemented in diversionary programs is still not the ultimate solution because the overarching criminal system is not set out to be therapeutic. A therapeutic jurisprudence model, "adopts a rehabilitative approach, convening courts to

therapeutically treat offenders.”¹⁶³ Post-arrest diversion relies on this model, having the judge attempt to make court proceedings themselves part of “ongoing psychotherapeutic interventions aimed at behavioral modification.”¹⁶⁴ While therapeutic diversionary models are set out to move individuals away from the criminal justice system, the overarching system is still guided by these criminal laws. In this progressive push to focus on rehabilitation, the Substance Abuse and Crime Prevention Act of 2000 or “Proposition 36” was created in California. The Act allows certain nonviolent drug offenders into diversion drug treatment programs rather than incarceration.¹⁶⁵ Trying to combine both the criminal justice system with a public health system, the Act seemed promising for the state of California where substance abuse is one of the major problems affecting the state’s public health,¹⁶⁶ but because of the overbroad controlling criminal law many addicts who requested rehabilitation were still denied.

In the case of People v. Canty, defendant Michelle Canty was driving under the influence of drugs and seemed to be drifting into the center of the road, when she was stopped by an officer.¹⁶⁷ Canty had told the officer that she had taken methamphetamine and when the officer conducted a search he discovered that she had also possessed two grams of the drug.¹⁶⁸ Canty was charged with several felonies which included transportation, possession for sale, and being under the influence of methamphetamine.¹⁶⁹ After pleading guilty, both Canty and her mother submitted written requests to the trial court asking that she receive drug treatment, explaining

¹⁶³ See Allegra M. Mcleod, Decarceration Courts: Possibilities and Perils of a Shifting Criminal Law, 100 Geo. L.J. 1587, 1595 (2012).

¹⁶⁴ See Allegra M. Mcleod, Decarceration Courts: Possibilities and Perils of a Shifting Criminal Law, 100 Geo. L.J. 1587, 1595 (2012).

¹⁶⁵ See Behjat Sharif, The Substance Abuse and Crime Prevention Act: Challenges and Promises for Public Health., California Journal of Health Promotion 1, no. 1 32, 42 (2003)

¹⁶⁶ Id.

¹⁶⁷ People v. Canty, 32 Cal. 4th 1266, 1274 (2004)

¹⁶⁸ Id.

¹⁶⁹ Id.

that she had previously attended a drug treatment program which helped her to stay clean for more than two years.¹⁷⁰ Despite Michelle’s pleas, the trial court denied defendant’s request to be diverted to a drug treatment program holding that she was ineligible because her conviction of driving while under the influence was a “misdemeanor not related to the use of drugs,” within the meaning of Proposition 36, to which the Court of Appeals and the Supreme Court of California affirmed.¹⁷¹

In Canty, Michelle argued that the misdemeanor of driving while under the influence of drugs should be equated with that of being under the influence of drugs or of possessing drugs, claiming that the use of drugs is integral to both acts.¹⁷² While this may seem to be clear to those looking at drug use from a rehabilitative standpoint, because the court is guided by a looming criminal law system they could not agree. The court had to differentiate these acts by the impairment required for conviction and vehicle codes, stopping Canty from gaining the rehabilitative help she so desperately needed because of the fine print in the criminal law.¹⁷³

B. Decreasing the Substantive Criminal Footprint

The Human Rights Watch called for decriminalization in their 2016 article by making clear that “laws criminalizing drug use are inconsistent with respect for human autonomy.”¹⁷⁴ Criminalization of drugs is both “not an effective public safety policy,” while also being counterproductive.¹⁷⁵ Individuals suffering from addiction fear law enforcement, forcing them to hide out while using, run from health services, and sometimes refuse to call for help for fear of

¹⁷⁰ Id.

¹⁷¹ Id.

¹⁷² Id. at 1278.

¹⁷³ Id.

¹⁷⁴ See Leslie E. Scott, Drug Decriminalization, Addiction, and Mass Incarceration: A Theories of Punishment Framework For Ending The War on Drugs, 48 N. Ky. L. Rev. 267, 269 (2021)

¹⁷⁵ Id.

potential arrest leading to overdose and death. The Human Rights Watch article, titled “Every 25 Seconds: The Human Toll of Criminalizing Drug Use in the United States,” points out that every twenty-five seconds in the country, someone is arrested for possessing drugs for their own use.

176

Turning to other decriminalization models, it has been over a decade since Portugal has removed drug use from their criminal justice system.¹⁷⁷ When deciding whether to decriminalize drug use, the CNDS stated that “decriminalize does not mean ‘deproblematize,’ and emphasized that the stigma attached to criminal proceedings actually harms attempts to aid drug users.”¹⁷⁸ In 2000, Portugal passed the law “30/2000” which decriminalized “the consumption, acquisition, and possession of all illicit drugs for personal use.”¹⁷⁹ Under this regime, drug use is prohibited as an administrative offense, rather than a criminal one.¹⁸⁰ In situations where the police encounter a person who is using drugs, the officers instead confiscate the drugs and issue an administrative citation to the person, to which the person then has 72 hours to appear before the CDT.¹⁸¹ Once the CDT determines that the person is a dependent drug user, the person has the opportunity to voluntarily enter and complete drug treatment where all sanctions are then suspended.¹⁸² This model of decriminalization pushes the goals of dissuading drug use and encouraging addicts into treatment, rather than harsh punishment and criminal records.

While it is fine for diversion to exist so long as the incarceration system does what needs to happen for optimum widespread change is a lessening of the substantive criminal footprint

¹⁷⁶ Id.

¹⁷⁷ See Jordan Blair Woods, A Decade After Drug Decriminalization: What Can The United States Learn From The Portuguese Model, 15 UDC-DCSL L. Rev. 1, 5 (2011)

¹⁷⁸ Id. at 8.

¹⁷⁹ Id. at 16.

¹⁸⁰ Id.

¹⁸¹ Id. at 17.

¹⁸² Id. at 18.

overall to instead work on making addiction an individual public health matter. It is clear that the “deterrence theory,” of incarceration and therapeutic models controlled by the same system are running individuals in a repetitive cycle without reaching the core of the problem. It has been found that due to the impairment caused to areas of the brain related to rationality and decision-making caused by chronic drug use, it makes it highly unlikely that an addicted person will even be deterred from drug use by the threat of jail time.¹⁸³ On the other hand, the individuals who are desperate for help and seek access to diversion programs rather than prison are usually denied, making these resources “a viable option for only a small percentage of offenders with a history of drug use.”¹⁸⁴ It is clear that drug use and punishment can no longer go hand in hand to solve the country’s sweeping problem. Instead Allyson Sung suggests that, “the combination of decriminalizing drug use, instituting state-funded mental health and harm reduction facilities, and the creation of community engagement programs to address opioid use and addiction, may help to re-center communities.¹⁸⁵” While diversionary programs may be a step in the right direction, the ultimate answer must be a reduction in the criminal law.

V. Conclusion

This analysis calls for an end to the overcriminalization of drug use and the over reliance placed on diversionary programs that the substantive criminal law is inflicting. Although both post-arrest and pre-arrest diversion models have structures that try to move individuals away from the incarceration system as a whole, both programs are ultimately plagued with flaws that only decriminalization of drug use can remove.

¹⁸³ See Leslie E. Scott, Drug Decriminalization, Addiction, and Mass Incarceration: A Theories of Punishment Framework For Ending The War on Drugs, 48 N. Ky. L. Rev. 267, 273 (2021)

¹⁸⁴ Id. at 289.

¹⁸⁵ See Allyson Sam Sung, Drug Use and Punishment: A Public Health Crisis American Can No Longer Ignore., 17 Seattle J. Soc. Just. 129, 131 (2019)