

A NEW APPROACH:

A Prosecutor's Guide to Advancing a Public Health Response to Drug Use

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Introduction

For decades, the United States has relied on the criminal system to respond to substance use disorder – with minimal success.¹ Shortly before the publication of this guide, the Centers for Disease Control and Prevention announced that over 93,000 people lost their lives to drug overdoses in the United States in 2020, an increase of nearly 30 percent from the previous year.² These staggering figures illustrate the urgent need for criminal system actors, and prosecutors in particular, to rethink their roles in one of America’s most intractable public health crises.

Laws, policies, and practices have provided prosecutors with immense power over how communities respond to the intersections of drug use, poverty, racial inequities, and public safety. Each day, prosecutors make choices that bear directly on the rights, health, and livelihood of people who use drugs. However, many prosecutors lack full awareness of how their policies and everyday actions can imperil the health and safety of the communities they are bound to protect.

Between 1980 and 2016, drug-related arrests increased by 171 percent and now account for more than 1.5 million arrests annually – mostly for drug possession.³ Today, about one in five incarcerated people are jailed or imprisoned for a drug offense.⁴ Each year, the United States spends more than \$47 billion on drug prohibition.⁵

Our nation’s reliance on policing and prosecution has failed to achieve many of its purported goals of reducing the supply, demand, and markets for illicit drugs on a meaningful scale. As enforcers of our nation’s drug laws, prosecutors too often use their power to keep the engine turning for mass incarceration, which has taken a grave and inequitable toll on the vitality of many communities – especially those of color. Yet, with robust enforcement powers and political influence, prosecutors have a unique opportunity to improve our society’s response to drug use while minimizing the harms of the legal system.

This document seeks to provide prosecutors with a set of guiding principles and strategies for advancing drug policy grounded in principles of harm reduction, public health, and racial justice. These recommendations convey ideas informed by best practices, empirical evidence,

1 See Redonna K. Chandler et al., [Treating Drug Abuse and Addiction in the Criminal Justice System: Improving Public Health and Safety](#), 301 JAMA 183-90 (2009) (“The past 20 years have seen significant increases in the numbers of individuals incarcerated or under other forms of criminal justice supervision in the United States. These numbers are staggering—approximately 7.1 million adults in the United States are under some form of criminal justice supervision An estimated one-half of all prisoners (including some sentenced for other than drug offenses) meet the criteria for diagnosis of drug abuse or dependence.”).

2 Josh Katz & Margot Sanger-Katz, [Drug Deaths Spiked by 30 Percent Last Year, Surpassing 90,000](#), N.Y. Times (Jul. 14, 2021).

3 Rebecca Neusteter & Megan O’Toole, [Every Three Seconds, Unlocking Prison Data on Arrests: Emerging Findings](#) Vera Inst. of Just. (Jan. 2019).

4 Wendy Sawyer & Peter Wagner, [Mass Incarceration: The Whole Pie 2020](#), Prison Pol’y Initiative (Mar. 24, 2020).

5 Jeffrey Miron, CATO Inst., [The Budgetary Effects of Ending Drug Prohibition](#), Tax & Budget Bull. No. 83 (July 23, 2018).

and the collective wisdom of a working group of prosecutors, defense attorneys, advocates, people who have personally experienced incarceration for drug-related crimes, and public health experts from diverse jurisdictions. This Guide's central goal is to provide practical advice to prosecutors on how they can use their discretion on a daily basis in a way that promotes public health. Our hope is that this resource, along with corresponding short video presentations, will stimulate creativity among prosecutors and inspire them to chart a more promising course of U.S. drug policy.

Vision Statement & Guiding Principles

This guide was created following a six-month convening of experts in prosecution, public health, and harm reduction. It envisions a path forward for prosecutors handling cases involving the use and sale of drugs. The following are the working group’s guiding principles:

1. Traditional prosecution of drug-related crimes, with an emphasis on incarceration, is largely ineffective.⁶ Instead, prosecutors should adopt a range of practical strategies to achieve two interrelated goals: **(1)** enhancing access to voluntary treatment and services in community settings; and **(2)** minimizing the role of the criminal system to mitigate harms created by arrest, incarceration, surveillance, involuntary treatment, and the stigma of a criminal record.
2. Prosecutors must acknowledge that a complex interplay of social, economic, and political inequities underlie drug use, substance use disorder, and drug markets in underserved communities. Prosecutors should learn and reckon with the ways in which the laws, policies, and practices of the “War on Drugs” are inextricably tied to the historical legacies of racial discrimination and oppression.
3. The health and well-being of people who use drugs should guide prosecutorial policies and practice. All policies and strategies implemented along the criminal legal continuum should be assessed by outcomes related to health equity, social stability, and racial justice, rather than solely punishment and recidivism.⁷
4. Prosecutors should implement policy changes that are sustainable, in that they endure changes in leadership and decreased resources during economic downturns.
5. Prosecutors should employ a humanistic approach to their work by evaluating each case based on all of the circumstances, rather than by the crime charged.

⁶ [More Imprisonment Does Not Reduce State Drug Problems](#), Pew Charitable Trusts (Mar. 8, 2018).

⁷ David Noble, [Mapping the Landscape of Prosecutor-Led Pretrial Diversion](#), 11 Crim. L. Prac. 8, 10 (2020) (“Traditionally, prosecutors and other stakeholders have gauged the success or failure of diversion based on the rate of recidivism among participants. This is problematic, in part because it is extremely difficult to draw a causal link between a diversion model’s offerings and whether or not a participant is rearrested. Further, recidivism cannot properly account for the progress an individual makes towards strengthening familial and communal ties, furthering their education, or improving their employment prospects.”).

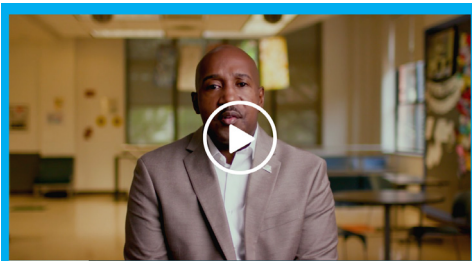
Action Guide for Working Within the Criminal System

This guide gives examples of how prosecutors can realize the goals of harm reduction, health promotion, and racial justice.

I. Education for Prosecutors

It is imperative that both line and elected prosecutors have a basic understanding of the physical effects of substance use disorder, what leads people to use and sell drugs, the nature of recurring use, and the medical treatment options for substance use disorder. Without a solid understanding of these topics, prosecutors cannot make the best decisions or most appropriate plea offers in drug-related cases. Additionally, elected prosecutors should provide their staff with opportunities to learn about the history of drug laws in the United States. It is critical that all prosecutors understand the legacy of racially motivated drug laws and enforcement tactics so that they can work to actively combat racism in the criminal system.

As a starting point, elected prosecutors should invite directly impacted people to speak to their staff about their experiences with drug use, diversion programs, and incarceration resulting from drug-related offenses. These presentations can humanize accused people for prosecutors and teach prosecutors about the realities of substance use disorder, the recurrence of use, or why some people turn to drug trafficking for income.



[Click here for short video presentations by Andre Ward, Julie Eldred and Tele Rabii, who have all been directly impacted by the criminal system.](#)

Elected prosecutors should also bring in medical professionals and harm reduction experts to explain to staff members the basics of substance use disorder and the importance of responding to recurrence of use with compassion. Local harm reduction leaders can explain the foundations of harm reduction, the consequences of punitive drug law enforcement, and the different types of interventions and support services shown to deliver the best outcomes.



[Click here for a short video presentation by harm reduction experts Ronald Martin and Robert Childs.](#)

Offices with limited resources that cannot bring in speakers must, at a minimum, require staff to read materials so they can familiarize themselves with these issues. Refer to the attached Appendix for resources all staff members can read to educate themselves on these topics.

Elected prosecutors should develop an internal communication strategy for their staff that outlines available alternatives to incarceration programs in their jurisdiction. Ideally, offices will also provide structural tools that assist their staff in making those referrals, such as a flowchart to help prosecutors identify cases that are eligible for diversion or other non-incarceratory programs. That way, line prosecutors can effectively utilize alternatives to incarceration in their communities when appropriate.

II. Before an Arrest: Culture Change, Legislative Advocacy, and Partnering with Pre-Arrest Diversion and Prevention Programs

The pursuit of public health and public safety are not mutually exclusive goals. There are structural deficiencies in our state and local infrastructures for providing people with services to treat substance use disorder. The scarcity of compassionate support and evidence-based services for people who use drugs is most pronounced in over-policed communities where most residents are racial minorities or are economically disadvantaged.⁸

While prosecutors should try to mitigate the harms that arise from the criminal system, they should also work to reduce the role of law enforcement in addressing drug use altogether. First, prosecutors should change the narrative around drugs in the community by emphasizing treatment and support rather than traditional, punitive responses to drug offenses. Second, prosecutors should advocate for social services for people with substance use disorders. Prosecutors can leverage their platform to support other community leaders seeking to expand the capacity of drug treatment, supportive housing, and other services in their communities that minimize the role of the criminal system. Third, prosecutors should advocate for legislation that adopts a public health approach to drug policy. Fourth, prosecutors should support effective existing pre-arrest diversion programs. Finally, prosecutors should engage their communities when developing new pre-arrest diversion programs. Each of these recommendations is discussed in more detail below.



Click here for a short video presentation featuring three prosecutors working to change drug policy within their respective offices.

⁸ See Janet R. Cummings et al., [Decline in Public Substance Use Disorder Treatment Centers Most Serious in Counties with High Shares of Black Residents](#), Health Affairs Vol. 35, 6 (2016) (“By 2010, counties with a very high or extremely high percentage of black residents were significantly less likely to have any outpatient facility, compared to counties with less than the mean percentage of black residents in the multivariate analysis . . .”).

A. Change the Narrative on Drugs - Both in the Prosecutor's Office and in the Community

As stewards of public safety, elected prosecutors have a powerful influence over how the public views drug use and drug-related crimes. An arrest, conviction, or incarceration for a drug-related offense creates stigma for the accused. Stigma involves social disapproval, shame, and discrimination based on one's association with a particular group or identity.⁹ Research shows that feeling stigmatized makes people less likely to seek help or services from health care providers, treatment centers, and other community members.¹⁰ Stigma and criminalization create significant barriers to gaining community support for drug treatment and harm reduction services that are vital to slowing the wave of overdose deaths.

Drug laws in the United States grant prosecutors immense power over the lives of people who encounter the criminal system. Prosecutors should use this power to uproot and reverse an ideology that labels people who use and sell drugs as criminals who always deserve punishment. As more prosecutors have begun to acknowledge that this narrative is one that contributes to, rather than effectively addresses the public health crisis, prosecutors at all levels of experience can play an instrumental role in de-stigmatizing drug use. For example, line prosecutors who have a personal connection to these issues and understand the science of substance use disorder can raise awareness among their colleagues and advocate for community-driven solutions over punishment. Those handling drug cases who do not have such experience should make it a priority to educate themselves about substance use disorder and ways to more humanely address their drug-related cases.

Elected prosecutors should promote a narrative in their community that calls for downsizing the role of the criminal system when it comes to drug-related issues, while increasing resources for public health solutions to substance use disorder. Elected prosecutors should organize visits with their line prosecutors to local methadone clinics and other harm reduction-oriented facilities. During such a visit, prosecutors should strive to learn from harm reduction service providers the importance of "meeting people where they are" to earn their trust and reduce the stigma that may stand in the way of accessing services. They should also seek to learn how fear of arrest and prosecution can interrupt or interfere with utilization of these vital services.



[Click here for a short video presentation by harm reduction experts Ronald Martin and Robert Childs.](#)

⁹ See John F. Kelly et al., [Stop Talking 'Dirty': Clinicians, Language, and Quality of Care for the Leading Cause of Preventable Death in the United States](#), 128 Am. J. of Med. 1, 8-9 (Sept. 2, 2014) ("Stigma is defined as an attribute, behavior, or condition that is socially discrediting.")

¹⁰ *Id.* ("[Stigma] is important because of the 23 million Americans who meet criteria for a substance use disorder each year, only 10% access treatment, and stigma is a major barrier to seeking help.")

Additionally, prosecutors' offices can promote a culture shift inside and outside the office by avoiding stigmatizing language when discussing drug-related offenses. Prosecutors should take every opportunity to use language that humanizes people involved with the criminal system by avoiding words like "addict," and instead saying "a person with substance use disorder." For additional resources on the importance of humanizing language, refer to the attached Appendix.

In addition, prosecutors should help promote access to opioid agonist medications (e.g. methadone and buprenorphine), which do not require full detoxification before use, unlike extended release naltrexone (Vivitrol).¹¹ Prosecutors should be aware of the stigma that people who choose to use opioid agonists frequently endure in both the justice and health care systems. Prosecutors can help mitigate stigma by promoting access to all FDA-approved medications for opioid use disorders, and ensuring that people have autonomy to choose which medication is best suited for their needs with guidance from a licensed medical professional.



[Click here for a short video presentation by Dr. Melinda Campopiano, a medical professional, on the different medications used to treat opioid use disorder.](#)

Finally, prosecutors should advocate for the end of urine drug screening as a basis for sanctions in the criminal system. Drug testing is frequently used at various stages of the legal process and is commonly imposed as a condition of pleas, probation, or parole. Using drug testing as a condition of release and as a punitive tool, rather than as an aid for treatment, is harmful in several ways.¹² First, it promotes an abstinence-only approach to substance use disorder. It therefore fails to consider the fact that people with substance use disorder and contact with the criminal system often return to use,

11 Joshua D. Lee et al., *Comparative Effectiveness of Extended-Release Naltrexone Versus Buprenorphine-Naloxone for Opioid Relapse Prevention*, 391 *Lancet* 309 (2017) ("In summary, for the intention-to-treat population, XR-NTX [extended release naltrexone] treatment was less effective than BUP-NX [sublingual buprenorphine-naloxone] treatment for the prevention of opioid relapse following admission for inpatient detoxification. This outcome was primarily due to fewer XR-NTX inductions and high occurrence of relapse among induction failures."). See also Mark A. Schuckit, *Treatment of Opioid Use Disorders*, 375 *N. Engl. J. Med.* 357 (2016) ("[I]n most studies of oral naltrexone, approximately 50% of patients discontinued the drug by 6 weeks, with only 15% remaining in the study at 25 weeks in some evaluations. Higher rates of adherence are seen with opioid maintenance.... In addition, because of the loss of tolerance that occurs with abstinence from opioids, the danger of overdoses that may lead to death is enhanced among patients who discontinue naltrexone and return to opioid use.").

12 See Matthew Hurford, et. al., *Appropriate Use of Drug Testing in Clinical Addiction Medicine*, *Am. Soc'y of Addiction Med.* 2, 5 (April 5, 2017) ("The inappropriate use of drug testing can have extraordinary costs to third-party payers, taxpayers, and at times the patients who are receiving care Drug testing should be used as a tool for supporting recovery rather than exacting punishment.").

and that substance use disorder is a chronic, relapsing condition.¹³ Punishing people with a conviction or incarceration for a positive drug test is counterproductive. This is particularly true for community members recently released from prison who are likely to return to use and face the added stigma of a criminal record.¹⁴ It should also be noted that drug testing poses financial and logistical hurdles for those under court supervision.¹⁵



[Click here for a short video presentation by Tele Rabii on the impact of drug testing when he participated in drug court.](#)

In addition, when drug testing is a condition of release, people with substance use disorder may face re-incarceration for using drugs. Nearly one in four people are in prison for supervision violations.¹⁶ Strict drug testing conditions may discourage those with substance use disorder to seek help when they need it most, fearing additional criminal charges or incarceration.

In some situations, drug testing may be helpful to ensure the safety of the individual or the community. For example, some people who struggle with substance use may view drug testing as a way to measure their own progress in treatment. Additionally, in cases where an individual's substance use has resulted in harm to their community, it may be beneficial to drug test the individual for reasons of public safety (an example would be a person who burglarized a home to steal money to buy drugs). However, drug testing should always be trauma-informed and should never be used to "catch" someone in the act of consuming drugs in order to punish them more severely.

13 Barbara Andraka-Christou, *Improving Drug Courts Through Medication-Assisted Treatment for Addiction*, 23 Va. J. Soc. Pol'y & L. 179, 221 (2016) ("One-third of individuals incarcerated for drug-related crimes relapse within 2 months of release; 80% relapse within one year; and 95% relapse within 3 years. Additionally, studies have found that rates of treatment contact post-prison are low, and that the chance of relapse is especially high immediately following release."); [The Science of Drug Use and Addiction: The Basics](#), Nat'l Inst. on Drug Abuse (last visited Sept. 6, 2021) ("The chronic nature of addiction means that relapsing to drug use is not only possible but also likely. Relapse rates are similar to those for other well-characterized chronic medical illnesses such as hypertension and asthma, which also have both physiological and behavioral components.").

14 Chandler et al., *supra* note 1 ("On release from prison or jail, addicted persons will experience challenges to their sobriety through multiple stressors that increase their risk of relapsing to drug use. These include the stigma associated with being labeled an ex-offender, the need for housing and legitimate employment, stresses in re-unifying with family, and multiple requirements for criminal justice supervision.").

15 [Putting an End to Drug Testing](#), Drug Pol'y Alliance (April 1, 2021) ("Drug tests can cost individuals up to \$60 out-of-pocket. Often, people are notified that they must immediately report for a drug test, requiring them to make the difficult choice of whether or not to drop all family and job obligations to report for a test, sometimes dozens of miles away." (citing [How Court-Ordered Drug Testing Poses Impossible Choices](#), PBS News Hour (Dec. 8, 2020))).

16 [Confined and Costly: How Supervision Violations Are Filling Prisons and Burdening Budgets](#), Council of State Gov'ts Just. Ctr. (June 18, 2019).

B. Advocate for Social Services for People With Substance Use Disorder

Due to society's reliance on imprisonment to address substance use disorder, access to public health services is often limited. Prosecutors can build support for proposals to address gaps in a community's social service infrastructure. For example, prosecutors can back efforts to create or expand public health interventions and services that protect the health and safety of people who use drugs. Examples of interventions shown to promote health include: syringe-service programs,¹⁷ medications for opioid use disorder (MOUD),¹⁸ naloxone distribution programs,¹⁹ safe injection and overdose prevention sites,²⁰ and supportive and permanent housing programs. Access to these programs is limited or non-existent in many communities due to legal restrictions, lack of health insurance, and insufficient investments from state and local governments.²¹ An elected prosecutor who removes the stigma from these services by vocally supporting them can greatly impact a community's willingness to invest in them.

C. Advocate for Legislative Change

Elected prosecutors should work collaboratively with lawmakers and other community stakeholders to support legislation that adopts a public health approach to drug policy.



Click here for a short video presentation featuring District Attorney Sherry Boston (DeKalb County, Georgia) discuss legislative advocacy.

17 The [Centers for Disease Control and Prevention \(CDC\)](#) describes syringe-service programs as “a public health strategy for persons who inject drugs (PWID) . . . [that] aim to reduce PWID’s risk of getting and transmitting HIV, viral hepatitis, and other blood-borne infections by using new or sterile injection equipment for each injection.”

18 [According to the CDC](#), medications for opioid use disorder (MOUD) include methadone, buprenorphine, and naltrexone. These are prescription medications that can help prevent withdrawal symptoms or block the effects of opioids.

19 Naloxone distribution programs give community members access to naloxone, a medication used to reverse an opioid overdose. [Expanding Access to Naloxone: A Review of Distribution Strategies](#), Penn Leonard Inst. of Health Econ. & CHERISH Issue Brief (May 29, 2019).

20 Safe injection sites (also called safe or supervised injection facilities, drug consumption rooms, and overdose prevention sites or centers) are places where people can use drugs with sterile equipment, under the supervision of trained staff who are equipped to respond to overdose events and other medical emergencies. Safe injection sites are not currently available in the United States, though they are available in Canada and in some European nations. When tailored to the needs of a community, these services have been shown to reduce unsafe disposal of used equipment, prevent overdoses, and reduce drug use in public spaces. See Alex H. Kral & Peter J. Davidson, [Addressing the Nation’s Opioid Epidemic: Lessons from an Unsanctioned Supervised Injection Site in the U.S.](#), 53 *Am. J. Preventative Med.* 919, 919-20 (2017); M-J. S. Milloy, et al., [Estimated Drug Overdose Deaths Averted by North America’s First Medically-Supervised Safer Injection Facility](#), 3 *PLOS ONE* (2008).

21 See Solmaz Amiri et al., *Disparities in Access to Opioid Treatment Programs and Office-Based Buprenorphine Treatment Across the Rural-Urban and Area Deprivation Continua: A U.S. Nationwide Small Area Analysis*, 24 *Value in Health* 188, 193 (2020) (discussing the limited access to opioid treatment programs and office-based buprenorphine treatment); Amanda J. Abraham et al., *Geographic Disparities in Availability of Opioid Use Disorder Treatment for Medicaid Enrollees*, 53 *Health Servs. Res.* 389, 400-401 (2017) (concluding that “Medicaid enrollees in areas in the Southeast have the largest gaps between county-level OUD [opioid use disorder] rates and estimated county-level capacity for treatment, as measured by county-level total treatment admissions among OTPs [opioid treatment programs] that accept Medicaid.”).

Recently, several jurisdictions have decriminalized possession of drug paraphernalia.²² Additionally, state legislators in Washington, Kansas, New York, Maryland, Massachusetts, Rhode Island, Vermont, and Maine have introduced bills decriminalizing possession of small amounts of controlled substances.²³ Prosecutors should support efforts to undo harmful drug laws by supporting public health-focused legislation. Below is a list of examples of prosecutors publicly advocating for changes in legislation to promote a public health approach to drug policy:

- » In California, while still the San Francisco District Attorney, George Gascón co-authored Proposition 47.²⁴ That ballot measure re-classified simple drug possession felonies as misdemeanors.
- » In Oregon, three elected prosecutors publicly supported a ballot measure that passed and took effect in February 2021.²⁵ The law decriminalizes possession of small amounts of certain drugs by reclassifying these as civil cases.²⁶ People can no longer be arrested or criminally prosecuted for possessing very small amounts of drugs including heroin, cocaine, and methamphetamine.²⁷
- » In Rhode Island, the state Attorney General voiced his support for a newly passed bill reclassifying possession of 10 grams or less of certain controlled substances from a felony to a misdemeanor.²⁸
- » In Chittenden County, Vermont, State's Attorney Sarah George has supported decriminalizing personal drug use and possession.²⁹ Her office stopped prosecuting misdemeanor possession of buprenorphine (which is used to treat opioid use disorder) in 2018.³⁰ In 2021, Vermont became the first state to decriminalize possession of buprenorphine.³¹

D. Support Existing Pre-Arrest or Pre-Booking Programs

Prosecutors can also promote public health and reduce the footprint of the criminal system by supporting pre-arrest programs. These programs are designed to prevent, minimize, or divert contact with the criminal system and offer access to housing, health care, and drug treatment to address underlying needs. Preventing people with substance use disorder from going to jail serves as a vital overdose prevention strategy. Individuals confronting substance use-related challenges are particularly vulnerable while incarcerated. The number of people who have died of drug overdoses has increased within state prisons

22 [State-by-State Laws](#), Drug Pol'y Alliance (last visited July 20, 2021).

23 *Id.*

24 Cara Bayles, [George Gascón on Being LA's New Progressive Prosecutor](#), Law 360 (Dec. 6, 2020).

25 Garrett Andrews, [District Attorneys Disagree on Measure to Decriminalize Some Drugs](#), Bulletin (Oct. 14, 2020).

26 Tatiana Parafiniuk-Talesnick, [Starting Monday, Oregon Spearheading Drug Decriminalization: Here's What You Need to Know](#), Register Guard (Jan. 31, 2021).

27 *Id.*

28 Katie Mulvaney, [Drug Bills Signal Sea Change in RI's Approach to Opioid Crisis](#), Providence J. (July 3, 2021).

29 Karen Anderson & Mitch Wertlieb, ["A Public Health Issue": Chittenden Co. State's Attorney on Drug Decriminalization](#), VT Pub. Radio (Feb. 23, 2021).

30 Mike Riggs, [This Vermont Prosecutor Is Pushing Back Against the DOJ's Drug Warriors](#), Reason (June 15, 2018).

31 [Vermont Becomes First State to Legalize Limited Possession of Buprenorphine](#), VT Digger (June 3, 2021).

and jails in recent years.³² Unfortunately, most correctional systems do not provide people with evidence-based treatments, such as initiation or continuation of MOUD or access to naloxone.³³

At the same time, people who are unable to gain access to drugs while incarcerated often go through an inhumane detoxification experience while in jail and remain abstinent until they are released. Research shows that people released from jail or prison have an elevated risk of overdose during the initial days and weeks after their release “probably due to decreased tolerance during incarceration.”³⁴

Seattle’s Law Enforcement Assisted Diversion (LEAD) program aims to stabilize court-involved individuals struggling with poverty and severe behavioral health issues by conducting outreach to them and introducing them to case management, housing, and treatment services. Outreach workers and case managers engage in trauma-informed care and establish a connection with participants to support long-term changes in their lives. LEAD prosecutors coordinate with case managers, law enforcement, and other community partners to help LEAD participants address their court obligations and navigate the legal system.



Click here for a short video presentation featuring a former LEAD prosecutor, Grace Wiener Ritter.

Although Seattle’s LEAD program is perhaps the most well-known diversion program in the country and has been replicated in many jurisdictions, there are other models anchored in harm reduction principles. For example, the District Attorney’s Office in Kings County, New York launched a program called Brooklyn Collaborative Legal Engagement Assistance Response (CLEAR). The program redirects people charged with low-level drug offenses to community-based treatment services as an alternative to prosecution. A peer mentor meets the person in custody at the precinct, gives them an overdose response kit with naloxone, and teaches them how to use it. The peer mentors are people in recovery with

32 U.S. Dept. of Just., Bureau of Just. Stat., [Mortality in Local Jails 2000-2018—Statistical Tables 1](#) (April, 2021) (“The number of deaths in local jails due to drug or alcohol intoxication has more than quadrupled between 2000 (37) and 2018 (178).”).

33 See Christine Vestal, [New Momentum for Addiction Treatment Behind Bars](#), Pew Charitable Trusts (April 4, 2018) (“In fact, nearly all corrections officials reject the use of either methadone or buprenorphine behind prison walls. That’s despite a history of research showing both medicines are highly effective at eliminating cravings, preventing overdoses and keeping people in recovery from opioid addiction.”).

34 See Shannon Mace, et al., [Medication-Assisted Treatment for Opioid Use Disorder in Jails and Prisons: A Planning & Implementation Toolkit](#), Vital Strategies & Nat’l Council for Behavioral Health 72 (2020) (“Individuals released from jail and prison are at heightened risk of opioid overdose, particularly in the first two weeks after release.” (citations omitted)).

lived experiences with substance use disorder. The CLEAR program requires participants to visit a community-based center soon after their arrest, where a case manager will recommend services – such as treatment, employment or housing – based on what the person says they need. If the person engages in services, the person does not have to go to court. Instead, the District Attorney’s Office dismisses the charge and the arrest is sealed.



[Click here for a short video presentation by Jose Ramos, one of Brooklyn CLEAR’s case managers, and Karen Varriale, the Brooklyn prosecutor who runs the program.](#)

E. Engage with Communities in Developing Pre-Arrest Diversion Programs

Elected prosecutors should acknowledge the profound harms of aggressive prosecution of drug offenses. They should maximize access to media to express a commitment to listening to people and communities whose entanglement in the criminal system is connected to drugs. Furthermore, prosecutors should commit to monitoring diversion programs to ensure that a person’s race or socioeconomic status does not determine whether they are given the opportunity to participate, and that there are not inequities in access to services and case outcomes.

Before an elected prosecutor implements any program, community members should have the opportunity to voice possible solutions. This process might start with town halls to learn from community members about how the enforcement of drug laws has affected their lives and perceptions of safety in their neighborhoods. Such events must be carefully planned with guidance from trusted organizations with credibility among drug users and other marginalized communities.

As an example of an initiative that prosecutors could support going forward, a coalition of marginalized groups launched Atlanta’s Policing Alternatives and Diversion Initiative (PAD) in 2017. The initiative was in response to broken-windows style policing that produced continuous cycles of arrest and incarceration among sex workers, people who use drugs, and unhoused people in downtown Atlanta. Through the initiative, the community now has the option to call 311 for a community caseworker to arrive on scene for a quality of life concern, instead of the police.

III. Decision of Whether to Prosecute and What to Charge

One of the greatest powers of a prosecutor is the ability to decide whether to move forward with a case and what to charge. Below are several ideas for prosecutors to consider – many with examples from jurisdictions adopting these principles – to reduce the negative impact of the criminal system on our communities’ public health.

A. Declining to Prosecute Cases

Elected prosecutors must reduce overreliance on the criminal system for public health problems by declining to prosecute certain cases. They should carefully assess cases brought to their offices by law enforcement because declining to prosecute certain cases can discourage the police from making certain arrests. Prosecutors should consider whether the prosecution of drug possession is necessary for community safety. If prosecutors do decline to prosecute entire categories of crime, such as simple drug possession, they should also advocate for the elimination of outstanding warrants connected to those crimes and decline to pursue probation violations for those offenses.

For example, in March 2020, the Baltimore City State’s Attorney’s Office announced that it would no longer pursue drug possession, attempted distribution, and paraphernalia charges, among other crimes.³⁵ The policy aimed to eliminate the use of arbitrary drug amounts that deem a crime “possession” with the understanding that users are varied in their drug consumption. The Baltimore City State’s Attorney’s Office also wanted to avoid signaling to drug sellers that there was a cut off that they could possess without being charged for distribution.³⁶ The Office continues to charge possession with intent to distribute for drug selling, which requires indicia of sale like large amounts of cash, scales, bags, and individually wrapped products.

The Baltimore City State’s Attorney’s Office found that prohibiting the prosecution of drug crimes had consequences for diversion programs because some programs required a drug possession charge for eligibility. As a result, the Office focused on increasing the types of offenses that would permit entry into diversion and reducing the barriers to entry, like criminal records. The Office began to consider crimes adjacent to drug use – theft and robbery, for example – and offer diversion to drug users charged with those crimes. The Office dismissed all pending possession cases, including drug possession crimes charged in cases with violent crimes.

The Baltimore City State’s Attorney’s Office took additional steps to harmonize the policy. The office moved to dismiss all outstanding warrants for drug possession, including some decades-old cases. The Office decided not to move forward with any probation violation

³⁵ Tim Prudente, [Confused over Marilyn Mosby’s New Policy on Baltimore Drug Prosecutions? Here’s What Her Office Says It Means](#), Balt. Sun (Apr. 26, 2021).

³⁶ *Id.*

charges where the underlying offense was drug possession. The Office coordinated with the police department, prompting the police department to announce that it would reduce arrests. According to a representative of the Baltimore City State's Attorney's Office, the city saw an 80 percent reduction in drug possession arrests and a 39 percent reduction in people entering the system. The city also saw a 33 percent reduction in 911 calls made about drugs.³⁷ According to a press release from the Office, of the "nearly 1,500 individuals with quashed warrants or dismissed charges, only 0.4% (5 individuals) were arrested for any other crime during the 8-month period following the policy change."³⁸

B. Bail

In the United States, a significant number of people who are incarcerated pretrial are detained simply because they cannot afford bail.³⁹ There is a strong public health rationale for ending or strictly limiting reliance on cash bail. Imposing cash bail can result in people being subjected to jail conditions that imperil their health. Unfortunately, most jails are inhumane environments that lack the capacity to provide ethical detoxification and treatment options for people experiencing withdrawal, though that is slowly beginning to change.⁴⁰ This problem results in the preventable suffering and deaths of people in jails as well as costly litigation for local jurisdictions.⁴¹ A person who is detained in jail also has an increased chance of suffering a fatal overdose upon release from custody.⁴²



Click here for a short video presentation by Julie Eldred, who was incarcerated for substance-use related challenges.

Pre-trial detention, even for a short duration, can also trigger a host of deleterious consequences, including unemployment, loss of temporary or transitional housing, and

37 Press Release, Office of the State's Attorney for Baltimore City, [State's Attorney, Mayor's Office, and Community Partners Announce Success of Covid Criminal Justice Policies](#) (Mar. 26, 2021).

38 *Id.*

39 Bernadette Rabury & Daniel Kopf, [Detaining the Poor](#), Prison Pol'y Initiative 1 (May 2016).

40 Christine Vestal, [This State Has Figured Out How to Treat Drug-Addicted Inmates](#), Pew Charitable Trusts (Feb. 26, 2020).

41 See Susan Pollitt, & Luke Woollard, [Barriers to Access and Inadequate Levels of Care in North Carolina Jails](#), 80 NC Med. J. No. 6, 345-346 (2019) ("However, in recent years lack of resources and increasing health care demands and costs have led to inadequate levels of care in North Carolina jails."); J. Lyons, [The Systematic Neglect of Inmates Suffering from Substance-Use Disorder in the American Prison Systems](#), 31 BYU Prelaw Rev. Art. 7 (2017) (discussing the inhumane treatment of several incarcerated individuals experiencing withdrawal); Bernie O'Donnell, [Wilkinson County to Pay \\$420,000 Settlement in Woman's Jail Death](#), 13WMAZ, Jan. 2, 2020; Elise Kaplan, [Lawsuit Filed in Death of Inmate at Bernalillo County Metropolitan Detention Center](#), Albuquerque J. (July 23, 2021).

42 See, e.g., Lia N. Pizzicato et al., [Beyond the Walls: Risk Factors for Overdose Mortality Following Release from the Philadelphia Department of Prisons](#), 189 Drug and Alcohol Dependence, 108 (2018) ("Individuals released from incarceration [in a Philadelphia jail] had higher risk of overdose death compared to the non-incarcerated population.").

other harms.⁴³ Studies show that people detained pre-trial are significantly more likely to receive a prison sentence than those who are released pending disposition.⁴⁴ As discussed throughout this Guide, imprisonment only exacerbates the likelihood that someone with substance use disorder will suffer from the aforementioned harms.

There are a several ways prosecutors can reduce the effects of cash bail in their local systems to promote public health. First, incumbent district attorneys and those seeking election can advocate for ending the use of cash bail in their local court systems. A growing number of prosecutors, in states such as California, Vermont, and Michigan, are calling for reduced reliance on cash bail.⁴⁵ The reasons outlined above may help persuade voters, judges, and other constituents to embrace these changes.

In addition, while prosecutors do not set bail, they have significant influence over whether bail is imposed and at what amount. Prosecutors in leadership positions can instruct their line prosecutors not to pursue pre-trial detention and monetary bail for designated drug charges (for example, possession and small sales), sex work, public intoxication, and other quality-of-life crimes.

C. Mandatory Minimum Sentences

Prosecutors routinely charge people with crimes carrying a mandatory prison sentence, and then offer a plea to a lesser crime that carries a significantly lower penalty. This practice can put the accused under a tremendous amount of pressure.⁴⁶ In addition to severe punishments for drug-related crimes, mandatory minimums have fueled mass incarceration.⁴⁷ Therefore, prosecutors should implement clear written policies as to when line prosecutors can charge crimes that carry mandatory prison sentences. For instance, prosecutors should consider prohibiting such a charge when it is a person's first or second offense.

Prosecutors must be aware of the consequences of charging certain offenses and think more holistically about their use of mandatory sentencing structures. Prosecutors should

43 See Will Dobbie et al., [The Effects of Pretrial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges](#), 108 Am. Econ. Rev. 201, 204 (2018) ("We find evidence that pretrial release increases both formal sector employment and the receipt of employment- and tax-related government benefits, with larger effects among individuals with no prior offenses in the past year."); Emily Leslie & Nolan G. Pope, [The Unintended Impact of Pretrial Detention on Case Outcomes: Evidence from New York City Arraignments](#), 60 J. of L. and Econ. 529, 530 (2017) ("Detainees might miss work and therefore forgo income or even lose employment, and they are unable to attend to family responsibilities or access their social support network.").

44 See Christopher T. Lowenkamp et al., [Investigating the Impact of Pretrial Detention on Sentencing Outcomes](#), Arnold Ventures 4 (2013) ("Low-risk defendants who are detained for the entire pretrial period are 5.41 times more likely to be sentenced to jail and 3.76 times more likely to be sentenced to prison when compared to low-risk defendants who are released at some point before trial or case disposition. Moderate and high-risk defendants who are detained for the entire pretrial period are approximately 3 times more likely to be incarcerated than similar defendants who are released at some point.").

45 Rachel M. Cohen, [Newly Elected Michigan Prosecutor Will Stop Seeking Cash Bail](#), Appeal, Jan. 4, 2021.

46 Michael Cassidy, [\(Ad\)ministering Justice: A Prosecutor's Ethical Duty to Support Sentencing Reform](#), 45 Loy. U. Chi. L.J. 981, 999-1000 (2014).

47 *Id.* at 987-88.

make sure that the consequence of such a charge fits the situation they are prosecuting. This means conducting a comprehensive investigation of a case before presenting it to a grand jury to understand not only the crime, but also the person charged. For example, with regard to hand-to-hand drug sellers, prosecutors should consider the circumstances of sellers who live in extreme poverty.



Click here for a short video presentation featuring Chris Martin, a prosecutor working to change his office's drug policies.

Mandatory minimum statutes have been shown to perpetuate racial disparities.⁴⁸ Elected prosecutors should make sure their attorneys are aware of the bias that has resulted in the disproportionate application of these statutes and should implement policies to actively combat racial disparities in sentencing. A prosecutor's written policy should ensure that their office is monitoring charges and sentencing recommendations for racial disparities.

Closely related to the use of mandatory minimums are habitual offender statutes, which increase a person's exposure to prison time when they have a prior conviction. Particularly because long prison sentences have been found ineffective in addressing drug-related crimes, prosecutors should avoid utilizing habitual offender statutes when possible. In Ingham County, Michigan, the District Attorney's Office requires line prosecutors to consider, among other things, the age of the prior conviction and whether the person has a history of violence before using a habitual offender statute.

D. Drug Induced Homicide

A Growing Trend

A steep and steady surge in overdose-related fatalities across the United States has sparked a series of legislative responses. Some states have passed Good Samaritan laws, which provide varying degrees of criminal immunity for people who witness or experience an overdose and call 911 for medical assistance. At the same time, however, states have enacted statutes that allow for the prosecution of people who distribute drugs that are linked to a fatal overdose.⁴⁹

The legal constructs and penalties in these statutes - often referred to as drug-induced

48 Sonja B. Starr & M. Marit Rehani, *Mandatory Sentencing and Racial Disparity: Assessing the Role of Prosecutors and the Effects of Booker*, 123 Yale L.J. 2, 7 (2013) ("But judges' choices do not appear to be principally responsible. Instead, between half and the entire gap can be explained by the prosecutor's initial charging decision -- specifically, the decision to bring a charge carrying a 'mandatory minimum.' After controlling for pre-charge case characteristics, prosecutors in our sample were nearly twice as likely to bring such a charge against black defendants.").

49 See generally, Leo Beletsky, *America's Favorite Antidote: Drug-Induced Homicide in the Age of the Overdose Crisis*, 2019 Utah L. Rev. 833 app. (2019).

homicide (DIH) laws or “drug delivery resulting in death” statutes – vary in specificity and severity. DIH statutes originated as part of the “War on Drugs” that contributed to mass incarceration and the disproportionate prosecution of people of color. The same 1986 federal drug law that made a significant distinction in sentencing between crack cocaine and powder cocaine⁵⁰ also mandated a sentence of 20 years to life for drug-induced homicide.⁵¹ As of 2019, twenty-five states have enacted some form of a DIH statute.⁵² Over a dozen carry minimum prison sentences, including several that impose life sentences or the death penalty.⁵³ Some DIH statutes are broad and can apply to someone who merely delivers or administers a drug that results in a fatal overdose.⁵⁴

The criminalization of drug distribution places a responsibility on prosecutors to act in many tragic situations where a fatal overdose occurs, family members are grieving, and an investigation by law enforcement reveals who supplied, sold, or administered a drug that led to a fatal overdose. In these cases, prosecutors are under tremendous pressure to act. As a result, prosecutors have increasingly relied on the prosecution of DIH in response to the overdose crisis.⁵⁵ Unfortunately, many district attorneys and line prosecutors are not well-versed in how their charging decisions and public messaging may counteract the efforts of public health agencies and other stakeholders on the frontlines of overdose prevention initiatives. For example, one purported justification of DIH enforcement is to deter the distribution of illicit drugs on the streets, particularly those that carry a high-risk of overdose, such as heroin. However, critics argue that DIH laws and their highly-publicized enforcement are generally more likely to worsen the underlying problems that they purport to address.⁵⁶ Therefore, notwithstanding the pressure prosecutors may face to pursue drug-induced homicides, prosecutors must consider the potential ramifications of these cases and the long-term consequences of prosecuting them.

One of the biggest concerns about prosecuting drug-induced homicides is that these prosecutions undermine Good Samaritan laws. The primary goal of Good Samaritan laws is to save lives by encouraging people most likely to witness an overdose to call for

50 Sarah N. Lynch, [U.S. Justice Department Backs Bill To End Disparities in Crack Cocaine Sentences](#), Reuters (June 22, 2021) (“In 1986, Congress passed a law to establish mandatory minimum sentences for drug trafficking offenses, which treated crack and cocaine powder offenses using a 100 to 1 ratio. Under that formula, a person convicted for selling 5 grams of crack cocaine was treated the same as someone who sold 500 grams of powder cocaine.”).

51 21 U.S.C.A. § 841; Jake Shuler, [Overdose and Punishment](#), New Republic (Sept. 10, 2018).

52 See [Drug Induced Homicide Laws](#), Prescription Drug Abuse Pol’y Sys. (Jan. 1, 2019).

53 *Id.*

54 For example, in Michigan, “[a] person who delivers a schedule 1 or 2 controlled substance, other than marihuana, to another person . . . that is consumed by that person or any other person and that causes the death of that person or other person is guilty of a felony punishable by imprisonment for life or any term of years.” MICH. COMP. LAWS § 750.317a (West 2018).

55 In Pennsylvania, for example, “[d]rug delivery resulting in death charges statewide . . . increased by 1,267 percent between 2013 and 2017.” [Drug Delivery Resulting in Death Citations at Five-Year High](#), Unified Jud. Sys. PA. (Mar. 9, 2018).

56 Kelly Kung et al., [Analysis of the Effect of Drug Induced Homicide Prosecution Media Reports on Drug Overdose Deaths](#) (forthcoming 2021) (“We estimate that an increase in media coverage of DIH prosecutions is associated with an approximately 7.7% increase in overdose deaths.”); Beletsky, *supra* note 49, at 875-80 (explaining why DIH laws do not fulfill their purported purposes of deterrence, incapacitation, and retribution).

emergency help. In most situations, the people in the best position to call for emergency medical intervention are friends, family members, and social acquaintances who are also using or supplying the drugs before someone with them overdoses. Mitigating the fear of arrest and prosecution when timely medical intervention is necessary increases the likelihood that people call 911.⁵⁷ Good Samaritan laws are based on the theory that people who use drugs are more likely to seek help when fear of police, prosecutors, and legal penalties is diminished.⁵⁸

DIH laws are antithetical to Good Samaritan laws. The vast majority of Good Samaritan statutes only apply to possession charges, and not to distribution or death resulting from overdose.⁵⁹ Therefore, in jurisdictions with DIH laws, individuals involved in any form of distribution (even at the lowest level) may decline to call for medical attention when someone in their presence overdoses notwithstanding the existence of a Good Samaritan law.⁶⁰

A Point of Disagreement in the Working Group: Whether Prosecutors Should Ever Prosecute DIH Cases

The working group spent a significant amount of time discussing DIH laws and whether enforcement of those laws is ever appropriate. There was consensus among group members that these laws have been exploited in reaction to the overdose epidemic and that they have resulted in the unjust prosecution of family members and friends who struggle with substance use disorder. Additionally, as detailed above, the working group agreed that DIH prosecutions undermine Good Samaritan laws and may lead to dangerous responses to drug overdoses.

However, there was disagreement on the ultimate question of whether DIH prosecutions were ever appropriate. Some group members felt all DIH prosecutions are irreconcilable

57 See [An Overdose Death Is Not Murder: Why Drug-Induced Homicide Laws Are Counterproductive and Inhumane](#), Drug Pol’y Alliance 40 (2017) (citing studies that show fear of police involvement is a common reason people do not call 911 when witnessing an overdose).

58 Caleb J. Banta-Green et al., Univ. of Wash. Alcohol & Drug Abuse Inst., [Washington’s 911 Good Samaritan Drug Overdose Law: Initial Evaluation Results](#) (Nov. 2011) (“88% of opiate users indicated that now that they were aware of the law they would be more likely to call 911 during future overdoses.”); Andrea Jakubowski et al., [Knowledge of 911 Good Samaritan Law and 911-Calling Behavior of Overdose Witnesses](#), Substance Abuse (Oct. 3, 2017) (“In the overdose events where the participant had correct knowledge of the GSL [Good Samaritan Law] at the time of the event, the odds of a bystander calling 911 were over three times greater than when the witness had incorrect knowledge of the GSL . . .”).

59 Jeremiah Goulka et al., [Drug-Induced Homicide Defense Toolkit](#) 63 (Ohio State Pub. L. Working Paper No. 467 63, 2021) (“Unfortunately, Good Samaritan laws are too narrowly drawn. In every state except Vermont and Delaware, these laws only provide immunity to charges for possession of drugs and drug paraphernalia for personal use, not to distribution or death resulting from overdose—and these laws vary state to state on whether they cover investigation, arrest, and/or prosecution. In other words, they create a quandary for people calling 911: you (probably) won’t get in trouble if the person experiencing an accidental overdose event survives, but if death occurs, you’re calling the cops on yourself.”).

60 There is also growing concern that the enforcement of DIH laws may perpetuate racial disparities. Although the data is very limited, a recent study that compiled media reports of DIH cases from 2000 to 2017 found that half of the 86 cases involved a situation where the deceased person was white, and the accused was a person of color. See Beletsky, *supra* note 49, at 889.

with principles of public health and should never be charged. Others opposed an inflexible policy prohibiting all DIH prosecutions because of the possibility of unforeseen, unique circumstances. Ultimately, however, the working group was unanimous that DIH prosecutions will not end the overdose crisis and should rarely – if ever – be pursued. Prosecutors have an opportunity to prioritize innovative, evidence-based solutions that address systemic factors rather than relying heavily on punitive tactics, such as DIH enforcement, that fail to address the core issues.

IV. Drug Courts

Drug courts have proliferated across the nation, and there is good reason to believe that they will remain prevalent in the criminal system for the foreseeable future. Of course, drug courts vary in their structure, eligibility criteria, treatment options, and typical program requirements for participants. In recent years, drug courts have been critiqued by researchers, clinicians, and harm reduction experts because many of their practices are overly burdensome, punitive, and not aligned with principles of harm reduction and evidence-based medicine. In jurisdictions where drug courts are a well-established component of the judicial system, prosecutors should be aware of common pitfalls of drug courts and make strides to ensure that drug courts incorporate best practices in harm reduction and public health.



Click here for short video presentations by Tele Rabii and Julie Eldred about their personal experiences with drug court.

The literature on pitfalls of drug courts is extensive. Fair and Just Prosecution outlines the common issues and critiques of drug courts for prosecutors in a detailed issue brief.⁶¹ That document explains, for example, that many drug courts use a “stigmatizing abstinence-based definition of recovery,” are not clinically sound, do not adequately serve those most in need of treatment, and exacerbate racial disparities. Rather than repeating these critiques, which have been researched and written about at length, the authors encourage prosecutors to refer to the attached Appendix for more resources.

⁶¹ [Reconciling Drug Courts, Decarceration, and Harm Reduction](#), Fair and Just Prosecution (2021).

V. Plea Negotiations

A. Prioritize Cases in Which the Accused Presents a Genuine Safety Threat

Ideally, prosecutors would decline to pursue cases that are not appropriate for the criminal system before they even charge the accused. For instance, prosecutors would distinguish those who sell drugs to support their own use from those who are selling enormous amounts of drugs for pure financial gain at the charging stage, and decline to prosecute the former category of cases. Realistically, however, prosecutors need time and resources to determine who presents a true public safety threat. Therefore, a prosecutor's efforts to approach drug cases in an innovative way will likely take place after charging and during plea negotiations. It will involve rigorous investigation to determine the motivation for the crime and the potential for recidivism.

Prosecutors should consider several factors when deciding whether a case should be given a non-incarceratory disposition. First, prosecutors should not pursue punitive sentences for people who are engaged in the sale of drugs when the accused's motive is clearly to support a substance use disorder. Studies show that a significant number of people charged with distribution-related crimes also use drugs.⁶² Given that jails and prisons are ill-equipped to address substance use disorder, prosecutors should generally divert these cases into treatment and other supportive programs, or ultimately dismiss them.

Second, even for people who are engaged in distribution solely for economic reasons (and not because of substance use disorder), prosecutors should scrutinize which distribution cases they are prosecuting, and to what end. Although prosecutors routinely justify the prosecution of distributors on the ground that distributors prey on vulnerable people, the prosecution of low-level dealers has proved ineffective in stopping drug use, in large part because low-level dealers are easily replaced with new ones.⁶³ In addition, prosecutors often justify pursuing cases against low-level distributors as a means to prosecute those at higher levels in criminal enterprises. However, in reality, the vast majority of people incarcerated for drug distribution offenses are those at the lowest levels of an organization.⁶⁴

62 [Rethinking the Drug Dealer](#), Drug Pol'y Alliance 36 (2019) ("A 2004 Bureau of Justice Statistics report found that 70% of people incarcerated for drug trafficking in state prison reported that they had used drugs in the month prior to their offense. A 2017 report by the same agency found that 29.9% of people in state prison and 28.8% of people sentenced to jail for drug offenses between 2007 and 2009 said their offense was committed to acquire drugs or to get money for drugs. In 2012, 84% of those arrested for distribution offenses in Chicago, 92.9% in New York, 87.8% in Sacramento, and 38.1% in Washington, D.C. tested positive for drug use.") (citations omitted)).

63 *Id.* at 12; [Federal Drug Sentencing Laws Bring High Cost, Low Return](#), Pew Charitable Trusts (2015) ("Even if street-level drug dealers are apprehended and incarcerated, such offenders are easily replaced, ensuring that drug trafficking can continue, researchers say" (citations omitted)).

64 Ryan S. King & Marc Mauer, [Distorted Priorities: Drug Offenders in State Prisons](#), Sent'g Project 7 (Sept. 2002) ("Using this framework, we can identify an upper limit of 28.5% of the drug offenders who reported a level of activity that might constitute a high-level role in the drug economy . . . this total should be viewed as an upper limit and we can assume that the overall proportion is actually lower. Therefore, a significant proportion of drug offenders in prison - at least 71% -- reported no involvement in actions that could be considered 'high-level drug activities.'"); U.S. Sent'g Comm'n, [Mandatory Minimum Penalties for Drug Offenses in the Federal Criminal Justice System](#) 43-45 (Oct. 2017) (showing that less than a quarter of those convicted in 2016 in the federal system were categorized as an "importer/high-level supplier," "organizer/leader" or "grower/manufacturer" rather than a lower-level member of the organization).

The fact that so few incarcerated distributors are leaders of large criminal enterprises indicates our system is prioritizing the prosecution of low-level dealers. At a minimum, elected prosecutors should evaluate how often they are sending low-level distributors to jail or prison, at what level in an organization those people are operating, and what percentage of those prosecutions led to the successful prosecution of a major supplier. If few of the prosecuted distribution cases are leading to successful prosecutions of major drug suppliers who perpetuate violence in their communities, then the office should shift resources to prosecuting crimes that have a bigger impact on public safety (for example, distributing drugs while possessing a loaded firearm).

Third, even when prosecutors use low-level dealers to pursue high-level suppliers, they must take into account the harms inflicted on low-level sellers as the office pursues the “kingpin” of an operation. The literature on collateral consequences of a conviction and incarceration makes clear that those who serve time in prison suffer major barriers to employment, education, housing, and a myriad of other aspects of life.⁶⁵ The ultimate question prosecutors should ask themselves when pursuing low-level distributors is, “What is the good that will come from this prosecution, and what is the harm?” In other words, before prosecuting a low-level seller as a means to pursue a high-level supplier, prosecutors must engage in a cost-benefit analysis. They should evaluate whether prosecuting and incarcerating the high-level supplier will have a big enough impact on public safety to justify the harm inflicted on low-level dealers.

B. Do Not Rely on Coercive Plea Tactics

Prosecutors should avoid pressuring the accused to plead guilty early in a case to a high-level charge contingent on various terms. Prosecutors traditionally have relied on such pleas to maximize their leverage so that the accused has a large “hammer” hanging over them in the event they do not satisfy the conditions of the plea (whether the terms include probation, treatment, or the completion of drug court). However, such early pleas are unduly coercive. Instead, prosecutors should, for example, adjourn the case for six months to see whether the person engages in treatment or another program and consider dismissing the case if the accused shows significant progress in that program. By simply adjourning the case, prosecutors reduce the level of coercion while retaining some degree of leverage because they can ultimately still move forward with prosecution. Moreover, during the pendency of the case, the accused is not saddled with a criminal conviction.

C. Prioritize Investigations to Make Fair Plea Decisions, and Consider the Accused’s Personal Circumstances

During plea negotiations, prosecutors should gather as much information about the accused as possible, including family history, substance use history, mental health information, and the underlying facts of prior convictions. Conducting an investigation into the history of the

⁶⁵ For a comprehensive review of the collateral consequences of criminal convictions, see [Collateral Consequences: The Crossroads of Punishment, Redemption, and the Effects on Communities](#), U.S. Comm’n on Civil Rights (June 2019).

accused gives a prosecutor a more complete picture of their circumstances, which can lead to a more just plea offer and outcome. Prosecutors should remember that defense counsel may be allies in conducting such investigations and should encourage defense attorneys to provide as much information about their clients as possible.

Prosecutors must be aware that individuals selling drugs in the absence of a substance use disorder may be facing poverty, lack of opportunity, and intergenerational trauma, which should be considered when evaluating the merits of a case. Drug distribution is a crime of opportunity often sought out by marginalized individuals. Through drug distribution, an individual may gain a level of respect and self-confidence that traditional institutions have failed to provide.



Click here for a short video presentation by Andre Ward, who was incarcerated for a drug trafficking-related crime.

Studies have shown that the majority of incarcerated people serving a sentence related to drug offenses are not violent.⁶⁶ Therefore, prosecutors should not assume that imposing long prison sentences on drug sellers will remove perpetrators of violence off the street. Furthermore, prosecutors should consider that prison can often be traumatizing and dehumanizing, leading to worse, not better, outcomes for individuals subjected to it.⁶⁷

Prosecutors should also consider the accused's circumstances in drug-related cases that include charges beyond possession and sale, such as drug-related sex work, burglaries, larcenies, and robberies. While the accused's motive is rarely a legal element required to prove a charge, prosecutors should consider motive during plea negotiations. Prosecutors should ask hard questions, interview witnesses, seek information about the accused, and attempt to understand why a crime was committed. For instance, in a case involving the burglary of the lobby of a building that does not result in physical harm and appears motivated by the need to support a substance use disorder, the prosecutor should try to gather information about the accused's background and make a non-incarceratory plea offer.

⁶⁶ King & Mauer, *supra* note 64, at 4 (“[A]pproximately three-quarters of inmates currently serving a sentence for a drug offense have no current or prior convictions for a violent offense, and more than a third of the total have been convicted only of drug offenses.”).

⁶⁷ Danielle Sered, [Accounting for Violence: How to Increase Safety and Break Our Failed Reliance on Mass Incarceration](#), Vera Inst. of Just. 23 (2017) (“Studies demonstrate that prison can have a criminogenic effect – meaning it is likely to cause, rather than prevent, further crime.”).

VI. An Alternative to Traditional Drug Prosecution

Some people commit felonies such as burglary, robbery, and grand larceny to buy drugs to alleviate tormenting symptoms of withdrawal. Prosecutors may be inclined to request high amounts of bail and be less willing to consider diversion programs in such cases, especially when there is a victim who was harmed by the conduct of the accused. Despite these challenges, there are a variety of ways prosecutors can consider the clinical needs and life circumstances of the accused while also holding them accountable for their behavior. For instance, prosecutors can create [restorative justice](#) programs for people who commit more serious drug-related felonies such as sale or even those involving violence. Restorative justice is a promising movement that delivers accountability for harms but also promotes a process of healing for the person who caused the harm. Common Justice, an organization located in New York City, provides restorative justice programs for young adults charged with serious felonies. These programs can rectify harms and promote community safety, while also avoiding the harms that traditional prosecution can perpetuate.

The federal RISE program in the District of Massachusetts uses restorative justice principles and is in part specifically designed for people whose history of substance use disorder substantially contributed to the commission of the crime charged.⁶⁸ In RISE workshops, participants, community members, and surrogate victims (i.e. people who have lost children to drug overdoses) meet to help RISE participants “appreciate that their crimes harmed real people, that they too may have been harmed by their crimes or other circumstances in their life, and that they bear an obligation to repair the harm they caused.”⁶⁹ Unlike Common Justice, the RISE program includes cases that do not involve a specific victim, such as drug sales.⁷⁰

Another model for drug-related cases is the Community Diversion Program in King County, Washington. The Prosecuting Attorney’s Office is working with community, county, and criminal justice partners to launch a pre-filing diversion program by early 2022 that will allow eligible people facing their first felony to be assessed by a public health official and matched with a community partner for services and support (in lieu of having their case filed by the prosecutor’s office).⁷¹ In addition, the program will include a Victim Restoration Fund for harmed parties, which is designed to immediately reimburse victims for some of their financial losses. The program will eventually be fully funded through savings from reduced use of courts, jails, and legal services. Eligible cases include some property crimes and drug offenses, but not violent crimes.

68 Leo T. Sorokin & Jeffrey S. Stein, *Restorative Federal Criminal Procedure*, 119 Mich. L. Rev. 1315, 1334 (2021).

69 *Id.* at 1335.

70 *Id.* at 1337.

71 Matt Markovich, [King County Council OKs Plan To Let Community Groups Decide Some Punishment--Not Judges](#), KOMO News (Nov. 17, 2020).

VII. Post-Conviction

Prosecutors should review lengthy drug-related sentences and consider whether courts could be used retroactively to [resentence](#) those already incarcerated. To make the process easier, states have begun enacting legislation to allow prosecutors to re-sentence people who have been incarcerated far longer than necessary for drug-related crimes. Prosecutors can advocate for these changes in legislation. Further, prosecutors should advocate for legislation that expunges the criminal records of people convicted of drug crimes to alleviate barriers to employment and other significant, long-standing consequences of a criminal conviction.

VIII. Conclusion

Prosecutors must use their power and status within the criminal system to help end counterproductive and overly punitive practices in drug prosecution. With drug overdoses at an all-time high, prosecutors' offices owe it to the communities they serve to advance drug policy grounded in principles of harm reduction, public health, and racial justice. Elected prosecutors can minimize and reshape their role in the drug epidemic by **(1)** ensuring line prosecutors have a basic understanding of substance use disorder; **(2)** using their status within the community to end the stigma surrounding drug use and advocate for more social services; **(3)** developing office policies and practices that reduce the negative impact of the criminal system on the community's public health; **(4)** ensuring their local drug courts reflect the principles of harm reduction; and **(5)** supporting legislation that allows courts to re-sentence people who have been incarcerated far longer than necessary for drug-related crimes. Prosecutors should take advantage of their unique and powerful position within the criminal system to address the core issues of the nation's drug epidemic.

Appendix

Resources for Prosecutors

Humanizing Language

Eddie Ellis, [An Open Letter to Our Friends on the Question of Language](#), Center for NuLeadership on Urban Solutions (2007).

[Words Matter: Preferred Language for Talking About Addiction](#), National Institute on Drug Abuse (June 23, 2021).

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[Effective Drug Control: Toward a New Legal Framework](#), King County Bar Association Drug Policy Project (Jan. 19, 2005).

Substance Use Disorder

[Treatment Approaches for Drug Addiction DrugFacts](#), National Institute on Drug Abuse (Jan. 17, 2019).

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[Race and Prosecutorial Diversion: What We Know and What Can Be Done](#), Prosecutorial Performance Indicators (July 2021).

Stephanie Schmitz Bechteler & Kathleen Kane-Willis, [Whitewashed: The African American Opioid Epidemic](#), Chicago Urban League Research and Policy Center (Nov. 2017).

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Shannon Mace, et al., [Medication-Assisted Treatment for Opioid Use Disorder in Jails and Prisons: A Planning & Implementation Toolkit](#), Vital Strategies & National Council for Behavioral Health (2020).

Harm Reduction

[Harm Reduction Responses to Drug Use](#), Fair and Just Prosecution (2019).

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Drug Courts

Alejandra Garcia & David Lucas, [Bridging the Gap: A Practitioner's Guide to Harm Reduction in Drug Courts](#), Center for Court Innovation (Aug. 2021).

[Reconciling Drug Courts, Decarceration, and Harm Reduction](#), Fair and Just Prosecution (2021).

[Neither Justice Nor Treatment: Drug Courts in the United States](#), Physicians for Human Rights (2017).

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Leo Beletsky, [America's Favorite Antidote: Drug-Induced Homicide in the Age of the Overdose Crisis](#), 2019 Utah L. Rev. 833 (2019).

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