



# FAIR AND JUST PROSECUTION

Promoting justice through leadership and innovation

## ISSUES AT A GLANCE

## Harm Reduction Responses to Drug Use

*Fair and Just Prosecution (FJP) brings together recently elected district attorneys<sup>1</sup> as part of a network of like-minded leaders committed to change and innovation. FJP hopes to enable a new generation of prosecutive leaders to learn from best practices, respected experts, and innovative approaches aimed at promoting a justice system grounded in fairness, equity, compassion, and fiscal responsibility. In furtherance of those efforts, FJP's "Issues at a Glance" briefs provide district attorneys with information and insights about a variety of critical and timely topics. These papers give an overview of the issue, key background information, ideas on where and how this issue arises, and specific recommendations to consider. They are intended to be succinct and to provide district attorneys with enough information to evaluate whether they want to pursue further action within their office. For each topic, Fair and Just Prosecution has additional supporting materials, including model policies and guidelines, key academic papers, and other research. If your office wants to learn more about this topic, we encourage you to contact us.*

### SUMMARY

**This FJP "Issues at a Glance" brief addresses strategies for promoting a public health and harm reduction response to individuals who use drugs.** It outlines the underlying principles of harm reduction, an approach that emphasizes meeting people where they are and mitigating the harms associated with drug use rather than eliminating drug use altogether. This brief describes how harm reduction has been applied successfully in the justice system, and also addresses why ultimately access to such services should be widely available in the community.

The harms caused by drug use are increasingly visible throughout the U.S., in rural as well as urban communities. Fueled by widespread opioid addiction, more Americans are dying annually from drug overdoses than did in the deadliest years for HIV or automobile accidents.<sup>2</sup> In addition, thousands more people who use drugs experience damaging health consequences such as disease, trauma, and bodily injury. Societal stigma and discrimination prevent people from seeking or receiving help. Because the justice system is often a de facto entry point for individuals who

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<sup>1</sup> The term "district attorney" or "DA" is used generally to refer to any chief local prosecutor, including State's Attorneys, Prosecuting Attorneys, etc.

<sup>2</sup> Sanger-Katz, M. (2018), *Bleak New Estimates in Drug Epidemic: A Record 72,000 Overdose Deaths in 2017*, The New York Times, <https://www.nytimes.com/2018/08/15/upshot/opioids-overdose-deaths-rising-fentanyl.html>.

**"We are in the midst of an overdose crisis and cannot sit by and let people die when there are proven interventions that can save lives."**

— KINGS COUNTY (BROOKLYN, NY) DISTRICT ATTORNEY ERIC GONZALEZ

struggle with substance use to connect to social services, many law enforcement leaders and justice system stakeholders are developing collaborative solutions and alternative pathways to ensure that people who use drugs are offered appropriate services, rather than trapped in cycles of punishment and harm.

As leaders in the criminal justice system, prosecutors can play a key role in advancing drug policy reforms and new thinking to achieve more compassionate, fair, and effective responses to drug use. This brief discusses the potential for harm reduction and public health strategies to help limit drug-related deaths, the spread of infectious disease, and other problems associated with drug use. It also discusses strategies that promote low-barrier access to treatment and aim to reduce problematic drug use. Finally, it highlights examples of innovations in harm reduction practices at several stages of the justice system, as well as initiatives spearheaded by community responses – a preferable starting point for engagement.

## BACKGROUND

### A. Past Punitive Responses to Drug Use

The U.S. overdose epidemic is unprecedented in scale: 70,237 people died from a drug overdose in 2017, a rate that has more than tripled since 1999.<sup>3</sup> Drug overdoses have contributed to a decline for the third year in a row in U.S. life expectancy – a phenomenon not observed in the previous 100 years.<sup>4</sup> The overdose rate is continuing to increase across nearly all demographic groups,<sup>5</sup> and nearly one in eight Americans reports having lost a friend or family member to opioids,<sup>6</sup> a category of drugs that includes heroin as well as legal prescription pain medications.

While the traditional law enforcement response to drug use has been punitive (and most recently focused on restricting the supply of legal and nonlegal opioids), there is growing consensus that past “war on drugs” policies have not stopped drug use or its negative consequences. Indeed, while the supply of prescription opioids has now been reduced, evidence demonstrates that shutting off that valve has caused other harms. People are increasingly using heroin both to replace prescription opioids<sup>7</sup> and at the onset of their drug use.<sup>8</sup> Furthermore, overdose deaths are increasingly driven<sup>9</sup> by the presence of synthetic opioids such as fentanyl, an extremely potent and

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<sup>3</sup> Hedegaard, H., Miniño, A.M., and Warner, M. (2018), *Drug Overdose Deaths in the United States, 1999-2017*, Centers for Disease Control and Prevention, <https://www.cdc.gov/nchs/products/databriefs/db329.htm>.

<sup>4</sup> Bernstein, L. (2018), *U.S. Life Expectancy Declines Again, A Dismal Trend Not Seen Since World War I*, The Washington Post, [https://www.washingtonpost.com/national/health-science/us-life-expectancy-declines-again-a-dismal-trend-not-seen-since-world-war-i/2018/11/28/ae58bc8c-f28c-11e8-bc79-68604ed88993\\_story.html?utm\\_term=.4106eb8f1a2f](https://www.washingtonpost.com/national/health-science/us-life-expectancy-declines-again-a-dismal-trend-not-seen-since-world-war-i/2018/11/28/ae58bc8c-f28c-11e8-bc79-68604ed88993_story.html?utm_term=.4106eb8f1a2f).

<sup>5</sup> Centers for Disease Control and Prevention (2018), *Overview of the Drug Overdose Epidemic: Behind the Numbers*, <https://www.cdc.gov/drugoverdose/data/index.html>.

<sup>6</sup> The Associated Press-NORC Center for Public Affairs Research (2018), *Americans Recognize the Growing Problem of Opioid Addiction*, <http://www.apnorc.org/projects/Pages/HTML%20Reports/Americans-Recognize-the-Growing-Problem-of-Opioid-Addiction.aspx>.

<sup>7</sup> National Institute on Drug Abuse (2018), *Prescription opioid use is a risk factor for heroin use*, <https://www.drugabuse.gov/publications/research-reports/relationship-between-prescription-drug-heroin-abuse/prescription-opioid-use-risk-factor-heroin-use>.

<sup>8</sup> Cicero, T. J., Ellis, M. S., and Kasper, Z. A. (2017), *Increased use of heroin as an initiating opiate of abuse*, *Addictive Behaviors*, 74, 63-66, <https://www.sciencedirect.com/science/article/abs/pii/S0306460317302083?via%3Dihub>.

<sup>9</sup> Hedegaard et al., *Drug Overdose Deaths in the U.S.*, *supra* note 3.

deadly drug that emerged on the black market in response to reduced availability of heroin.<sup>10</sup>

Amidst this crisis, attitudes towards drug use are shifting: 67% of Americans think that the government should focus on the provision of *treatment*, rather than prosecution, for people who use drugs.<sup>11</sup> Policymakers are similarly recognizing the potential for saving lives and reducing unnecessary incarceration by changing the way the criminal justice system responds to drug use.

More than half of people incarcerated in state prisons meet the criteria for substance use disorder,<sup>12</sup> and as many as one in three people experiencing heroin addiction pass through the corrections system each year.<sup>13</sup> At the same time, nearly 80% of people with an opioid use disorder did not receive treatment within the past year.<sup>14</sup> While interactions with the justice system are an opportunity to help people who use drugs get the support they need, resources spent on prosecuting and incarcerating people who use drugs can instead be allocated toward the preferable provision of services proactively and outside of the justice system.

## B. Harm Reduction Approaches

To achieve these changes, policymakers and law enforcement leaders – including prosecutors – are increasingly adopting a *harm reduction* response to drug use. Harm reduction is a public health philosophy and set of practical strategies that seeks to reduce the negative consequences associated with drug use through an approach focused on ameliorating the impact rather than eliminating the conduct alone. The concept is premised on respect for the people who use drugs, and critically, accepts the fact that they may not be willing or able to stop using them or may not have access to needed services and support. Rather than promoting abstinence-based recovery as an assumed goal, harm reduction services instead aim to meet users “where they are,” with low barriers to entry, in recognition of the pervasive stigma and discrimination that often prevents people who use drugs from seeking and receiving help.<sup>15</sup> Specific harm reduction strategies include: sterile syringe access; medication-assisted treatment, and, in particular, opioid

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<sup>10</sup> Mars, S.G., Rosenblum, D., & Ciccarone, D. (2018), *Illicit fentanyl in the opioid street market: desired or imposed?*, *Addiction*, <https://www.ncbi.nlm.nih.gov/pubmed/30512204>.

<sup>11</sup> Pew Research Center (2014), *America’s New Drug Policy Landscape*, <http://www.people-press.org/2014/04/02/americas-new-drug-policy-landscape/>.

<sup>12</sup> Note that the following citation uses “dependence or abuse” as the criterion: Bronson, J., et al. (2017), *Drug Use, Dependence, and Abuse Among State Prisoners and Jail Inmates, 2007-2009*, U.S. Department of Justice Bureau of Justice Statistics, <https://www.bjs.gov/content/pub/pdf/dudaspi0709.pdf>.

<sup>13</sup> Boutwell, A.E., et al. (2007), *Arrested on heroin: a national opportunity*, *Journal of Opioid Management*, 3(6), 328-332, <https://www.ncbi.nlm.nih.gov/pubmed/18290584>.

<sup>14</sup> Saloner, B. & Karthikeyan, S. (2015), *Changes in Substance Abuse Treatment Use Among Individuals With Opioid Use Disorders in the United States, 2004-2013*, *Journal of the American Medical Association*, 314(14), 1515-1517, <https://jamanetwork.com/journals/jama/fullarticle/2456156>.

<sup>15</sup> The harm reduction movement originated in response to the HIV epidemic in the 1980s. It has increasingly been adopted in the U.S. and around the world as a response to drug use that is complementary to other responses, including enforcement (see, e.g., Des Jarlais, D.C. (2017), *Harm reduction in the USA: the research perspective and an archive to David Purchase*, *Harm Reduction Journal*, 14(51), <https://harmreductionjournal.biomedcentral.com/articles/10.1186/s12954-017-0178-6>). Countries such as Switzerland and Canada have adopted a “four pillars” approach to drug use, in which harm reduction is held on equal footing to treatment, prevention, and enforcement. See MacPherson, D. (2001), *A Framework for Action: A Four-Pillar Approach to Drug Problems in Vancouver*, City of Vancouver, [https://static1.squarespace.com/static/596f8b1ca803bb496e345ac8/t/59c97123f5e231aee5a781d/1506373924623/A\\_Four-Pillar\\_Approach\\_to\\_Drug\\_Problems\\_in\\_Vancouv.pdf](https://static1.squarespace.com/static/596f8b1ca803bb496e345ac8/t/59c97123f5e231aee5a781d/1506373924623/A_Four-Pillar_Approach_to_Drug_Problems_in_Vancouv.pdf).

agonist treatment;<sup>16</sup> the distribution of the overdose antidote medication naloxone; and overdose prevention sites.

Harm reduction approaches are gaining increasing support – including among law enforcement leaders – but it should be noted that traditional criminal justice system responses are not designed with a harm reduction philosophy in mind, and often operate in conflict with that model. Drug use in the U.S. is criminalized and widely enforced – more than 85% of arrests for drug-related offenses in 2017 were for possession.<sup>17</sup> Yet punitive responses to drug use have not been shown to reduce drug supply or use.<sup>18</sup> Indeed, punishing addicted drug users to change their behavior is inherently paradoxical because, in developing an addiction, an individual has already demonstrated that he or she does not respond to the negative consequences of drug use. Deep-seated, but misguided, beliefs about the nature of addiction and recovery have wide-ranging consequences: law enforcement officials nationwide routinely respond to measures intended to ameliorate the harms of drug use in a way that can exacerbate it. For example, some police departments and leaders confiscate naloxone<sup>19</sup> and oppose syringe access programs;<sup>20</sup> prosecutors file charges for drug-induced homicide<sup>21</sup> and syringe possession;<sup>22</sup> and correctional officials fail to provide evidence-based treatment in prisons and jails,<sup>23</sup> which results in people suffering opioid withdrawal symptoms and experiencing a higher risk of fatal overdose.

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<sup>16</sup> Medication-assisted treatment (MAT) is an evidence-based approach to treating opioid use disorder which combines behavioral therapy with medication. Opioid agonist treatment is a subset of MAT which encompasses two of the three medications approved for MAT – methadone and buprenorphine – which have the strongest evidence base, and, unlike the third medication (naltrexone or Vivatrol) act to manage withdrawal symptoms. For more, see “Promising Practices and the Prosecutor’s Role in Promoting Effective Drug Policies” below.

<sup>17</sup> Federal Bureau of Investigation, *2017 Crime in the United States*, <https://ucr.fbi.gov/crime-in-the-u.s/2017/crime-in-the-u.s.-2017/topic-pages/persons-arrested>.

<sup>18</sup> Travis, J., Western, B., and Redburn, S., eds. (2014), *The Growth of Incarceration in the United States: Exploring Causes and Consequences*, at 153-154, <https://www.nap.edu/catalog/18613/the-growth-of-incarceration-in-the-united-states-exploring-causes>.

<sup>19</sup> Marten, L. (2019), *Investigation: Where Are Naloxone Confiscations Happening the Most?* Filter, <https://filtermag.org/2019/03/06/investigation-where-are-naloxone-confiscations-happening-the-most/>.

<sup>20</sup> Lofton, K.L. (2018), *Diving Deep Into Harm Reduction Part 1: Why W.Va.’s Largest Needle Exchange Closed*, West Virginia Public Broadcasting, <https://www.wvpublic.org/post/diving-deep-harm-reduction-part-1-why-wva-s-largest-needle-exchange-closed#stream/0>.

<sup>21</sup> Goldensohn, R. (2018), *They Shared Drugs. Someone Died. Does That Make Them Killers?* The New York Times, <https://www.nytimes.com/2018/05/25/us/drug-overdose-prosecution-crime.html>.

<sup>22</sup> Goeller, A. (2017), *State Law Has Conflict on Needle Possession*, The Daily Journal, [http://www.dailyjournal.net/2017/10/21/state\\_law\\_has\\_conflict\\_on\\_needle\\_possession/](http://www.dailyjournal.net/2017/10/21/state_law_has_conflict_on_needle_possession/).

<sup>23</sup> Lopez, G. (2018), *How America’s Prisons are Fueling the Opioid Epidemic*, Vox, <https://www.vox.com/policy-and-politics/2018/3/13/17020002/prison-opioid-epidemic-medications-addiction>.

**“Science suggests that efforts to judge, shame and punish those with substance use disorder does nothing to relieve the pain or pull of addiction.”**

— KING COUNTY (SEATTLE, WA) PROSECUTING ATTORNEY DAN SATTERBERG

## C. Building Alternatives to a Criminal Justice Response

As this brief outlines, in some communities the criminal justice system is adapting to mitigate these harms and instead help the numerous justice-involved individuals who use drugs and are in need of support. However, the justice system should not be the only, or primary, pathway to treatment – by design, justice-system interventions may exclude those who need help the most, such as people with criminal histories. Implementing harm reduction in the criminal justice system should therefore be viewed as a short-term and intermediate solution, and should not preclude working toward a larger and simultaneous goal of providing support through a *public health* response.

While some of these principles and strategies may appear politically challenging, it's important to place the current crisis and U.S. responses in context. In the past two decades, many countries have implemented different models of drug policy reform – from the decriminalization of all personal drug use in Portugal, to the legalization of recreational marijuana in Canada and Uruguay – while major international bodies have expressed support for such a move away from penalizing drug use.<sup>24</sup> In the U.S., significant shifts in marijuana policy and a growing willingness to embrace harm reduction measures (such as syringe access programs) to combat the overdose crisis, including among those previously opposed to these strategies,<sup>25</sup> demonstrate the potential for further reform.

### HARM REDUCTION PRINCIPLES

Policies and programs that use a harm reduction approach can take a variety of forms. While there is no universal definition of what constitutes a harm reduction practice, understanding the basic tenets of the philosophy can facilitate the development of policies and programs that effectively mitigate the harms associated with drug use.

The following principles that underlie harm reduction practices are adapted from those developed by The Harm Reduction Coalition, a leading advocacy organization:<sup>26</sup>

- Legal and illegal drug use are part of our world and it is better to work to minimize their harmful effects rather than simply ignore or condemn them.
- Drug use is a complex, multi-faceted phenomenon that encompasses a range of behaviors, from severe addiction to total abstinence, and some ways of using drugs are clearly safer than others.
- Improving the quality of individual and community life and well-being – not necessarily cessation of all drug use – are the key criteria for successful interventions and policies.
- Services and resources for people who use drugs should be patient-centered, culturally sensitive, non-coercive, and non-judgmental.

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<sup>24</sup> Bilefsky, D. (2018), *Legalizing Recreational Marijuana, Canada Begins an Experiment*, The New York Times, <https://www.nytimes.com/2018/10/17/world/canada/marijuana-pot-cannabis-legalization.html>; Eastwood, N., Fox, E., and Rosmarin, A. (2016), *A Quiet Revolution: Drug Decriminalisation Across the Globe*, Release, <https://www.release.org.uk/sites/default/files/pdf/publications/A%20Quiet%20Revolution%20-%20Decriminalisation%20Across%20the%20Globe.pdf>.

<sup>25</sup> Twohey, M. (2016), *Mike Pence's Response to H.I.V. Outbreak: Prayer, Then A Change of Heart*, The New York Times, <https://www.nytimes.com/2016/08/08/us/politics/mike-pence-needle-exchanges-indiana.html>; Vestal, C. (2018), *Why Police Backing is Key to Needle Exchanges*, Pew Stateline, <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2018/02/13/why-police-backing-is-key-to-needle-exchanges>.

<sup>26</sup> The Harm Reduction Coalition, *Principles of Harm Reduction*, <https://harmreduction.org/about-us/principles-of-harm-reduction/>.

- People who use drugs and those with a history of drug use must have a meaningful voice in the creation of programs and policies designed to serve them, and should be the primary agents of reducing the harms of their drug use.
- Poverty, class, racism, social isolation, past trauma, sex-based discrimination and other social inequalities affect both people’s vulnerability to, and capacity for, effectively addressing drug-related harm.
- The real and tragic harm and danger associated with licit and illicit drug use should not be ignored or minimized.
- Harm reduction extends beyond reducing harm caused by drugs, to harms caused by drug policies, and aims to restore rights and invest resources in communities most harmed by drug policies.

## PROMISING PRACTICES AND THE PROSECUTOR’S ROLE IN PROMOTING EFFECTIVE DRUG POLICIES

Prosecutors can play a critical role in changing responses to drug use by not only implementing harm reduction approaches in their offices, but also, as public officials, using their platform to destigmatize drug use and advocate for harm reduction programs in their communities. Given that the dominant response to drug use in recent decades has been criminalization, it is particularly impactful for prosecutors, as well as law enforcement officials and other criminal justice partners, to call for interventions that minimize the role of the justice system. In doing so, they will help achieve the structural changes – including resource re-allocation and destigmatization – that are necessary to achieve a true public health approach to drug use.

The following examples illustrate how district attorneys and other stakeholders have incorporated harm reduction practices at various stages of the justice system, and more broadly.

### A. Change Punitive Drug Use Responses

Harm reduction recognizes that criminalizing drug use has negative effects on individuals by increasing stigma and discrimination, redirecting resources away from treatment and prevention efforts, and perpetuating inequalities in the criminal justice system.

The adverse effects of marijuana prohibition, in particular, have prompted dozens of states to adopt, by ballot measure or through legislatures, **new approaches to marijuana use**. In the majority of states,<sup>27</sup> medical marijuana is now legal.

As the FJP brief “Marijuana Policy Reform” describes, many prosecutors similarly have moved away from strict marijuana enforcement, even in the absence of state or city-level policy reform.<sup>28</sup> A growing number of district attorneys across the country – from big cities like Brooklyn (NY) or Chicago (IL) to smaller communities like Corpus Christi (TX) or Burlington (VT) – have exercised their prosecutorial discretion and declined to prosecute most low-level marijuana offenses. In Baltimore City (MD), State’s Attorney Marilyn Mosby announced that she would not only no longer prosecute marijuana possession, but she will also not be prosecuting distribution or intent

<sup>27</sup> Thirty-two states permit the use of medical marijuana as of the publication of this brief. See Marijuana Policy Project, *State Policy*, <https://www.mpp.org/states/>.

<sup>28</sup> Fair and Just Prosecution (2017), *Marijuana Policy Reform*, <https://fairandjustprosecution.org/wp-content/uploads/2017/09/FJPBrief.Marijuana.9.25.pdf>.

to distribute based on the quantity of marijuana alone: other indicators of drug dealing must be present to trigger a prosecution.<sup>29</sup> Other DAs, including Kim Ogg in Houston (TX) and John Chisholm in Milwaukee County (WI), have implemented cite-and-release programs that treat marijuana possession as an infraction – thus helping individuals avoid deeper involvement in the criminal justice system.

## B. Create Low-Barrier Access to Treatment

The ongoing opioid crisis has brought increased attention to the limited availability of medication assisted treatment (MAT) and opioid agonist treatment (OAT) in particular. OAT is a gold-standard approach<sup>30</sup> to treating opioid addiction which combines behavioral therapy with the medications methadone or buprenorphine (or in combined form as suboxone).<sup>31</sup> These medications suppress opioid withdrawal symptoms, reduce cravings, and eliminate the “high” associated with opioid use, with little potential for overdose when used as prescribed. The aim of OAT is to help the patient attain a productive and healthy lifestyle. Despite being highly effective, OAT is severely underused and has limited availability, in part due to stigma around its use based on the misconception that OAT is replacing one drug with another.<sup>32</sup> Because unnecessary legal and regulatory barriers make OAT very difficult to access, there is a black market for the prescription-only medications among people seeking to avoid using opioids. In 2018, Chittenden County (Burlington, VT) State’s Attorney Sarah George and Police Chief Brandon del Pozo announced that they would no longer arrest or prosecute individuals for illegally possessing buprenorphine, in tandem with public health efforts to expedite access to the medication in Vermont.<sup>33</sup>

## C. Divert People Out of the Justice System and, When Needed, into Treatment

Prosecutors across the U.S. are increasingly supporting and developing opportunities to divert people who use drugs from the justice system at various points of contact, including before

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<sup>29</sup> Dewan, S. (2019), *A Growing Chorus of Big City Prosecutors Say No to Marijuana Convictions*, New York Times, <https://www.nytimes.com/2019/01/29/us/baltimore-marijuana-possession.html?auth=login-email&login=email>.

<sup>30</sup> Connery, H.S. (2015), *Medication-assisted treatment of opioid use disorder; review of the evidence and future directions*, Harvard Review of Psychiatry, 23(2), 63-75, <https://www.ncbi.nlm.nih.gov/pubmed/25747920>; Thomas, C.P., et al. (2014), *Medication-Assisted Treatment With Buprenorphine: Assessing the Evidence*, Psychiatric Services 65(2), 158-170, <https://ps.psychiatryonline.org/doi/pdf/10.1176/appi.ps.201300256>; Fullerton, C.P., et al. (2014), *Medication-Assisted Treatment with Methadone: Assessing the Evidence*, Psychiatric Services 65(2), <https://www.ncbi.nlm.nih.gov/pubmed/24248468>.

<sup>31</sup> The FDA has approved only methadone, buprenorphine, and naltrexone to treat opioid use disorder. While all three medications fall under the commonly-used terminology “medication-assisted treatment” (MAT), only opioid agonist treatment (OAT) – that is, methadone and buprenorphine – act to manage withdrawal symptoms. Naltrexone (also known as Vivatrol) does not, and only acts to block the effects of using opiates. Naltrexone is often offered in coercive correctional settings and has a more limited evidence base than opioid agonist treatment; therefore, this brief focuses on OAT. There are a variety of factors that determine which OAT medication is prescribed; however, generally, methadone is preferred for more severe opioid dependencies. Compared to methadone, buprenorphine has the advantages of 1) having a lower potential for abuse; 2) can be taken at home and 3) any doctor with the appropriate waiver can prescribe it. However, 30 million Americans live in counties where no doctor has such a waiver. For more information, see: Pew Charitable Trusts (2016), *Medication-Assisted Treatment Improves Outcomes for Patients with Opioid Use Disorder*, <https://www.pewtrusts.org/en/research-and-analysis/fact-sheets/2016/11/medication-assisted-treatment-improves-outcomes-for-patients-with-opioid-use-disorder>.

<sup>32</sup> Substance Abuse and Mental Health Administration (2019), *Medication and Counseling Treatment*, <https://www.samhsa.gov/medication-assisted-treatment/treatment>.

<sup>33</sup> Freese, A. (2018), *Burlington to Ease Access to Opioid Addiction Medication*, Seven Days, <https://www.sevendaysvt.com/vermont/burlington-to-ease-access-to-opioid-addiction-medication/Content?oid=16884183>.

an interaction with police, at the point of arrest, pre-arraignment, and at sentencing. The approaches below vary in terms of the extent to which they balance the priorities of punishment and rehabilitation. Indeed, some experts have adopted the term “alternatives to punishment” to describe measures that do not impose any form of punishment or coercive sanction on people who use drugs, reflecting the fact that some responses aimed at diverting people from prison may still maintain a punitive element.<sup>34</sup> These punitive-based responses are in tension with the nature of substance use disorder, and should be avoided.

Interactions with the justice system provide an opportunity for connecting people who use drugs into community-based services and support to avoid deeper justice system entanglement. To do so effectively, programs should reflect the fact that not all people who use drugs have a substance use disorder and incorporate a range of available responses. They should also recognize that, for people with a substance use disorder, relapsing despite the presence of negative consequences is part of the disorder, and adding further consequences to relapsing will not end harmful drug use.

Several widely adopted approaches that deflect people from the criminal justice system focus on people who use drugs, aiming to divert them at the earliest point of contact with the justice system.<sup>35</sup>

**Law Enforcement Assisted Diversion (LEAD)** is one of the most widely-recognized pre-booking diversion programs that engages individuals with unmet behavioral health needs, many of whom cycle frequently through the justice system, through an innovative partnership between police, prosecutors,<sup>36</sup> and social workers. Prior to booking and prosecution, individuals who would otherwise be arrested on low-level charges – such as for drug possession, drug sales, and prostitution – are diverted by police officers to a trauma-informed intensive case management program that often includes housing support and substance use treatment. Once clients are in the program, prosecutors work closely with case managers and other justice system stakeholders to exercise their discretion to ensure that decisions – about existing or subsequent charges filed – support participants’ opportunity for behavioral change. As a harm reduction intervention, LEAD

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<sup>34</sup> European Monitoring Centre for Drugs and Drug Addiction (2015), *Alternatives to punishment for drug-using offenders*, [http://www.emcdda.europa.eu/publications/emcdda-papers/alternatives-to-punishment\\_en](http://www.emcdda.europa.eu/publications/emcdda-papers/alternatives-to-punishment_en).

<sup>35</sup> While the examples in this section are targeted to people who may have a substance use issue, there are also innovative programs designed to more productively respond to people who use drugs and do not have a need for treatment. For example, Project Reset in Manhattan (and in parts of Brooklyn and the Bronx) serves people who are issued a desk appearance ticket for certain first-time low-level, non-violent crimes, including drug possession, trespassing, and shoplifting. Participants complete 2-4 hours of tailored community-based programming, such as group workshops, restorative circles, arts programming, and individual counseling sessions. Upon completion, prosecutors decline to prosecute the case and the original arrest is sealed. For more information, see Center for Court Innovation (2018), *Fact Sheet: Project Reset*, [https://www.courtinnovation.org/sites/default/files/media/document/2018/PR\\_FactSheet\\_10252018.pdf](https://www.courtinnovation.org/sites/default/files/media/document/2018/PR_FactSheet_10252018.pdf).

<sup>36</sup> For a detailed discussion of the prosecutor’s role in LEAD, see LEAD (2017), *Core Principles for Prosecutor Role*, <http://static1.1.sqspcdn.com/static/f/1185392/27826915/1518217024843/LEAD+Core+Principles+for+Prosecutor+2017.pdf?token=kvhPkjx2RpagwBM8SH5wli8sJ8E%3D>.

***“We have a crisis with opioids and substance use and if we keep doing things the same and don’t try different things we’re going to be stagnant. The data shows up to now – no one has ever died in a safe injection site.”***

**— SUFFOLK COUNTY (BOSTON, MA) DISTRICT ATTORNEY RACHAEL ROLLINS**

recognizes that individuals with substance use disorder may continue to struggle for an extended period of time and may relapse despite best efforts at recovery. Therefore the program does not utilize a “zero-tolerance” approach toward drug use or prioritize “completion” or abstinence as an expected goal.<sup>37</sup> For more information on LEAD, see the FJP issue brief on “Promising Practices in Prosecutor-Led Diversion.”<sup>38</sup>

**Project HOPE in Staten Island, New York** is a pre-arraignment diversion program launched by the Richmond County (Staten Island) District Attorney’s office as part of a broader public engagement initiative in response to the opioid crisis.<sup>39</sup> Project HOPE aims to divert people charged with low-level offenses to treatment after arrest. Individuals are offered the opportunity to meet with a peer coach, receive a Naloxone kit and training, and to have their charges declined by the DA’s office if they subsequently “meaningfully engage” in treatment services – importantly, this is defined by a community-based service provider rather than by a justice system stakeholder.<sup>40</sup> The program utilizes a broad definition of treatment that includes harm reduction principles,<sup>41</sup> and in its definition of engagement, acknowledges that relapse is often part of recovery. In its first 26 months, 577 individuals entered the program, 94% of whom successfully had their charges dismissed (while approximately 22% were rearrested). Though there is still no formal evaluation of the program’s impact, Staten Island experienced a 15% decline in overdose deaths in 2017-2018. Similar programs are now in operation in the four other New York City boroughs, including Brooklyn’s Project CLEAR.<sup>42</sup>

Other harm reduction efforts incorporate ways to productively respond to people who may commit more serious crimes to support their drug use in the absence of other social supports.

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<sup>37</sup> An independent evaluation of the program in King County (Seattle) Washington, where LEAD originated, found that participants had 58% lower odds of future arrest compared to a control group, and 39% lower odds of being charged with a felony. Participants also had improved outcomes on housing, employment, and income, and the program was found to save nearly \$7,000 in justice system utilization costs per year per participant. Collins, S.E., Lonczak, H.S., & Clifasefi, S.L. (2017), *Seattle’s Law Enforcement Assisted Diversion (LEAD): Program effects on recidivism outcomes*, Evaluation and Program Planning, 64, 49-56, [https://docs.wixstatic.com/ugd/6f124f\\_f4eed992eaff402f88ddb4a649a9f5e6.pdf](https://docs.wixstatic.com/ugd/6f124f_f4eed992eaff402f88ddb4a649a9f5e6.pdf); Clifasefi, S.L., Lonczak, H.S. & Collins, S.L. (2017), *Seattle’s Law Enforcement Assisted Diversion (LEAD) Program: Within-Subjects Changes on Housing, Employment, and Income/Benefits Outcomes and Associations With Recidivism*, Crime & Delinquency, 63(4), 429-445, [https://docs.wixstatic.com/ugd/6f124f\\_83818330ce894828a01a62363a77b1c1.pdf](https://docs.wixstatic.com/ugd/6f124f_83818330ce894828a01a62363a77b1c1.pdf); Collins, S.L., Lonczak, H.S., and Clifasefi, S.L. (2015), *LEAD Program Evaluation: Criminal Justice and Legal System Utilization and Associated Costs*, [https://docs.wixstatic.com/ugd/6f124f\\_2f66ef4935c04d37a11b04d1998f61e2.pdf](https://docs.wixstatic.com/ugd/6f124f_2f66ef4935c04d37a11b04d1998f61e2.pdf).

<sup>38</sup> Fair and Just Prosecution (2017), *Promising Practices in Prosecutor-Led Diversion*, <https://fairandjustprosecution.org/wp-content/uploads/2017/09/FJPBrief.Diversion.9.26.pdf>.

<sup>39</sup> Office of the District Attorney, Richmond County (2018), *SIHope.org*, <https://sihope.org/index.html>.

<sup>40</sup> Office of the District Attorney, Richmond County (2017), D.A. McMahon, Mayor Bill de Blasio, City Council Speaker Melissa Mark-Viverito, BP James Oddo, NYPD Commissioner James P. O’Neill, The Legal Aid Society, NYS Office of Alcoholism and Substance Abuse Services & Community Partners announce groundbreaking Heroin Overdose Prevention & Education (“HOPE”) Program, <https://statenilandda.org/wp-content/uploads/2018/04/Heroin-Overdose-Prevention-Education-%E2%80%9CHOPE%E2%80%9D-Program.pdf>.

<sup>41</sup> Lewis, C. (2017), *Staten Island’s new jail-diversion program for drug users could provide citywide model*, Crain’s New York Business, [https://www.crainnewyork.com/article/20170417/HEALTH\\_CARE/170419893/hope-program-staten-island-s-new-jail-diversion-program-for-drug-users-could-be-a-model-for-nyc](https://www.crainnewyork.com/article/20170417/HEALTH_CARE/170419893/hope-program-staten-island-s-new-jail-diversion-program-for-drug-users-could-be-a-model-for-nyc).

<sup>42</sup> Kings County District Attorney’s Office (2018), *Project Brooklyn CLEAR, Offering Treatment to Individuals Arrested With Small Amounts of Narcotics, Expanded to the Entire Borough of Brooklyn*, <http://www.brooklynnda.org/2018/10/16/project-brooklyn-clear-offering-treatment-to-individuals-arrested-with-small-amounts-of-narcotics-expanded-to-the-entire-borough-of-brooklyn/>.

**The US District Court of Massachusetts’ RISE program**, developed by the court with input from the U.S. Attorney’s office, is a deferred-sentencing program for people who have pled guilty to felony charges (excluding sex offense charges) and who have either a significant history of substance use disorder which affected their commission of the crime, or who have a demonstrated absence of full-time productive activity, decision-making skills, or a positive social support network.<sup>43</sup> Participants receive tailored programming – which includes a restorative justice component – for up to 12 months.<sup>44</sup> Those who meet their goals or demonstrate progress toward them will have their sentence reduced, changed to probation, or dismissed.<sup>45</sup>

As part of wide-ranging marijuana policy reforms (discussed above), in 2019, the **Baltimore City State’s Attorney’s Office** mandated referral of all first-time non-violent felony drug offenses to the **“AIM to B’More” diversion program**.<sup>46</sup> Through the program, which has operated since 2015, participants are assessed for serious or chronic behavioral and psychological needs, provided necessary treatment, and are encouraged to develop an action plan with a social worker. Upon successful completion of the program, which includes a 2-year supervised probation period, an individual’s record will be expunged. The program has a 68% completion rate, a 32% recidivism rate, and 98% of graduates are currently employed full-time.<sup>47</sup>

In 2011, **Ohio** broadened its **deferred prosecution program, “Intervention in Lieu of Conviction,”** which targets defendants whose drug use contributed to the commission of certain offenses, to apply to a broader group of drug-related charges, including low-level trafficking offenses, and, with the prosecutor’s consent, to people who have a prior non-violent felony.<sup>48</sup> In 2018, Ohio further revised the program, adding additional eligible charges and ending its “one-strike” policy towards defendants who do not meet their supervisory conditions (i.e., fail a drug test). Instead of an automatic guilty charge and imposition of a criminal sanction, judges are now allowed to use their discretion to allow defendants to continue or re-enroll in the program,<sup>49</sup> an important acknowledgement of the nature of substance use disorder, relapse, and recovery.

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<sup>43</sup> Valencia, M. (2016), *Defendants Offered Alternative to Prison*, Boston Globe, <https://www.bostonglobe.com/metro/2016/12/18/defendants-offered-alternative-prison/7xsV5ibaQFCxEa0itjBkDJ/story.html>.

<sup>44</sup> U.S. District Court of Massachusetts (2017), *The Rise Program*, <https://www.map.uscourts.gov/sites/map/files/2017%20RISE%20Program%20Statement.pdf>.

<sup>45</sup> *Id.*

<sup>46</sup> The Baltimore City State’s Attorney’s Office (2019), *Reforming a Broken System: Rethinking the Role of Marijuana Prosecutions in Baltimore City*, [https://www.stattorney.org/images/MARIJUANA\\_WHITE\\_PAPER\\_FINAL.pdf](https://www.stattorney.org/images/MARIJUANA_WHITE_PAPER_FINAL.pdf).

<sup>47</sup> The Baltimore City State’s Attorney’s Office (2019), *AIM To B’More*, <https://www.stattorney.org/aim-to-bmore>.

<sup>48</sup> Subramanian, R. and Moreno, R. (2014), *Drug War Détente? A Review of State-level Drug Law Reform, 2009-2013*, Vera Institute of Justice, <https://www.vera.org/publications/drug-war-detente-a-review-of-state-level-drug-law-reform-2009-2013>.

<sup>49</sup> The Ohio Senate, District 18 (2018), *Eklund Announces Comprehensive Changes to Ohio’s Criminal Justice System*, <http://www.ohiosenate.gov/senators/eklund/news/eklund-announces-comprehensive-changes-to-ohios-criminal-justice-system>; Rittgers & Rittgers Attorneys at Law (2018), *Recent Changes in Ohio’s Intervention in Lieu of Conviction (“ILC”) Statute*, <https://www.rittgers.com/blog/2018/11/recent-changes-in-ohios-intervention-in-lieu-of-conviction-ilc-statute.shtml>.

**“The statistics are damning when it comes to the disproportionate impact that the ‘War on Drugs’ has had on communities of color.”**

— BALTIMORE CITY STATE’S ATTORNEY MARILYN MOSBY

Finally, **drug courts** are a common means of providing a sentencing alternative of court-supervised treatment for certain eligible individuals. While some drug courts employ harm reduction principles, court-based models of supervised drug treatment have also been criticized by advocates and health professionals because they are not always the best response mechanism. Drug courts are difficult to complete, and missing a court appointment can lead to “failure” of a drug court program. Evidence indicates that due to low completion rates, drug courts often do not reduce the time that participants are incarcerated.<sup>50</sup>

#### D. Support Strategies that Prevent Overdoses and the Spread of Infectious Disease

There are several harm reduction strategies that are being successfully implemented in communities across the country to reduce overdoses and limit the spread of infectious disease. Notably, these strategies are largely driven by public health and community agencies – not law enforcement – so they generally do not directly engage the prosecutor. Elected prosecutors should, however, support and promote approaches that emphasize public health and social services engagement and expertise, as opposed to criminal enforcement, recognizing that criminal enforcement of drug use has not proven successful in saving lives and advancing societal well-being.

A recent nationwide push to **improve access** to the opioid overdose antidote medication **naloxone** has focused on people likely to witness an overdose, including those who use drugs, friends and family members of people who use drugs, and frontline police officers. Naloxone, a prescription medication, reverses the effects of an opioid overdose within minutes, and has no potential for dependency or misuse – but requires prompt administration. Several states are taking steps to remove barriers to naloxone access for anyone able to use it.

In **Pennsylvania**, a statewide initiative led by the Department of Health distributed at least 4,500 free doses of naloxone to members of the public in a single day.<sup>51</sup> The initiative builds on the success of equipping police with naloxone: departments statewide report using naloxone to reverse an overdose 6,472 times from 2014 to 2017.<sup>52</sup> Several district attorneys spoke out in

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<sup>50</sup> See, e.g., Mehta, C. (2017), *Neither Justice Nor Treatment: Drug Courts in the United States*, Physicians for Human Rights, <https://phr.org/resources/neither-justice-nor-treatment/>; Drug Policy Alliance (2011), *Drug Courts Are Not The Answer: Toward a Health-Centered Approach to Drug Use*, [http://www.drugpolicy.org/sites/default/files/Drug%20Courts%20Are%20Not%20the%20Answer\\_Final2.pdf](http://www.drugpolicy.org/sites/default/files/Drug%20Courts%20Are%20Not%20the%20Answer_Final2.pdf); and Parsons, J. and Neath, S. (2017), *Minimizing Harm: Public Health and Justice System Responses to Drug Use and the Opioid Crisis*, Vera Institute of Justice, <https://www.vera.org/publications/for-the-record-public-health-justice-system-responses-opioid-crisis>.

<sup>51</sup> Tustin, K. (2018), *Delco hands out free doses of naloxone to fight opioid scourge*, Delaware County Daily Times, [https://www.delcotimes.com/news/delco-hands-out-free-doses-of-naloxone-to-fight-opioid/article\\_a65e37d4-ff1e-11e8-a664-73af67d4bd92.html](https://www.delcotimes.com/news/delco-hands-out-free-doses-of-naloxone-to-fight-opioid/article_a65e37d4-ff1e-11e8-a664-73af67d4bd92.html).

<sup>52</sup> Satullo, S. (2018), *The Pa. counties where police have most used the overdose antidote Narcan*, lehighvalleylive.com, [https://www.lehighvalleylive.com/news/2018/03/where\\_pa\\_police\\_are\\_using\\_narc.html](https://www.lehighvalleylive.com/news/2018/03/where_pa_police_are_using_narc.html).

***“Harm reduction models – from needle exchanges to overdose prevention sites – are used the world over and have been proven to be cost-effective, and more importantly to save lives.”***

**— CHITTENDEN COUNTY (BURLINGTON, VT) STATE’S ATTORNEY SARAH GEORGE**

support of the effort,<sup>53</sup> including Chester County District Attorney Tom Hogan, who drew attention to the importance of ensuring that naloxone distribution efforts go beyond law enforcement to reach those who are closest to potential overdoses: “Every week, Chester County police officers save lives by administering naloxone to people who are overdosing. This naloxone giveaway day invites ordinary citizens to join us in fighting the opioid epidemic by arming themselves to protect friends and loved ones who might overdose.”<sup>54</sup>

**Syringe access programs** (“SAPs”; also called syringe exchange services, syringe services programs, needle-exchange programs, or needle and syringe programs) offer people who use drugs sterile syringes free of cost, and facilitate the safe disposal of used syringes, to reduce the spread of infectious disease. Most SAPs also offer other services, including referral to treatment and overdose prevention education.<sup>55</sup> In 2016, the federal government eased some restrictions on federal funding for syringe access programs,<sup>56</sup> but access to SAPs remains limited, especially in rural communities.<sup>57</sup> And in 16 states, access to syringes remains illegal due to drug paraphernalia and other laws.<sup>58</sup> Law enforcement officials, including prosecutors, are often instrumental in establishing SAPs in those states because programs facing the threat of prosecution are unlikely to get off the ground.

Decades of evidence<sup>59</sup> show that SAPs reduce the spread of infectious diseases, are cost-effective, and do not lead to more drug use or crime.<sup>60</sup> Indeed, SAP clients have been found to be five times more likely to enter treatment than people who used drugs without entering an SAP.<sup>61</sup> By facilitating the safe disposal of used syringes and reducing the need to share syringes, SAPs may also improve officer safety. A study in Connecticut following the state’s expansion of access to sterile and legal syringes showed that needle-stick injuries to police officers – which may occur in the process of searching individuals in possession of used needles – declined by 66%.<sup>62</sup>

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<sup>53</sup> Rickman, R. (2018), *Free Naloxone Distribution Throughout Bucks County*, WBCB News, <http://www.wbcnews.com/blog/free-naloxone-distribution-throughout-bucks-county/>; Delaware County District Attorney’s Office (2018), *Delco Heroin Task Force joins statewide effort Stop Overdoses in PA: Get Help Now Week*, <https://www.delcoda.com/latest-news/318-delco-heroin-task-force-joins-statewide-effort-stop-overdoses-in-pa-get-help-now-week>.

<sup>54</sup> Chester County Pennsylvania (2018), *Chester County to Host Free Naloxone Day for Residents*, <https://www.chesco.org/CivicAlerts.aspx?AID=862>.

<sup>55</sup> Centers for Disease Control and Prevention (2018), *Syringe Services Programs*, <https://www.cdc.gov/ssp/index.html>.

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

<sup>57</sup> Harm Reduction International (2018), *Global State of Harm Reduction: 2018*, <https://www.hri.global/global-state-harm-reduction-2018>.

<sup>58</sup> NASTAD, *Syringe Service Program Policy Environments Across the United States*, <https://www.nastad.org/maps/syringe-service-program-policy-environments-across-united-states>.

<sup>59</sup> World Health Organization (2004), *Effectiveness of Sterile Needle And Syringe Programming In Reducing HIV/AIDS Among Injecting Drug Users*, [https://www.who.int/hiv/pub/prev\\_care/effectivenesssterileneedle.pdf](https://www.who.int/hiv/pub/prev_care/effectivenesssterileneedle.pdf); Frakt, A. (2016), *Politics Are Tricky but Science Is Clear: Needle Exchanges Work*, The New York Times, <https://www.nytimes.com/2016/09/05/upshot/politics-are-tricky-but-science-is-clear-needle-exchanges-work.html>.

<sup>60</sup> Marx, M.A., et al. (2000), *Trends in crime and the introduction of a needle exchange program*, American Journal of Public Health, 90(12), 1933-1936, <https://www.ncbi.nlm.nih.gov/pubmed/11111271>.

<sup>61</sup> Hagan, H., et al. (2000), *Reduced injection frequency and increased entry and retention in drug treatment associated with needle-exchange participation in Seattle drug injectors*, Journal of Substance Abuse Treatment, 90(12), 247-252, <https://www.ncbi.nlm.nih.gov/pubmed/11027894>.

<sup>62</sup> Groseclose, S.L., et al. (1995), *Impact of increased legal access to needles and syringes on practices of injecting drug-users and police officers*, Journal of Acquired Immune Deficiency Retrovirology Association, 10(1), 82-89, <https://europepmc.org/abstract/med/7648290>.

**Overdose Prevention Sites** (“OPS”; also called safe consumption sites, drug consumption rooms, or supervised injecting facilities) are legally-sanctioned spaces in which people can consume self-supplied drugs in a hygienic environment and under supervision. The goal of such facilities is to prevent overdose deaths by providing a supervised environment to provide basic medical care in the event of an overdose and training people who use drugs in safe drug use. Like SAPs, OPS also aim to connect people to treatment who are often disconnected from social services, and who may otherwise not seek or receive it.

Though more than 120 OPS exist worldwide<sup>63</sup> and a significant and growing body of evidence indicates that they prevent fatal overdoses, none exist yet in the U.S. However, there are currently efforts to open OPS led by local policymakers in cities such as Seattle, Philadelphia, New York, and San Francisco.<sup>64</sup> Some of these efforts have faced opposition at the state and federal level, including by federal prosecutors. Local prosecutors in these cities and elsewhere, however, have countered this opposition<sup>65</sup> and pledged not to prosecute such sites, while also using their convening power to bring together officials to discuss establishing them. Notably, in Burlington, Vermont, State’s Attorney Sarah George formed a commission of law enforcement officials, medical professionals, and social service representatives to study whether to recommend OPS after the state saw an increase in opioid-related deaths. The commission ultimately supported legislation to establish an OPS in Vermont.<sup>66</sup>

Another treatment option for opioid use disorder that is already implemented in other countries and is now being considered in the United States is **heroin-assisted treatment** (HAT). A small minority of chronic opioid users fail to respond positively to medication-assisted treatment, such as methadone or buprenorphine. Under HAT, a “second-line” treatment intervention, patients receive medical-grade heroin doses in a clinical setting and under the supervision of medical staff.<sup>67</sup> Evidence consistently shows that for such opioid users, HAT improves treatment retention, and reduces criminal activity and illicit heroin use – important considerations given the current harms associated with the emergence of fentanyl on the black drug market.<sup>68</sup> Early results regarding the prescription of **hydromorphone** – an injectable medication that is already legally

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<sup>63</sup> Harm Reduction International, *Global State of Harm Reduction: 2018*, [supra note 57](#); Gutman, A. (2019), *What to expect when your city is expecting a supervised injection site: Lessons from around the globe*, Philadelphia Inquirer, <https://www.inquirer.com/opinion/commentary/safe-injection-sites-philadelphia-dublin-ottawa-toronto-mexicali-20190629.html>.

<sup>64</sup> Krinsky, M. and Satterberg, D. (2018), *Don’t jail addicts. Overdose prevention sites work, and the U.S. needs to get on board*, USA Today, <https://www.usatoday.com/story/opinion/policing/2018/11/01/drugs-opioids-policing-usa/1821797002/>.

<sup>65</sup> For example, in Philadelphia, a nonprofit organization, Safehouse, has planned to open the country’s first official OPS and is facing a lawsuit by the U.S. Attorney for the Eastern District of Pennsylvania. In response, Philadelphia District Attorney Larry Krasner has pledged not to prosecute those who visit and work in the OPS, and joined more than 60 criminal justice leaders in filing an amicus brief supporting Safehouse. See Fair and Just Prosecution (2019), *More Than 60 Criminal Justice Leaders Advocate for Overdose Prevention Sites as Critical to Saving Lives*, <https://fairandjustprosecution.org/wp-content/uploads/2019/07/FJP-Safehouse-Amicus-Brief-Release-FINAL.pdf>.

<sup>66</sup> Murray, E. (2017), *Top officials at odds over need for safe injection sites in Vermont*, Burlington Free Press, <https://www.burlingtonfreepress.com/story/news/local/2017/11/29/safe-injection-sites-needed-vermont-says-study-group/902666001/>.

<sup>67</sup> European Monitoring Centre for Drugs and Drug Addiction (2012), *New heroin-assisted treatment: Recent evidence and current practices of supervised injectable heroin treatment in Europe and beyond*, [http://www.emcdda.europa.eu/system/files/publications/690/Heroin\\_Insight\\_335259.pdf](http://www.emcdda.europa.eu/system/files/publications/690/Heroin_Insight_335259.pdf).

<sup>68</sup> Strang, J., Groshkova, T., and Metrebian, N. (2018), *Considering Heroin-Assisted Treatment and Supervised Drug Consumption Sites in the United States*, RAND Corporation, [https://www.rand.org/pubs/research\\_reports/RR2693.html](https://www.rand.org/pubs/research_reports/RR2693.html).

approved for pain management – show similar effects.<sup>69</sup>

Finally, legal responses to encourage individuals to seek help in the event of an overdose include **Good Samaritan or 911 immunity laws**, which shelter people seeking medical assistance during an overdose crisis from arrest, charge, or prosecution for certain controlled substance possession and paraphernalia offenses. The level of public awareness of these protections also impacts the success of other harm reduction practices, such as naloxone distribution efforts targeting people leaving prison.<sup>70</sup>

While nearly every state has such a law in place,<sup>71</sup> many jurisdictions are also unfortunately increasingly pursuing drug-induced homicide prosecutions, which impose severe criminal penalties on individuals who deliver drugs to someone whose ingestion ultimately results in the recipient's death. Such prosecutions undermine the effectiveness of Good Samaritan laws.

## RECOMMENDATIONS

### A. Limit Prosecutions And Avoid Policies That May Increase Drug-Related Harms

1. **Don't prosecute marijuana possession**, and don't make exceptions to such policies because of quantity or someone's criminal record.
2. **Develop proportionate, appropriate, and non-criminal responses for people who use drugs**, including instituting diversion programs that offer supportive services other than treatment, and declining to prosecute drug-related nonserious crimes.
3. **Don't seek or support probation or parole revocations based on positive drug tests.** Relapse is part of recovering from problematic drug use, and policies that fail to acknowledge that reality do more harm than good.
4. **Don't prosecute possession of OAT drugs**, such as suboxone or buprenorphine.
5. **Establish and clearly communicate policies that encourage people to help those who use drugs.** Promote and clearly define Good Samaritan protections, and make clear that naloxone possession, distribution, and administration will not result in prosecution.
6. **Don't prosecute people who call the police in response to an overdose and rarely, if ever, prosecute drug-induced homicides.** Do not charge individuals for homicide when they share or give away drugs that cause an overdose or when there was no specific intent to cause harm or death.
7. **Don't seek mandatory minimum or habitual offender sentences based on underlying charges for drug possession.**
8. **Support expungement and sentencing reductions for past drug-related convictions that would be treated differently today.** As policies shift and public opinion on drug use evolves, it is important to take proactive steps to ensure that individuals and communities who have been most affected by past punitive responses receive the benefit of policy changes.

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<sup>69</sup> *Id.*

<sup>70</sup> Anthony-North, V. et al. (2018), *Corrections-Based Responses to the Opioid Epidemic: Lessons from New York State's Overdose Education and Naloxone Distribution Program*, Vera Institute of Justice, <https://www.vera.org/publications/corrections-responses-to-opioid-epidemic-new-york-state>.

<sup>71</sup> National Conference of State Legislatures (2017), *Drug Overdose Immunity and Good Samaritan Laws*, <http://www.ncsl.org/research/civil-and-criminal-justice/drug-overdose-immunity-good-samaritan-laws.aspx>.

## B. Increase Opportunities for the Justice System to Respond Productively to Problematic Drug Use

1. **Develop and support programs that direct people away from punishment and toward treatment and support for those that need or want it.** Existing pre-arrest and pre-arraignment programs such as LEAD, HOPE, and Operation SAFE have successfully demonstrated that diversion from prosecution toward treatment and other services is possible, effective and pragmatic, particularly when grounded in principles of harm reduction.
2. **Expand eligibility for existing diversion programs,** including for people who commit low-level trafficking offenses or who have prior criminal histories.
3. **Push for drug courts to incorporate evidence-based practices,** including starting treatment rapidly, providing access to OAT, and providing post-program support. Importantly, push for drug courts to move beyond abstinence-only “one-strike” policies that necessarily lead to incarceration, and recognize failed drug tests as a reality of substance use disorder, rather than an automatic disqualifier.

## C. Use the DA’s Leadership Position to Advance Reform

As elected leaders, district attorneys have an influential voice in their community. They can therefore help overcome some of the biggest barriers to implementing harm reduction programs: stigma around drug use, and misconceptions about the nature of addiction and recovery. The following strategies utilize the DA’s convening power and public voice to encourage a public health approach to drug use:

1. **Educate the community on what to do in the case of an overdose and what services are available** by launching a public awareness campaign.
2. At all stages of the criminal justice system, **empower, give voice to, and make space for individuals who use drugs or who have used drugs** as advisors, trainers, and peer support professionals.
3. **Build a relationship with your local harm reduction advocacy community** as a resource to assist in the promotion of better policies.
4. **Use the convening power of the prosecutor’s office to bring stakeholders to the table** to design and implement needed programs. Build mechanisms for structured collaboration such as workgroups, task forces, or criminal justice coordinating committees.
5. **Support efforts to establish Overdose Prevention Sites and syringe access programs.**
6. **Support legislation to expand and strengthen Good Samaritan Laws,** including by enhancing 911 immunity laws and adding affirmative defenses.
7. **Call for increased and immediate access to OAT,** both in the community and in correctional settings.

*“It’s a matter of fundamental fairness. With every criminal conviction, someone carries with them collateral consequences for the rest of their lives... [W]e don’t believe that people should have to carry those collateral consequences for conduct that would otherwise be legal now.”*

— BOULDER (CO) DISTRICT ATTORNEY MICHAEL DOUGHERTY

8. **Call for increased training and access to naloxone** for law enforcement as well as community members.
9. **Support legislation that decriminalizes marijuana** and reclassifies other simple drug possession as a nonpunitive civil violation.

## CONCLUSION

As public safety leaders, prosecutors are uniquely positioned to help shift the response to problematic drug use from one of criminalization and punishment to a more effective, compassionate, and humane approach. Decades of research and experience have shown that incarcerating people who traffic, sell, and use drugs will not stem the tide of the current overdose crisis. Indeed, an enforcement-only approach has been shown to exacerbate the harms of drug use. Lessons learned from other countries confirm that it is possible for public officials to shift their philosophy to adopt a more humane harm reduction starting point.

With the overdose crisis accelerating, it is past time to end the stigma of drug use and recognize evidence-based practices that will achieve the results that are desperately needed. Prosecutors can implement and advocate for a variety of harm reduction responses – within the justice system and outside of it – that have been proven to save lives and address the harms of drug use.

## RESOURCES

- Jeffery A. Singer (2018), *Harm Reduction: Shifting from a War on Drugs to a War on Drug-Related Deaths*, Cato Institute, <https://www.cato.org/publications/policy-analysis/harm-reduction-shifting-war-drugs-war-drug-related-deaths>.
- Leah Pope et al. (2017), *A New Normal: Addressing Opioid Use through the Criminal Justice System*, The Vera Institute of Justice, <https://www.vera.org/publications/new-normal-opioid-use-criminal-justice-system>.
- Drug Policy Alliance (2017), *A Public Health and Safety Approach to Opioid Addiction and Overdose*, <http://www.drugpolicy.org/resource/public-health-and-safety-approach-problematic-opioid-use-and-overdose>.

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