# NOTE

## CARE OVER CAGES: EXAMINING WHETHER DIVERSION FOR MENTAL HEALTH AND SUBSTANCE USE DISORDER MEETS ABOLITIONIST AND PUBLIC HEALTH PRIORITIES

*Kai MacLean*[*]

ABSTRACT

*The criminal legal system developed diversion programs to respond to needs that it is ill-equipped to address, including health conditions like substance use disorder ("SUD") and mental illness. Diversion is operationalized by policing practices, deals made under prosecutorial discretion, and institutionalized "specialty courts" that serve as a forum to adjudicate cases with special needs. Though diversion programs were implemented to better address health conditions in the criminal legal system, do these programs help their participants?*

*This Note answers this question by using abolition and public health as frames of analysis. Abolition theory and practice emphasize that the criminal legal system fails to achieve its goals, causes immense harm, and should be eliminated in favor of a collection of other solutions that provide care, liberty, and safety for all. Public health seeks to improve the health and well-being of populations, and by acknowledging the criminal legal system is a driver of health that predisposes individuals to lifelong health and social challenges, its goals are fundamentally aligned with abolitionist efforts.*

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*This Note starts by discussing the relationship between mental health and SUD and the criminal legal system and tracing the development of diversion programs for these conditions. Diversion is then evaluated through an adapted abolitionist and public health reform framework to determine if it meets the goals of those two fields. This Note concludes that while diversion may be a source of harm reduction for people in the present, mental health and SUD should ultimately be treated outside of the criminal legal system. I propose three areas for change: reframing our perceptions of criminality, reforming health and criminal law, and expanding community-led care and support.*

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## INTRODUCTION

The United States currently incarcerates almost two million people.[1] People face psychological harm while serving a sentence, resulting from constant surveillance, a lack of privacy, witnessing and experiencing violence, and isolation.[2] Furthermore, a criminal record subjects individuals to lifelong discrimination in employment, housing, and education.[3] Stigma towards formerly incarcerated individuals can negatively impact people's ability to reintegrate with the community post-release.[4] The modern carceral state evolved from the enslavement of Black Americans, after which Black codes, vagrancy laws, and convict leasing developed as de facto enslavement, leading to a disproportionate racial effect on the U.S. population behind bars.[5] Ultimately, incarceration is a traumatic experience that actively harms people's health; precipitates lifelong social, political, and financial exclusion; and devastates communities of color.[6]

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[1] Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2026*, PRISON POL'Y INITIATIVE (Mar. 11, 2026), https://www.prisonpolicy.org/reports/pie2026.html [https://perma.cc/VB29-LKFK] (accounting for incarcerated populations across jails, prisons, and other forms of confinement in United States).

[2] Mika'il DeVeaux, *The Trauma of the Incarceration Experience*, 48 HARV. C.R.-C.L. L. REV. 257, 259, 267 (2013) (highlighting physical and psychological impacts of incarceration).

[3] Peter Leasure & Tia Stevens Andersen, *Recognizing Redemption: Old Criminal Records and Employment Outcomes*, 41 HARBINGER 271, 274 (2017) (noting impacts of criminal record on employment opportunities and outcomes); Rebecca Sinko, Tina DeAngelis, Bernadette Alpajora, Josephine Beker & Ilyse Kramer, *Experience of Stigma Post Incarceration: A Qualitative Study*, 8 OPEN J. OCCUPATIONAL THERAPY, no. 3, Summer 2020, at 1, 1 ("Occupational marginalization for formerly incarcerated individuals is often related to the evident stigmatization in education, housing, and employment.").

[4] Sinko et al., *supra* note 3, at 10-12 (summarizing how stigma can come from family and community systems).

[5] *See* Elizabeth Hinton, LeShae Henderson & Cindy Reed, *An Unjust Burden: The Disparate Treatment of Black Americans in the Criminal Justice System*, VERA (May 2018), https:// www.vera.org/publications/for-the-record-unjust-burden [https://perma.cc/A2WA-R7RG] (tracing criminal legal system's roots to post-Reconstruction regimes that sought to keep Black Americans subjugated); Sawyer & Wagner, *supra* note 1 (demonstrating Black Americans comprise 14% of U.S. population but 42% of U.S. correctional population).

[6] *See* Leah Wang, *Updated Charts Show the Magnitude of Prison and Jail Racial Disparities, Pretrial Populations, Correctional Control, and More*, PRISON POL'Y INITIATIVE (Apr. 1, 2024), https://www.prisonpolicy.org/blog/2024/04/01/updated-charts [https://perma.cc/U7CT-5TEA]; Ames Grawert & Terry-Ann Craigie, *Mass Incarceration Has Been a Driving Force of Economic Inequality*, BRENNAN CTR. FOR JUST. (Nov. 4, 2020), https://www.brennancenter.org/our-work/analysis-opinion/mass-incarceration-has-been-

These negative impacts especially harm people with mental health conditions and substance use disorder ("SUD"), who are incarcerated at shockingly high rates.[7] The United States dedicates significant resources to the criminal legal system, and uses it as an imprecise instrument to address many of our social issues, such as a lack of affordable housing, economic instability, and limited access to health care services.[8] The inability to address mental health needs and SUD, as well as other social determinants of health, can cause individuals to cycle in and out of incarceration and worsen their conditions.[9]

Diversion within the criminal legal system may be viewed as one effort within a larger movement towards carceral system abolition, which is "a gradual project of decarceration" where imaginative solutions for social services, public safety, and well-being are substituted for the present punitive approach.[10] Diversion programs can include treatment for SUD, mental health counseling, vocational training, and community service as a substitute

driving-force-economic-inequality [https://perma.cc/926M-K2HS]; BRIAN ELDERBROOM, LAURA BENNETT, SHANNA GONG, FELICITY ROSE & ZOË TOWNS, FWD.US, EVERY SECOND: THE IMPACT OF THE INCARCERATION CRISIS ON AMERICAN FAMILIES 11-18 (2018), https://every second. fwd.us/ downloads/ every second. fwd. us.pdf [https:// perma.cc/ 6C95- 4JQP]; Hernandez D. Stroud, Lauren-Brooke Eisen & Ram Subramanian, *A Proposal to Reduce Unnecessary Incarceration*, BRENNAN CTR. FOR JUST. (Mar. 14, 2023), https:// www.brennancenter.org/our-work/policy-solutions/proposal-reduce-unnecessary-incarceration [https://perma.cc/UGK8-2PWD].

[7] Brandy F. Henry, *Adverse Experiences, Mental Health, and Substance Use Disorders as Social Determinants of Incarceration*, 48 J. CMTY. PSYCH. 744, 745 (2020) (documenting 15% of all men and 31% of all women across jails have mental health condition, and about half have SUD); Kevin Mark Smith, *A Targeted Approach to Criminal Justice Reform*, 90 UMKC L. REV. 397, 418 (2021) (noting research estimating 65% of prison population has SUD).

[8] *See* Lauren-Brooke Eisen, *The Federal Funding that Fuels Mass Incarceration*, BRENNAN CTR. FOR JUST. (June 7, 2021), https://brennancenter.org/our-work/analysis-opinion/ federal- funding- fuels- mass- incarceration [https:// perma.cc/ 9ZUM-ULHJ] (tracing flow of federal dollars towards law enforcement militarization, some of which is "at the expense of crime prevention activities or programs that could divert people from the criminal legal system").

[9] Meredith Harbison, *Emerging Mental Health Courts: The Intersection of Mental Illness, Substance Use, Poverty, and Incarceration*, 60 U. LOUISVILLE L. REV. 615, 616 (2022) ("The traditional adversarial court system fails to provide adequate resources, services, and support to defendants with diagnosable mental illnesses, who often also experience substance use disorders and housing insecurity, thereby creating a repetitive, detrimental effect wherein this population cycles in and out of incarceration . . . .").

[10] *See* Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156, 1161, 1163 (2015).

for time served.[11] Diversion is considered an alternative to incarceration because a prosecutor or a judge may dismiss charges or mitigate a sentence upon completion of a diversion program.[12] On the other hand, diversion programs function by maintaining the specter of re-incarceration over program participants and tethering them to a prolonged relationship with the criminal legal system.

This Note examines diversion programs for SUD and mental health needs through an abolitionist perspective to strategize achieving public health goals.[13] It proceeds in three parts. Part I describes present issues with the criminal legal system's treatment of people with mental illness and SUD. It examines how stigmas about these conditions drive their criminalization and how incarceration fails to serve therapeutic and rehabilitative goals. This Part also provides an overview of diversion programs, their development, and case studies of programs implemented by various states. Part II critically examines whether diversion programs advance abolitionist goals and improve health outcomes. In Part III, I argue that resources should be allocated away from diversion programs and towards solutions that support individuals' access to health care services. I conclude that an interdisciplinary approach that

[11] Cory R. Lepage & Jeff D. May, *The Anchorage, Alaska Municipal Pretrial Diversion Program: An Initial Assessment*, 34 ALASKA L. REV. 1, 4 (2017).

[12] *See id.* at 4-5.

[13] Throughout this Note, I distinguish mental health needs from substance use disorder. Though SUD can be considered a mental health condition, it is often viewed as distinct from a "mental health disorder." *See Co-Occurring Disorders and Other Health Conditions*, SAMHSA (Dec. 22, 2025), https://www.samhsa.gov/substance-use/treatment/co-occurring-disorders. There are several reasons for this schism, including historical stigma towards people who use drugs, the development of the Diagnostic and Statistical Manual of Mental Disorders ("DSM"), and the explosion of the opioid epidemic. *See* Sean M. Robinson & Byron Adinoff, *The Classification of Substance Use Disorders: Historical, Contextual, and Conceptual Considerations*, BEHAV. SCIS., Aug. 18, 2016, at 1, 7-14. Scholars have noted consequences resulting from the lack of coordinated care and multifaceted approaches for people who might have both an SUD and a mental health disorder. *See Substance Use Disorder and Mental Illness Often Go Hand in Hand. Both Must Be Addressed*, COLUM. UNIV. DEP'T PSYCHIATRY (Sep. 27, 2023), https://www.columbiapsychiatry.org/news/mental-health-and-substance-use-disorders-often-go-hand-hand-both-must-be-addressed [https://perma.cc/ ZTA5-TJPD]. For the purposes of this Note, I also refer to "mental health needs," "mental illness," and "mental health disorder" interchangeably, because individuals who enter the criminal legal system may have many mental health needs that have gone undiagnosed or untreated and may appear in a more generalized form of distress. This is consistent with how organizations focusing on mental health also use these terms. *See, e.g.*, *Mental Health Conditions*, NAT'L ALL. ON MENTAL ILLNESS, https://www.nami.org/about-mental-illness/mental-health-conditions [https://perma.cc/K5FL-PKSR] (last visited May 8, 2026).

embodies both abolitionist and public health principles is viable and preferable for pursuing public health and safety goals.

## I. DIVERSION TO ADDRESS SUBSTANCE USE DISORDER AND MENTAL HEALTH IN THE CRIMINAL LEGAL SYSTEM

Given the prevalence of individuals with mental health conditions and SUD in the criminal legal system, many practitioners, courts, and scholars have advocated for diversion programs for these individuals, with the intention of providing an alternative adjudication process that addresses their specific needs.[14] Many people appreciate policing, courts, and carceral institutions for promoting a perception of safety by protecting against "dangerous" people with SUD and/or mental health conditions. In reality, SUD and mental health conditions are not typically a contributing factor in violent or criminal behavior.[15] Data demonstrate that an overwhelming majority of people with serious mental illness are not violent towards others.[16] Regardless, many people and political leaders in the United States believe that individuals with mental illness pose a threat to public safety, and act on that belief in their voting and decision-making.[17] As a result, the law criminalizes these conditions and circumstances that often accompany these health conditions—such as poverty and a lack of stable housing—leading these individuals to experience frequent and prolonged engagement with the criminal legal system.[18] This Section will demonstrate how mental illness and SUD are criminalized and treated (or left untreated) in the criminal legal system, and how diversion rose as a solution to address these health conditions within the system's existing architecture.

[14] *See, e.g.*, Erin R. Collins, *The Problem of Problem-Solving Courts*, 54 U.C. DAVIS L. REV. 1573, 1575-76 (2021) [hereinafter Collins, *The Problem*] (describing problem-solving courts, a type of diversion, as "popular" reform furthered by state courts, DOJ, and even Presidents Trump and Biden).

[15] *Id.* at 1617-19.

[16] Jeffrey W. Swanson & Mark L. Rosenberg, *American Gun Violence & Mental Illness: Reducing Risk, Restoring Health, Respecting Rights & Reviving Communities*, 152 DÆDALUS 45, 49 (2023) (estimating only 3% of gun homicides committed by people with serious mental illness and only 4% of violent behavior risk associated with serious mental illness).

[17] *See id.* (describing politicians' tendency to attribute mental health as root cause of gun violence).

[18] Collins, *The Problem*, *supra* note 14, at 1626 (describing how homelessness and surrounding circumstances lead to criminalization of unhoused populations).

A. *Stigma Leads to Criminalization*

People frequently stigmatize SUD and mental illness. SUD is a medical condition, but it is often viewed as a moral failing.[19] People with SUD are perceived as dangerous, untrustworthy, lacking self-control, and blameworthy for their illness.[20] Studies also indicate that people with mental illness are viewed as dangerous, unpredictable, and unable to obtain a job or live independently.[21] Stigma towards these conditions leads to social exclusion and discrimination from employers, healthcare providers, and others in interpersonal contexts.[22]

Criminal laws developed to target people with SUD and mental health needs. For example, an abundance of state and federal criminal statutes impose penalties for using and possessing drugs and related paraphernalia.[23] American drug policy is premised on the conclusion that people who use drugs are morally bankrupt, and that the country can "punish [its] way out of illicit drug use and trafficking."[24] People with mental illness often face co-occurring housing insecurity, poverty, and SUD, which can subject them to

[19] Brittany Kelly & Diana White, *Community Level Intervention Strategies to Confront the Criminalization of Substance Use Disorder: Cross-Sector Collaboration Along the Sequential Intercept Model Applying a Critical Race Theory Lens*, 21 J.L. SOC'Y 31, 31 (2021) (noting substance use disorder is diagnosable and treatable illness in medical community, which is at odds with U.S. tradition of criminalizing health condition).

[20] *See, e.g.*, Alene Kennedy-Hendricks et al., *Social Stigma Toward Persons with Prescription Opioid Use Disorder: Associations with Public Support for Punitive and Public-Health-Oriented Policies*, 68 PSYCHIATR. SERVS. 462, 464, 466 (2017) (finding majority of respondents from nationally representative sample believed individuals with prescription opioid use disorder lacked self-discipline, were more dangerous than general population, and were to blame for this condition); Bruce G. Taylor et al., *Social Stigma Toward Persons with Opioid Use Disorder: Results from a Nationally Representative Survey of U.S. Adults*, 56 SUBST. USE & MISUSE 1752, 1756 (2021) (finding survey respondents agreed with statements that people with opioid use disorder were dangerous and lacked trustworthiness).

[21] Patrick W. Corrigan, Benjamin G. Druss & Deborah A. Perlick, *The Impact of Mental Illness Stigma on Seeking and Participating in Mental Health Care*, 15 PSYCH. SCI. PUB. INT. 37, 41-43 (2014).

[22] *Id.*

[23] *See, e.g.*, 21 U.S.C. § 844 (describing penalties for simple possession of controlled substances under federal law); THE NETWORK FOR PUB. HEALTH L., HARM REDUCTION AND OVERDOSE PREVENTION: 50-STATE SURVEY (2023), https://www.networkforphl.org/wp-content/uploads/2024/10/50-State-Survey-Harm-Reduction-Laws-in-the-United-States.pdf [https://perma.cc/GE2D-EUV9] (compiling state laws imposing penalties on drug possession).

[24] Michael Tonry, *From Policing to Parole: Reconfiguring American Criminal Justice*, 46 CRIME & JUST. 1, 18 (2017).

arrests for disorderly conduct or trespassing.[25] Police, instead of trained mental health professionals, are the default responders to people who are having mental health emergencies, which has led to criminal outcomes for people with mental health concerns—or worse, physical injury or death.[26] As a result of our criminal laws and policies, agents within the criminal legal system are primed to view people with mental illness and SUD as criminals in need of incapacitation, rather than individuals in need of medical treatment.[27]

Because of our tendency to respond to these health conditions with criminal law, people with these conditions are overrepresented in the criminal legal system. Three jails in New York, Los Angeles, and Chicago are the three largest providers of psychiatric care in the United States.[28] 11-31% of people in state prisons have a mental illness, and 6-14% of that population has a serious mental illness.[29] Statistics from 2019 demonstrate that 8% of the national population qualifies as having a SUD, but 41% of arrested people, 32% of people in federal prisons, and 49% of people in state prisons have a SUD.[30]

In addition, because the criminal legal system evolved from the enslavement of Black Americans, Reconstruction laws (which subjugated newly freed Black Americans), and the Jim Crow regime, the criminal legal system now has severe racial disparities.[31] As a result, the criminalization of

[25] Alene Kennedy-Hendricks, Haiden A. Huskamp, Lainie Rutkow & Colleen L. Barry, *Improving Access to Care and Reducing Involvement in the Criminal Justice System for People with Mental Illness*, 35 HEALTH AFFS. 1076, 1078 (2016).

[26] Thalia González, *Restorative Justice Diversion as a Structural Health Intervention in the Criminal Legal System*, 113 J. CRIM. L. & CRIMINOLOGY 541, 551 (2023).

[27] *See* Tonry, *supra* note 24, at 1 (arguing most people would agree criminal defendants "at every stage . . . are disproportionately mentally ill, drug-dependent, or both and are often dealt with inappropriately or inhumanely").

[28] Ailsa Chang, *'Insane': America's 3 Largest Psychiatric Facilities Are Jails*, NPR (Apr. 25, 2018, at 16:56 ET), https://www.npr.org/sections/health-shots/2018/04/25/605666107/insane-americas-3-largest-psychiatric-facilities-are-jails [https://perma.cc/5BNU-ABKU].

[29] Kennedy-Hendricks et al., *supra* note 25, at 1077. Studies of people in Massachusetts and Los Angeles show over a quarter of people with serious mental illness were charged with at least one offense over a ten-year period, which is a significantly higher proportion than those without serious mental illnesses. *See id.*

[30] Emily Widra, *Addicted to Punishment: Jails and Prisons Punish Drug Use Far More than They Treat It*, PRISON POL'Y INITIATIVE (Jan. 30, 2024), https://www.prisonpolicy.org/blog/2024/01/30/punishing-drug-use [https://perma.cc/4T8K-ACHB].

[31] *See* Hinton et al., *supra* note 5 (noting after passage of Thirteenth Amendment, Southern states developed Black Codes, vagrancy laws, and convict leasing, all of which forced Black people into exploitative labor functionally maintaining their enslavement); MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF

people with SUD and mental illness also more severely implicates people of color, particularly Black people.[32]

### B. *Treatment While Behind Bars Is Insufficient and Can Exacerbate Health Consequences*

Incarceration has pervasive, negative, and long-lasting impacts on health, particularly for individuals with mental health needs and SUD. Medication for SUD is difficult to access in carceral settings.[33] Because individuals are forced into abstinence when they are incarcerated, they may return to levels of drug use similar to before they were incarcerated, with lower tolerance.[34] This makes them more susceptible to a drug overdose and/or death.[35] Medications like methadone or Suboxone reduce the likelihood of drug overdose and can assist recovery efforts.[36] However, only 23 of 3,200 jails in the country provide this type of medication to their incarcerated populations.[37] Individuals with mental illness also do not receive adequate treatment during incarceration, putting them at greater risk of self-harm and suicide.[38]

Beyond the lack of treatment during incarceration, involvement in the criminal legal system predisposes individuals with health needs to lifelong barriers that exclude them from opportunities. Incarceration interrupts people's access to benefits, including Medicaid, and can permanently exclude an individual from some programs, such as public housing and the Supplemental Nutrition Assistance Program ("SNAP").[39] Without access to programs addressing their basic needs, individuals experience deleterious health consequences.[40]

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COLORBLINDNESS 1-2 (10th anniversary ed. 2020) (describing criminal legal system as modern redesign of Jim Crow policies).

[32] *See* Kelly & White, *supra* note 19, at 34 (noting Black people more than two and a half times as likely than White counterparts to be arrested for drug possession).

[33] *Id.* ("Medicated Assisted Treatment (MAT) is incredibly difficult to access in prison and jail systems, and the consequences of incarceration without treatment can be as severe as continued use, heightened use, or overdose upon release.").

[34] Smith, *supra* note 7, at 417, 419.

[35] *Id.*

[36] *Id.* at 420.

[37] *Id.*

[38] Kennedy-Hendricks et al., *supra* note 25, at 1078.

[39] *Id.*

[40] *See* Aleks Kajstura, *Hunger as Punishment: How States Restrict SNAP Benefits for People on Probation*, PRISON POL'Y INITIATIVE (Feb. 24, 2026), https://www.prisonpolicy.org/ blog/ 2026/ 02/ 24/ snap_exclusions [https://perma.cc/ NY4V-2MFP] (describing how states can deny formerly incarcerated individuals SNAP benefits, exacerbating existing levels of food insecurity and poverty); Leah Wang, *Chronic Punishment: The Unmet*

Criminal records also predispose individuals to losing opportunities to thrive in society. Employers, landlords, and universities inquire into criminal backgrounds when making their decisions about granting jobs, housing, and admission.[41] Without steady employment, formerly incarcerated individuals struggle to achieve socioeconomic stability: Data estimate that people without criminal records were 60% more likely to receive an interview callback, and at any given time, an estimated 60% of formerly incarcerated individuals do not have a job.[42] Without a job or a record of steady employment, and in light of a lack of affordable housing options and discrimination from landlords, people leaving incarceration are likely to face housing insecurity and instability.[43] Though higher education is a path to socioeconomic stability and mobility, research demonstrates that higher education institutions weigh felony records negatively against their applicants in admissions.[44] Given that people of color, and Black people in particular, are policed, criminalized, and imprisoned at rates astronomically higher than White people, these consequences of criminal legal involvement fall disproportionately on their communities.[45]

*Health Needs of People in State Prisons*, PRISON POL'Y INITIATIVE (June 2022), https:// www.prisonpolicy.org /reports/chronicpunishment.html [https://perma.cc/JNH9-7KMR] (describing how significant proportion of incarcerated individuals are uninsured or rely on Medicaid and have multiple health needs aggravated by carceral settings).

[41] Amy F. Kimpel, *Paying for a Clean Record*, 112 J. CRIM. L. & CRIMINOLOGY 439, 485 (2022).

[42] Amanda Agan & Sonja Starr, *The Effect of Criminal Records on Access to Employment*, 107 AM. ECON. REV. 560, 560 (2017); Leah Wang & Wanda Bertram, *New Data on Formerly Incarcerated People's Employment Reveal Labor Market Injustices*, PRISON POL'Y INITIATIVE (Feb. 8, 2022), https://www.prisonpolicy.org/ blog/ 2022/02/08/ employment [https://perma.cc /U2ZM-TDD2].

[43] JOCELYN FONTAINE & JENNIFER BIESS, URB. INST., HOUSING AS A PLATFORM FOR FORMERLY INCARCERATED INDIVIDUALS 3, 6-7 (2012), https://www.urban.org/sites/default/ files/publication/25321/412552-Housing-as-a-Platform-for-Formerly-Incarcerated-Persons.PDF.

[44] *See* Robert Stewart & Christopher Uggen, *Criminal Records and College Admissions: A Modified Experimental Audit*, 58 CRIMINOLOGY 156, 171, 180 (2019) (noting over 70% of colleges require criminal history information during application processes and finding rejection rates for applicants with felony convictions almost 2.5 times rate of control applicants).

[45] *See id.* at 171-72 (finding Black applicants with criminal records rejected from higher education institutions more than White applicants with criminal records); *see also, e.g.*, Kimpel, *supra* note 41, at 488-89 (noting burden of criminal records falls more heavily on people of color experiencing poverty); NAZGOL GHANDNOOSH & CELESTE BARRY, SENTENCING PROJECT, ONE IN FIVE: DISPARITIES IN CRIME AND POLICING 8 (2023) (finding Black, White, and Latinx Americans use drugs at similar rates, but one in four Black people

Individuals with SUD and mental illness face conditions that increase their risk of reengagement with the criminal legal system. For example, inadequate treatment during incarceration or post-release could increase the likelihood of engaging in criminalized drug use, and a lack of stable housing post-release could subject someone to penalty for homelessness.[46] This establishes a pattern where individuals cycle in and out of the criminal legal system.[47] Incarceration thus harms people's health and stability and has failed to achieve therapeutic and rehabilitative goals.

### C. *The Rise of Diversion*

Diversion gained momentum during the 1970s as an alternative to prosecuting criminal cases.[48] Traditionally, pretrial diversion was a method by which an individual could meet certain conditions and have their charges dismissed.[49] The National Association of Pretrial Services Agencies defines "pretrial diversion" as "a voluntary option which provides alternative criminal case processing for a defendant charged with a crime that ideally, upon successful completion of an individualized program plan, results in a dismissal of the charge(s)."[50] Statutes authorize diversion programs, as can a prosecutor's discretion and policy choices.[51] "Diversion" also refers to efforts conducted by arresting officers to direct individuals to alternative pathways instead of traditional booking procedures.[52] All of this results in a "patchwork" of different diversion programs across jurisdictions.[53] In our current era, prosecutors' offices or courts often manage diversion programs.[54] Individuals may enter diversion programs before or after entering a plea. Pre-

are arrested for drug law violations and more than three times more likely to be arrested for marijuana possession than White counterparts).

[46] *Five Charts that Explain the Homelessness-Jail Cycle—and How to Break It*, URB. INST. (Sep. 16, 2020) [hereinafter *Homelessness-Jail Cycle*], https://www.urban.org/features/ five- charts- explain- homelessness- jail- cycle-and-how-break-it (noting conviction history can exclude individual from housing, and how being unhoused can subject person to police encounters for criminalized behaviors related to living outside).

[47] *Id.*

[48] Lepage & May, *supra* note 11, at 5.

[49] Christine S. Scott-Hayward, *Rethinking Federal Diversion: The Rise of Specialized Criminal Courts*, 22 BERKELEY J. CRIM. L. 47, 53 (2017).

[50] *Id.* at 54 (alteration in original) (quoting NAT'L ASSOC. PRETRIAL SERVS. AGENCIES, PERFORMANCE STANDARDS AND GOALS FOR PRETRIAL DIVERSION/INTERVENTION 1 (2008)).

[51] Kimpel, *supra* note 41, at 452-53.

[52] Aaron Littman, *Jails, Sheriffs, and Carceral Policymaking*, 74 VAND. L. REV. 861, 909-10 (2021).

[53] Kimpel, *supra* note 41, at 452-53.

[54] *See id.* at 453; Darcy Covert, *Transforming the Progressive Prosecutor Movement*, 2021 WIS. L. REV. 187, 216 (noting many diversion programs take form of specialty courts).

plea diversion can shape the offer extended to a defendant or lead to dismissal of charges, whereas post-plea diversion requires a guilty plea as a condition of participation.[55]

This Note will analyze pretrial diversion broadly as a concept, and specifically, its effectiveness as a means of addressing SUD and mental illness. For the purposes of this Note, I define "diversion" as *police, prosecutor, or court-led programs that specifically target individuals with SUD and mental illness and direct them away from the criminal legal system, acknowledging that incarceration would fail to meet their needs and cause additional harm*. The next Section will describe specific examples of diversion programs, led by police departments, prosecutors, and official diversion courts.

### D. *Exploring Different Forms of Diversion*

#### 1. Police-Led Diversion

Police engage in diversion by identifying individuals' needs when they are suspected of or arrested for crimes and directing them toward alternatives to the typical resolution of a criminal case.[56] Police officers have vast discretionary powers they wield when stopping, questioning, and arresting an individual. Many people with mental illness enter the criminal legal system when police charge them with misdemeanors, including disorderly conduct, trespass, or even congregating in public spaces.[57] Informal police diversion occurs when police officers encounter people and choose not to charge them with such low-level offenses.[58]

Over the years, police departments have joined forces with community mental health organizations to establish formalized diversion programs.[59] Many of these diversion efforts follow the Crisis Intervention Team ("CIT") structure, where officers work with community mental health providers to support an individual with a mental health crisis instead of arresting them.[60] The CIT model was first developed in 1988, providing law enforcement

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[55] Kimpel, *supra* note 41, at 452-53.

[56] Kathleen Hartford, Robert Carey & James Mendonca, *Pre-Arrest Diversion of People with Mental Illness: Literature Review and International Survey*, 24 BEHAV. SCI. & L. 845, 847 (2006) ("Pre-arrest diversion . . . is a complex process that frequently involves informal assessments by the officer on the scene . . . .").

[57] Jamelia N. Morgan, *An Abolitionist Critique of Quality-of-Life Policing*, 69 UCLA L. REV. 1624, 1628 (2023).

[58] *See* Anna D. Vaynman & Mark R. Fondacaro, *Prosecutorial Discretion, Justice, and Compassion: Reestablishing Balance in Our Legal Syste*m, 52 STETSON L. REV. 31, 36 (2022) (expanding on purpose and operationalization of police discretion).

[59] Hartford et al., *supra* note 56, at 847.

[60] Erin R. Collins, *Beyond Problem-Solving Courts*, 25 CARDOZO J. CONFLICT RESOL. 229, 243 (2023) [hereinafter Collins, *Beyond*].

officers with training in identifying mental illness and SUD and allowing officers to refer individuals to emergency health services, rather than booking them.[61]

With respect to SUD, an example of a formal, police-led diversion program is Law Enforcement Assisted Diversion ("LEAD"), a "street diversion" program where people who would typically be charged criminally for sex work and drug use are picked up by police and taken to supportive social services.[62] Another program—called the Angel Program—was established by the Michigan State Police in 2016, where individuals with SUD could walk into any state police post and begin an intake for placement into SUD treatment.[63] Building on LEAD and the Angel Program, Madison, Wisconsin established the Madison Addiction Recovery Initiative ("MARI"), which offered a pre-arrest diversion process for individuals accused of drug-related crimes.[64] Through MARI, an arresting officer who apprehended an individual with probable cause for a drug-related offense could direct that individual to enroll in substance use treatment instead of traditional adjudication procedures.[65] Based on the understanding that offering people with mental illness or SUD community support and treatment will improve their health outcomes and reduce burden on the criminal legal system, police-led diversion programs and partnerships with community health organizations have become more prevalent.[66]

2. Prosecutor-Led Diversion

Prosecutors can practice de facto diversion by declining to pursue charges or by crafting specialized plea agreements for people with mental health needs or SUD.[67] Our modern police apparatus is consistently given the fuel

[61] Hartford et al., *supra* note 56, at 850.

[62] Mary D. Fan, *Street Diversion and Decarceration*, 50 AM. CRIM. L. REV. 165, 166-67 (2013).

[63] *Angel Program*, MICH. STATE POLICE, https://www.michigan.gov/msp/divisions/grantscommunityservices/angel [https://perma.cc/X5LK-TD5A] (last visited May 8, 2026).

[64] *See generally* Jennifer E. Nyland et al., *Law Enforcement-Led, Pre-Arrest Diversion to Treatment May Reduce Crime Recidivism, Incarceration, and Overdose Deaths: Program Evaluation Outcomes*, J. SUBST. USE & ADDICT. TREAT., July 25, 2024; Alice Zhang, *Offering Recovery Rather than Punishment: Implementation of a Law Enforcement-Led Pre-Arrest Diversion-to-Treatment Program for Adults With Substance Use Disorders*, J. SUBST. USE & ADDICT. TREAT., Dec. 17, 2023, at 1.

[65] Nyland et al., *supra* note 64, at 2-3.

[66] Hartford et al., *supra* note 56, at 846-47 ("Many police services are organizing so that community mental health agencies can be contacted to help with calls involving mentally ill persons and, rather than charge the individuals, assist them to obtain treatment.").

[67] Kelly & White, *supra* note 19, at 37-38 (characterizing "de facto decriminalization" as an effort to reduce penalties for drug use and possession (emphasis omitted)); Deniz

to enforce low-level infractions, which has contributed to the exponential growth of the criminal legal system and the number of cases prosecutors must process.[68] The sheer numbers of people policed and directed towards the courts contribute to approximately 98% of convictions nationwide resulting from guilty pleas.[69] Though many factors also contribute to the high rates of plea deals in the criminal legal system, these factors certainly include the financial and emotional toll of being detained for a long period pre-trial while awaiting a case's disposition, or simply having to endure the administrative bureaucracy of the courts when trying to resolve a case.[70] Individuals may accept plea deals with a reduced sentence out of a desire to regain liberty and quickly resolve their case.[71]

Prosecutors and defense counsel often resolve cases with low-level offenses by working out deals that include a few months of specialized diversion programming or probation.[72] These arrangements can be almost mechanistic in their application to cases.[73] Even though a deal involving only probation time could be viewed as negligible, or perhaps even helpful to the individual, it can still keep them within the control and supervision of the courts and subject them to additional punishment should they fail to comply with the terms of their plea.[74]

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Aritürk, Michele M. Easter, Jeffrey W. Swanson & Marvin S. Swartz, *Diversion to Treatment when Treatment Is Scarce: Bioethical Implications of the U.S. Resource Gap for Criminal Diversion Programs*, 52 J.L., MED. & ETHICS 65, 71 (2024) (describing how prosecutors, judges, and police officers can prioritize treatment over pursuing charges).

[68] *See* Amanda Geller, *The Process Is Still the Punishment: Low-Level Arrests in the Broken Windows Era*, 37 CARDOZO L. REV. 1025, 1028 (2016) (indicating how modern policing follows "broken windows" approach, where law enforcement aggressively pursues low-level infractions).

[69] *2023 Plea Bargain Task Force Report Urges Fairer, More Transparent Justice System*, A.B.A. (Feb. 22, 2023), https://www.americanbar.org/news/abanews/aba-news-archives/202 3/02/plea-bargain-task-force.

[70] *See* Geller, *supra* note 68, at 1035-36 (exploring impact of extended pretrial detention); MALCOLM M. FEELEY, THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT 30 (paperback ed. 1992) (arguing arduous process of resolving criminal case may encourage criminal defendant to resolve case expeditiously).

[71] *See* Geller, *supra* note 68, at 1036.

[72] *See* Alexandra Natapoff, *The High Stakes of Low-Level Criminal Justice*, 128 YALE L.J. 1648, 1667-68 (2019).

[73] *See id.* at 1668-70.

[74] *See* ALEX ROTH, SANDHYA KAJEEPETA & ALEX BOLDIN, VERA INST. OF JUST., THE PERILS OF PROBATION: HOW SUPERVISION CONTRIBUTES TO JAIL POPULATIONS 1 (2021), https://vera-institute.files.svdcdn.com/production/downloads/publications/the-perils-of-probation.pdf [https://perma.cc/R7CH-E6D6].

Take the example of *Commonwealth v. Eldred*,[75] a Massachusetts state court case that was appealed to the Massachusetts Supreme Judicial Court.[76] Julie Eldred was charged with larceny for taking over $250 of jewelry, and admitted to police during the investigation that she stole the jewelry to help fund her heroin addiction.[77] The trial judge continued the case without a finding (also known as granting a "CWOF").[78] Ms. Eldred was given one year of probation with conditions, including a requirement that she needed to remain drug-free throughout probation, submit to random drug tests, and attend SUD treatment.[79] Shortly after her case ended in a CWOF, Ms. Eldred tested positive for fentanyl.[80] Her probation officer requested a probation hearing for the violation, and the same judge who had heard Ms. Eldred's case ordered her into custody until an inpatient treatment facility became available, which meant she spent ten days incarcerated before receiving care.[81]

Though Ms. Eldred argued that her SUD prevented her from engaging in a "willful violation" of her probationary condition to remain drug-free and the condition should be held invalid, the Massachusetts Supreme Judicial Court ultimately ruled that the drug-free condition of probation was permissible, even for a person with an SUD.[82] Ms. Eldred's case is indicative of the downsides of prosecutor deals that may appear on their face as lenient. Though CWOFs are not meant to result in a criminal record, failure to meet conditions attached to the disposition can further enmesh an individual in the criminal legal system. Furthermore, Ms. Eldred's case shows courts' resistance to acknowledging SUD as a health condition that is more effectively treated beyond the criminal legal system. Amici in *Eldred* commented that the probation requirement to "remain drug free" was at odds with the "well-established . . . clinical course of SUD," which acknowledges

[75] 101 N.E.3d 911 (Mass. 2018).

[76] *Id.*

[77] *Id.* at 915-16.

[78] *Id.* at 916. In Massachusetts, a continuance without a finding ("CWOF") is a disposition where a defendant admits to facts that would establish them as guilty for the alleged charges, but the case is "continued" or delayed to a certain date without a conviction put on their record. MASS. DIST./MUN. CTS. R. PROB. VIOLATION PROCS. 2. A CWOF usually includes probation with conditions imposed, where violation of probation terms can result in a judge entering the conviction, and where compliance with terms results in the ultimate dismissal of the case. *See id.*

[79] *Eldred*, 101 N.E.3d at 916.

[80] *Id.*

[81] *See id.*

[82] *Id.* at 916-17, 925; *see also* Corinne Zucker, Note, Commonwealth v. Eldred*: Denying a Medical Reality*, 92 TEMP. L. REV. 673, 676 (2020) (discussing facts and procedural history of *Eldred*).

and accepts that recurrences will be an aspect of the recovery process.[83] Thus, though prosecutors can exercise what appears to be leniency through probation-heavy plea deals, conditions of probation can be at odds with medical standards of care and return individuals to the criminal legal system.

3. Specialized Criminal Courts

Policymakers developed a new method of adjudication, classified as "specialized criminal courts" or "problem-solving courts," which are now the primary model for diversion programs.[84] These began in state courts and are now prominent in the federal criminal legal system.[85] Specialized criminal courts differ from traditional diversion programs in that they are generally only available after a guilty plea.[86] These courts are considered, and perhaps aspire to be, "assistance-based" rather than "punishment-based."[87] Eligibility for these programs may depend on status (such as a defendant being a veteran), the crime for which they are charged, or a "problem" viewed as contributing to their involvement in the legal system, such as SUD or mental illness.[88] There are now more than four thousand of these specialized criminal courts in the United States to address a defendant's circumstances.[89] This Section will describe two examples of these courts: one that focuses on mental health needs and another that addresses SUD.

The Brooklyn Mental Health Court was the first mental health court in New York City.[90] This court addresses defendants with schizophrenia, bipolar disorder, and intellectual disabilities.[91] Its stated goal is to "strengthen the justice system's ability to identify, assess, and monitor individual participants; to create linkages between the justice and mental health

[83] Brief on Behalf of the Mass. Med. Soc'y et al. as Amici Curiae Supporting Petitioner at 35, *Eldred*, 101 N.E.3d 911 (No. SJC-12279).

[84] Scott-Hayward, *supra* note 49, at 53, 57-58 (noting specialized criminal courts more prevalent than traditional pretrial diversion).

[85] *Id.* at 50.

[86] *Id.* at 60-61.

[87] Shanda K. Sibley, *The Unchosen: Procedural Fairness in Criminal Specialty Court Selection*, 43 CARDOZO L. REV. 2261, 2263 (2022).

[88] Scott-Hayward, *supra* note 49, at 49.

[89] Collins, *The Problem*, *supra* note 14, at 1575. In this Note, I choose to focus on mental health and drug courts, because these are the types of specialized courts that focus squarely on health issues that individuals in the criminal legal system are facing.

[90] *Fact Sheet: Brooklyn Mental Health Court*, CTR. FOR JUST. INNOVATION (Aug. 20, 2024), https://www.innovatingjustice.org/publications/fact-sheet-brooklyn-mental-health-court [https://perma.cc/9B5G-NLKM].

[91] BROOKLYN MENTAL HEALTH CT., OVERVIEW 1 (2024) https://www.innovatingjustice.org/wp-content/uploads/2022/02/BMHC_Factsheet_Overview_08202024.pdf [https://perma.cc/LDD3-FB2V].

systems; and to improve public safety by ensuring that participants receive high-quality community-based services."[92] This involves "hold[ing] participants with mental illness accountable for their actions by linking them to appropriate treatment and community-based support."[93] This court is available to individuals charged with nonviolent felonies and felonies involving assault, robbery, and burglary.[94] People charged with more serious felonies are considered on a case-by-case basis.[95] For cases involving victims, a victim must consent to the defendant's transfer into the Mental Health Court before the defendant is eligible to participate.[96] A prosecutor is also permitted to deny participation to any individual.[97]

A participant must plead guilty to enter the court and must also consent to the program requirements, which may include mental health and SUD treatment, community-based case management, education, and supportive housing.[98] Statistics demonstrate that 74% of court participants complete the program and are 46% less likely to be re-arrested than those not in the mental health court.[99] After completion of the program, a judge may vacate a participant's plea, clearing out the consequences of a criminal record.[100]

Next, Alaska has several "therapeutic courts," which are alternative justice models that accommodate certain issues defendants face or aspects of their identity. These therapeutic courts include drug courts, DUI courts, mental health courts, veterans courts, and Tribal wellness courts.[101] Anchorage's Wellness Felony Drug Court has a stated mission of "enhanc[ing] the quality of life in our community and public safety by breaking the cycle of criminality of drug- and alcohol-addicted persons, and to reduce the cost associated with re-arrest, criminal case processing, confinement, and jail

[92] *Brooklyn Mental Health Court*, CTR. FOR JUST. INNOVATION, https://www.innovatingjustice.org/programs/brooklyn-mental-health-court [https://perma.cc/P5U6-PTAD] (last visited May 8, 2026).

[93] BROOKLYN MENTAL HEALTH CT., *supra* note 91.

[94] *Id.*

[95] *Id.*

[96] *Id.*

[97] *Id.* at 2.

[98] *Id.*

[99] *Id.*

[100] *Id.*

[101] *Therapeutic Courts*, ALASKA CT. SYS.: TRIAL CTS., https://courts.alaska.gov/therapeutic/index.htm [https://perma.cc/5GH8-P2EV] (last visited May 8, 2026).

overcrowding."[102] This court states (multiple times) that it has the goal of helping its participants reach sobriety.[103]

To be eligible for this court, individuals must be charged (but not yet indicted) with drug possession or a minor drug-related offense, and they must have no prior participation in a drug- or alcohol-focused specialized court.[104] They must also accept a guilty plea or a no contest disposition.[105] Participants are required to engage in SUD treatment, undergo regular drug and alcohol testing, and maintain their sobriety.[106] This court demonstrates a narrower approach than the Brooklyn court because it is only available to individuals prior to indictment and focuses on a smaller subset of criminalized conduct. Ultimately, these specialty courts developed a distinct infrastructure to address mental health and SUD within the criminal legal system and to offer a tailored adjudication process sensitive to these health needs.

## II. EVALUATING DIVERSION FOR SUBSTANCE USE AND MENTAL ILLNESS THROUGH AN ABOLITIONIST AND PUBLIC HEALTH LENS

With the rise of diversion models, many policy actors accept this approach as a legitimate method for addressing SUD and mental illness.[107] The popularity of diversion may also result from the United States' failure to adequately address mental health and substance use issues through existing healthcare infrastructure and preventative efforts. Behavioral health care is separated from other medical care, underfunded, and fragmented in its delivery, which leads to many people lacking access to treatment.[108] About half of U.S. adults with a serious mental illness and about three-quarters of Americans ages twelve or older with an SUD have an unmet need for treatment.[109] The dearth of care for these health concerns, combined with their criminalization, can direct individuals into the criminal legal system.

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[102] ALASKA THERAPEUTIC CTS., ANCHORAGE WELLNESS FELONY DRUG COURT 1 (2022), https://public.courts.alaska.gov/web/forms/docs/pub-111.pdf [https://perma.cc/9KE5-EWFH].

[103] *Id.* at 1-2.

[104] *Id.* at 4.

[105] *Id.* at 3.

[106] *Id.* at 2.

[107] *See, e.g.*, AKHI JOHNSON & MUSTAFA ALI-SMITH, VERA INST. OF JUST., DIVERSION PROGRAMS, EXPLAINED 1 (2022), https://vera-institute.files.svdcdn.com/production/inline-downloads/ diversion- programs- explained.pdf [https:// perma.cc/ AMV5- MBT8] (suggesting diversion as step towards "better path to safety" and claiming diversion programs "help improve long-term community safety and reduce crime").

[108] Kennedy-Hendricks et al., *supra* note 25, at 1077-78 (describing shortcomings with how United States provides mental health care).

[109] Aritürk et al., *supra* note 67, at 66.

As described in Section I.B, the criminal legal system fails to therapeutically rehabilitate individuals and tends to precipitate poorer health outcomes. It also leads to many collateral consequences that remain with an individual throughout their life. As a result, many scholars have advocated for complete abolition of our current carceral system, in favor of developing new methods of managing public safety in a far more humane, liberatory, and empathetic manner. This Section will contribute to the conversation on carceral abolition by evaluating diversion programs through a framework comprised of abolitionist and public health principles. The analysis will consider whether diversion as a concept aligns with the goals of the abolitionist movement and improves the health of the people it aims to serve.

### A. *Establishing a Framework for Evaluating Diversion*

Carceral abolition envisions a new order where the need for the criminal legal system becomes nonexistent because people are given the services, care, and resources they need to survive and flourish.[110] In order to "move beyond reforms that tinker at the edge of a deeply rotten system" and to embrace transformation of our current society, abolitionist thinkers fundamentally challenge solutions flowing from the criminal legal system itself.[111] This involves the "decoupling of social responses to harm and conflict from the criminal legal system and building nonpunitive and noncarceral systems of accountability and care."[112] It also suggests envisioning "a world that prefigures political, economic, and social conditions such that the social problem no longer exists."[113]

Abolitionist theory does not purport to be an airtight, neatly packaged, easily implementable solution, which is a position and approach that some scholars criticize.[114] Instead, abolition embraces creativity, experimentalist spirits, and failure.[115] It also emphasizes community support, suggesting that relationship building in communities could eliminate the need for state interference and oversight.[116] It focuses on the process and strategy of efforts,

[110] Collins, *Beyond*, *supra* note 60, at 247.

[111] *Id.*

[112] Jamelia Morgan, *Responding to Abolition Anxieties: A Roadmap for Legal Analysis*, 120 MICH. L. REV. 1199, 1203 (2022).

[113] *Id.* at 1207.

[114] *Id.* at 1213 ("[A]bolitionist theory and organizing offers no quick fixes or clear, concrete pathways forward.").

[115] *Id.* at 1203 ("[A]bolitionist praxis offers not a blueprint but a process of experimentation that is accessible to all of us . . . ."); Collins, *Beyond*, *supra* note 60, at 247-49 (exploring "spirit of experimentalism" in carceral abolition).

[116] *See* Morgan, *supra* note 112, at 1205.

rather than the ultimate outcome, and considers making more things, testing, risking, and failing as valuable and productive efforts.[117]

In response to criticism that abolition does not offer one, streamlined, concise solution, it is helpful to conceptualize abolition as a method of practice prioritizing energy, mobilization, and resources towards solutions that reduce the power and influence of the carceral system.[118] Even if there was political will to tear down all carceral institutions tomorrow, they likely could not all be eliminated immediately because they are embedded so deeply in our economy and social order. As a result, abolitionist organizers advocate for "non-reformist reforms," which differ from traditional reforms in that they challenge existing power relations and call for fundamental change, rather than simple adjustments to existing structures.[119] By pursuing non-reformist reforms, activists can pursue incremental change as part of the long-term project of abolition.

Marbre Stahly-Butts and Amna Akbar put forth a five-part framework for evaluating whether a solution is a "radical reform," which they define as a reform that "attempts to get to the root of the issues we face" and that "aids in the ongoing collective project of transformation."[120] The authors describe a radical reform as one that "(1) shrinks the system doing harm;" (2) relies on organizing that seeks to point to new possibilities; (3) concentrates power back in the hands of those who are directly impacted, which often includes Black, brown, working-class, and poor people; (4) "acknowledges and repairs past harm; and (5) improves, or [keeps at neutral], the material conditions of directly impacted people."[121]

This Note adds a public health lens to this analysis by adding a sixth factor: The proposed solution improves the health outcomes of the population it aims to serve. Public health efforts are fundamentally aligned with abolitionist goals, so combining the two approaches is a natural next step.[122]

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[117] *Id.* at 1214.

[118] *See* Amna A. Akbar, *Non-Reformist Reforms and Struggles over Life, Death, and Democracy*, 132 YALE L.J. 2497, 2538 (2023) (contrasting "reformist reform[s]" with abolitionists non-reformist reforms seeking to limit "the scale and power of the carceral state").

[119] Marbre Stahly-Butts & Amna A. Akbar, *Reforms for Radicals? An Abolitionist Framework*, 68 UCLA L. REV. 1544, 1548 (2022).

[120] *Id.* at 1548, 1552.

[121] *Id.* at 1552.

[122] Paul J. Fleming, Maren M. Spolum, William D. Lopez & Sandro Galea, *The Public Health Funding Paradox: How Funding the Problem and Solution Impedes Public Health Progress*, 136 PUB. HEALTH REPS. 10, 12 (2021) ("Recognizing that health is not an end but a means by which all people can live unencumbered and full lives suggests orienting the work of public health to address the fundamental causes that create barriers to health and well-being. A fundamental causes approach demands 'dismantling the systems that

After observing the catastrophic effects of COVID-19 on health outcomes and the increased momentum for Black Lives Matter movements over the last decade, many take the view that "all policy is health policy."[123] The American Public Health Association even issued a statement calling for "moving toward the abolition of carceral systems and building in their stead just and equitable structures that advance the public's health" through reducing the numbers of incarcerated people, divesting resources from carceral systems and towards social determinants of health, and accepting non-carceral efforts for safety and accountability, among other measures.[124]

Building on the shared goals of public health and abolition advocates to build new structures of care, eliminate violent oppression, and pursue the health, safety, and acceptance of people with SUD and mental illness, this Section will evaluate diversion programs through the developed abolitionist-public health framework.

### B. *Criminal Legal System Diversion as an Abolitionist-Public Health Reform*

Applying the adapted, six-part framework to diversion for SUD and mental illness, diversion could be conceived as a solution that limits the harms of the criminal legal system, especially when compared to a traditional incarceration sentence. For the first part, one could argue that diversion of people away from incarceration shrinks the footprint of the criminal legal system. Studies have indicated that drug courts are associated with reduced rates of recidivism, bolstering an argument that diversion programs are a method of reducing frequent touchpoints with the criminal legal system.[125] Diversion could fulfill the third part of the framework—giving power and agency to those directly impacted—by providing people with health

initiate and sustain inequities in a broad range of societal institutions that are the drivers of inequities in health.'" (footnote omitted) (quoting David R. Williams & Lisa A. Cooper, *Reducing Racial Inequities in Health: Using What We Already Know to Take Action*, INT'L J. ENV'T RSCH. & PUB. HEALTH, Feb. 2019, at 1, 2)).

[123] González, *supra* note 26, at 544 (quoting Rachel R. Hardeman, Eduardo M. Medina & Rhea W. Boyd, *Stolen Breaths*, 383 NEJM 197, 198 (2020)).

[124] *Advancing Public Health Interventions to Address the Harms of the Carceral System*, AM. PUB. HEALTH ASS'N (Oct. 23, 2020), https://www.apha.org/policies-and-advocacy/public-health-policy-statements/policy-database/2021/01/14/advancing-public-health-interventions-to-address-the-harms-of-the-carceral-system [https://perma.cc/PRL9-4M46].

[125] Devin T. Driscoll, Note, *Solving the Problem of Problem-Solving Justice: Rebalancing Federal Court Investment in Reentry and Pretrial Diversion Programs*, 102 MINN. L. REV. 1381, 1387 (2018); *see also* BROOKLYN MENTAL HEALTH CT., *supra* note 91 (reporting 74% of active participants compliant with mental health court program requirements and 46% less likely to reoffend).

conditions a substantive chance at liberty and an opportunity to receive treatment. For the fifth part, because a criminal conviction can place significant burdens on an individual's ability to obtain benefits, housing, and employment, diversion programs that occur prior to a plea and result in the dismissal of charges can mitigate some of the harms of the criminal legal system and improve material conditions.[126] Similarly, diversion could meet the sixth part of the framework by potentially allowing an individual to completely bypass incarceration, which would reduce risks of overdose and mental health crises behind bars.[127]

However, diversion programs targeted towards supporting individuals who struggle with SUD and mental illness have often fallen short. This Section will demonstrate how certain aspects of diversion programs are limited when evaluated through the reform framework enumerated above.

1. Diversion Does Not Shrink the System Causing Harm

The first point of the framework asks whether the proposed solution diminishes the size of the system causing harm. Patterns would suggest diversion draws even more resources to the criminal legal system. Stahly-Butts and Akbar describe the "progressive prosecutor" solution as a representative example of this exact proposition.[128] They note that "many [progressive prosecutors] are asking for more power and money by requesting additional funds and looking to expand their duties to include the provision of social services."[129] Other scholars critical of progressive prosecutor offices have called on prosecutors who seek to change the criminal legal system to cede power, including advocating for the state to fund social services instead of prosecutor or court-led diversion programs.[130]

In addition, individuals are asked to submit to the power of the criminal legal system in order to participate in a diversion program, sacrificing their liberty and independence. For example, they may have to consent to searches of their house, vehicle, and person.[131] They could be subject to supervision and oversight by program staff, a commitment to sobriety, and a requirement

[126] *See* Scott-Hayward, *supra* note 49, at 58 (noting severe consequences of criminal convictions).

[127] *See supra* notes 38-45 and accompanying text.

[128] Stahly-Butts & Akbar, *supra* note 119, at 1567.

[129] *Id.* at 1573; *see also* Kimpel, *supra* note 41, at 479 (noting prosecutors use diversion programs as source of profit, creating perverse financial incentives).

[130] Covert, *supra* note 54, at 221 ("One who supports treatment-based alternatives to incarceration necessarily recognizes that crime is caused in part by these issues. Then tethering these individuals to the criminal system, rather than giving them the opportunity to focus on treatment and stabilization, is no solution at all.").

[131] *Id.* at 216-17.

to avoid re-arrest.[132] Ultimately, although diversion programs are marketed and lauded as an alternative to incarceration, the irony of such "alternatives" is that they can easily lead back to incarceration.[133] If an individual fails to complete a diversion program, court actors can impose harsher consequences—like a longer sentence—than if the case had been adjudicated traditionally.[134] The staff and resources needed to manage compliance with these diversion programs, and to surveil the ballooning carceral population, bolster the criminal legal system as a whole.

2. Diversion Programs Fortify Existing Criminal Legal System Infrastructure

Looking to the second point of the framework, diversion represents the instinct to draw on the existing infrastructure of the criminal legal system for answers, rather than thinking creatively about new solutions outside the system and relying on organized movements led by those who are most impacted by the system.[135] Though many well-meaning scholars and practitioners advocate for changes to the violent and demeaning criminal legal system, "[m]any reforms that look like progress at first glance[] expand the carceral state or worsen the problems we seek to remedy like the perpetuation of racial and social caste."[136] By couching changes within the system's existing operations and actors, reformers do not explore the root causes of how these health issues are criminalized, nor do they engage in a normative conversation about whether these should be dealt with in the criminal legal system at all.

By managing diversion programs for people with health concerns, the criminal legal system draws healthcare into its anatomy, and court actors step into the role of providers. There is an inherent tension in trying to treat health conditions in a fundamentally punitive system, resulting in diversion programs that provide treatment in a "legally coercive manner."[137] Diversion "tethers" individuals to the criminal legal system through paternalistic oversight, rather than expanding the horizons for addressing mental health and SUD effectively or giving individuals the ability to pursue treatment through traditional care avenues.[138] For example, a study of participants in a drug court found that only a little over 10% of study participants viewed

[132] *Id.* at 217.

[133] *See* Sawyer & Wagner, *supra* note 1.

[134] Collins, *Beyond*, *supra* note 60, at 233; *see also* Kimpel, *supra* note 41, at 456 (describing diversion as mechanism giving court increased control over low-level offenders).

[135] *See* Stahly-Butts & Akbar, *supra* note 119, at 1552.

[136] Kimpel, *supra* note 41, at 493.

[137] *See* Scott-Hayward, *supra* note 49, at 80.

[138] Covert, *supra* note 54, at 221.

treatment as their major incentive for joining; for most, participating was a method to avoid incarceration.[139] In sum, diversion programs have not relied on the input and leadership of community movements, and their novelty is limited to the universe of the existing criminal legal system.

3. Diversion Programs Do Not Give Power Back, Repair Past Harm, or Improve Material Conditions

Considering the next three factors of the framework, diversion fails to acknowledge and repair past harm, give power back to people most impacted, and improve the material conditions of people it seeks to support. By allocating additional power and resources to prosecutors' offices, specialized courts, and law enforcement officers to respond to individuals with SUD and mental illness, diversion does not give autonomy back to those overpoliced and over-criminalized, therefore missing the mark on the third part of the reform framework.[140] The discretionary nature of diversion programs allows for the introduction of bias and stigma in decision-making, which also disempowers the people these programs are meant to serve.[141] Prosecutors and judges do not liberally offer diversion to defendants; many options have strict eligibility criteria based on the criminalized conduct they are charged with or their record in the criminal legal system.[142] Defendants often must apply for admission into the program, and a prosecutor or a judge can make the decision whether to accept the defendant or not.[143] Many people are precluded from accessing diversion because of insufficient financial resources, since paying fees can be a precondition.[144] These financial obligations only perpetuate the racism of the criminal legal system—because people of color in aggregate have fewer financial resources than White people, diversion and its benefits may be more available to White people.[145] Because Black and brown people are already disproportionately targeted by

[139] Scott-Hayward, *supra* note 49, at 82.

[140] *See* Stahly-Butts & Akbar, *supra* note 119, at 1552.

[141] *See* Collins, *Beyond*, *supra* note 60, at 246.

[142] *See* Covert, *supra* note 54, at 216.

[143] Scott-Hayward, *supra* note 49, at 55; Sibley, *supra* note 87, at 2263.

[144] Scott-Hayward, *supra* note 49, at 57; *see also* Covert, *supra* note 54, at 219-20 (noting diversion may require participants to pay for regular drug tests or treatment in order to stay in compliance with program requirements); Kimpel, *supra* note 41, at 456-58 (highlighting how prosecutors can charge "diversion costs" of $750 per misdemeanor and $1,400 per felony, which include application fees, program costs, and educational courses).

[145] Kimpel, *supra* note 41, at 475-76 (pointing out 79% of White Americans as compared to 56% Black Americans reported being able to pay their bills even if $400 emergency arose).

criminal legal system actors, any benefits afforded by diversion may be hard-fought for.[146]

Next, diversion programs make no reparatory effort. They leverage the criminal legal system's existing foundation to manage health conditions, legitimizing a system that has its roots in slavery and failing to acknowledge the past and present harm caused by policing and carceral settings, particularly on communities of color.[147]

Lastly, diversion programs do not improve material conditions, because they set their participants up for failure and subject them to the collateral consequences of incarceration.[148] Participants in diversion programs must comply with certain conditions, such as mandatory counseling, community service, or restitution, and failure to meet those conditions can re-docket their case for prosecution or reimpose a sentence.[149] Programs may require participants to maintain employment, which is difficult for individuals because of employer stigma and hostility towards people with criminal records.[150] A diversion program requiring frequent visits with a supervisor may predispose an individual with poor access to transportation to fail.[151] People who are struggling with poverty, unstable housing, racism, and illness may find compliance with these onerous requirements even more difficult.[152] Diversion also does not necessarily expunge one's record.[153] Even an arrest and grant of diversion can remain public record.[154] This reality subjects individuals to the consequences of a criminal record, even when given the "leniency" of diversion.

Given these factors, and with respect to the recidivism point introduced above, scholars note that meta-analyses of specialty courts addressing individuals with SUD suggest that these types of courts have only "modest"

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[146] *See id.*

[147] *See* Hinton et al., *supra* note 5 (describing criminal legal system's tie to enslavement of Black Americans); Sawyer & Wagner, *supra* note 1 (highlighting racial disparities in carceral settings).

[148] *See, e.g.*, Sawyer & Wagner, *supra* note 1 (describing how "community supervision" alternatives to incarceration, like probation, parole, and pretrial supervision, are "so restrictive that they set people up to fail" and not "viable way to reduce the number of people behind bars").

[149] Scott-Hayward, *supra* note 49, at 55-56.

[150] *See* Covert, *supra* note 54, at 217.

[151] *Id.* at 218-19.

[152] *Id.* at 217-18 (noting poor people, people with mental illness and addiction, and people who generally face barriers to housing, employment, and transportation will struggle to fulfill conditions of diversion programs).

[153] *See* BROOKLYN MENTAL HEALTH CT., *supra* note 91, at 2 (stating Brooklyn Mental Health Court is only available to those who tender guilty plea).

[154] Kimpel, *supra* note 41, at 455.

effects on recidivism.[155] Though the Brooklyn Mental Health Court boasts a 46% reduction in likelihood to pick up a new case, only 74% of participants successfully complete the program, meaning a quarter of participants can ultimately end up incarcerated.[156] Though the goal of diversion programs is to divert participants away from the criminal legal system and its negative, lifelong consequences, program designs and empirical studies suggest this is not successfully achieved.

4. Diversion Does Not Improve Health Outcomes

Considering the sixth element of the framework, diversion fails to effectively treat health conditions of people engaged in the criminal legal system, and often sets them up for poorer health outcomes. Diversion programs, particularly specialty courts focused on providing alternatives to incarceration for those with SUD or mental illness, may not employ evidence-based practices for treating these needs. For example, the Anchorage Drug Felony Court above requires sobriety and maintains surveillance over its participants through regular drug tests to ensure compliance.[157] This court's fundamental model fails to take into account that recovery is clinically understood to be a lifelong, ongoing process that is expected to have challenges, including recurrences.[158] Many other drug court models are premised on this abstinence-only treatment, where any drug use while in the program could result in a violation.[159] Moreover, judges have relied on the reasoning that medications for treating SUD are fueling a different type of addiction.[160] A 2013 study found that 44% of all drug courts did not permit medication for SUD because of its cost or misinformed opinions about its purpose and efficacy.[161] Medications for SUD are evidence-based, expert-recommended, and critical for aiding people on a recovery path.[162]

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[155] Collins, *Beyond*, *supra* note 60, at 232-33.

[156] *See* BROOKLYN MENTAL HEALTH CT., *supra* note 91.

[157] ALASKA THERAPEUTIC CTS., *supra* note 102, at 2.

[158] Carlo C. DiClemente & Michele A. Crisafulli, *Relapse on the Road to Recovery: Learning the Lessons of Failure on the Way to Successful Behavior Change*, 48 J. HEALTH SERV. PSYCH. 59, 60 (2022) (describing process of recovery and difficulty of sustaining unwavering behavior change).

[159] Collins, *Beyond*, *supra* note 60, at 236.

[160] *Id.* ("[M]any drug court judges prohibit participants from using agonist medication-assisted treatments for opioid addiction, such as methadone and suboxone.").

[161] Collins, *The Problem*, *supra* note 14, at 1619.

[162] *See Substance Use Disorder Treatment Options*, SAMHSA (Aug. 25, 2025), https://www.samhsa.gov/substance-use/treatment/options ("Research shows that a combination of medication and therapy can successfully treat SUDs, and for some medications can help sustain recovery. Medications are also used to prevent or reduce opioid overdose. The goal

Similarly, mental health-focused courts require individuals to enroll in and complete treatment, failing to account for the myriad factors that make it generally difficult for people to access this care. The Brooklyn Mental Health Court requires mental health and SUD treatment as a condition of participation.[163] Though this court aims to mitigate some of the other difficulties people might face in accessing treatment, such as by providing supportive housing and case management, there are many barriers to receiving care that are out of a participant's control.[164] These barriers include insufficient insurance, high out-of-pocket costs, and the dearth of mental health care providers across the country.[165] An individual's failure to successfully enroll in and maintain mental health treatment can result in a violation of their terms of participation, while they also fail to achieve the ultimate rehabilitative goal that the court espouses.[166]

Some might argue that police-led diversion is more favorable to health than the specialty court model and would result in fewer collateral consequences, because it limits the contact an individual has with the criminal legal system.[167] However, it is ill-advised to promote police-led diversion because of the health impacts resulting from over-policing in communities, particularly those home to Black residents.[168] Aggressive police tactics and surveillance have been associated with higher levels of psychological distress and poorer chronic health outcomes.[169] In addition,

is to save lives and help people with their recovery, including the ability to live a self-directed life.").

[163] BROOKLYN MENTAL HEALTH CT., *supra* note 91, at 2.

[164] *See id.*

[165] *See* Hemangi Modi, Kendal Orgera & Atul Grover, *Exploring Barriers to Mental Health Care in the U.S.*, AAMC (2022), https://www.aamc.org/about-us/mission-areas/clinical-care/exploring-barriers-mental-health-care-us [https://perma.cc/Y3HY-RDNW] (describing workforce shortages and financial barriers to receiving mental health care); Aritürk et al., *supra* note 67, at 66 (highlighting severe resource gap for mental health and SUD treatment).

[166] *See* BROOKLYN MENTAL HEALTH CT., *supra* note 91 (describing strict terms of Brooklyn Mental Health Court program).

[167] *See* Aritürk et al., *supra* note 67, at 66-67 (describing varying levels of criminal legal system involvement of different diversion programs).

[168] *See* Michael Esposito, Savannah Larimore & Hedwig Lee, *Aggressive Policing, Health, and Health Equity*, HEALTHAFFAIRS (Apr. 30, 2021), https://www.healthaffairs.org/do/ 10.1377/ hpb202104 12.997570 (noting aggressive police tactics have been disproportionately leveraged against Black communities).

[169] *Id.*; Geller, *supra* note 68, at 1035 (explaining police encounters "physically invasive and psychologically taxing" indicating repeated interactions of this sort can "undermine" mental health).

there are significant risks of serious injury and death that too often result from police interactions, especially for communities of color.[170]

These diversion models cause harm to an individual's health and prolong engagement with the criminal legal system: if people are directed to treatment that is inappropriate, inaccessible, or unavailable, their condition could worsen or they could violate the terms of their diversion program, resulting in incarceration.[171] Of note, individuals with SUD are at exponential risk of an overdose immediately after release, with studies estimating that reentry populations are 120 times more likely to overdose than the general public.[172] Ultimately, diversion, like other proposed reforms to the criminal legal system, repackages the carceral state, rather than shrinking the reach of the system or meaningfully improving the lives of those most affected. Instead of calling for a significant reconfiguration of power relations and systems, adding a rehabilitative angle to the criminal legal system through diversion for SUD and mental illness simply revises the ways the system is leveraged to respond to social and economic problems.[173]

## III. AN ABOLITIONIST AND PUBLIC HEALTH-INFORMED APPROACH TO ADDRESS SUD AND MENTAL HEALTH

For many, diversion programs may seem like a promising solution to the issue of people with mental health concerns and SUD becoming frequently enmeshed and treated poorly in the criminal legal system. Diversion for individuals with SUD and mental health needs may have arisen out of a genuine concern for addressing these health conditions in the criminal legal system. But as Section II.B indicated, these programs often maintain carceral oversight and the threat of criminal punishment over their participants, fail to meaningfully support an individual's health and well-being, and have mixed outcomes with respect to program efficacy. They are not a "radical reform" that chips away at the size or power of the criminal legal system and our reliance on punitive responses.[174] Though these programs seek to promote health and to direct people away from the criminal legal system, they do not achieve these goals well.

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[170] Esposito et al., *supra* note 168.

[171] Aritürk et al., *supra* note 67, at 71.

[172] Patty Shillington, *Opioid Overdoses Among Incarcerated People May Be Reduced by Improving Release Process and Treatment Continuity*, U. MASS. AMHERST (Aug. 11, 2022), https://www.umass.edu/news/article/opioid-overdoses-among-incarcerated-people-may-be-reduced-improving-release-process [https://perma.cc/G87Z-DLW9].

[173] *See* Covert, *supra* note 54, at 221 ("[I]ncreasing the use of rehabilitative programs within the criminal system expands the ways in which we use the criminal system to respond to what are fundamentally social and economic problems.").

[174] *See* Stahly-Butts & Akbar, *supra* note 119, at 1551.

As Section II.A described, an abolitionist agenda does not offer one explicit course of action to remedy the issues it faces. There is no one answer to counter the numerous, intertwined problems that give rise to this issue, such as the legacy of racism and slavery in this country, the abundance of criminal laws that seek to exert control over people with mental illness and SUD, and the cyclical nature of engagement in the criminal legal system.[175] In reality, abolitionist movements acknowledge that they have to effectively "change everything."[176]

In light of this, this Part will propose a course of action that embodies the principles of abolition and public health. Drawing from the abolitionist attitude, this Part will not put its full weight behind one solution but rather propose a patchwork of starting points for thinking beyond our existing status quo and turning attention and creativity from the criminal legal system as the substrate. In this Part, I will first discuss the value of looking at existing diversion programs as a harm reduction strategy compared to traditional criminal case adjudication, which is especially relevant for practitioners confronting diversion as a mitigation strategy for criminal defendants. Next, I will describe how abolitionist movements and methods of practice should dovetail with public health approaches, through *theoretical reframing*, *legislative change*, and the *power of community mobilizing*. All of these would involve divesting resources from the criminal legal system and investing in social support and care.

### A. *Diversion Programs as Harm Reduction for Individuals in the Criminal Legal System*

On the path to transformational change, there is value in embracing harm reduction efforts in the immediate term. In their discussion of radical reforms, Stahly-Butts and Akbar acknowledge the tension between pursuing fundamental change and accepting incremental steps that perhaps reinforce the current system but are intended to improve the current conditions of people experiencing harm.[177] Diversion programs addressing mental illness and substance use, while potentially providing some benefit to people with certain health conditions, import criminal legal system overreach into health

[175] *See supra* Sections I.A-B (describing negative human consequences of criminal legal system for people with mental illness and SUD).

[176] Mariame Kaba, *So You're Thinking About Becoming an Abolitionist*, LEVEL (Oct. 30, 2020), https://level.medium.com/so-youre-thinking-about-becoming-an-abolitionist-a436f8e 31894.

[177] *See* Stahly-Butts & Akbar, *supra* note 119, at 1551-52 (discussing challenge of pursuing reforms that are truly transformative and acknowledging few reforms can meet all elements of their radical reform framework).

services that could be provided by communities and providers.[178] The criminal legal system can be violent and harmful, not only for the period that a person is incarcerated, but for the rest of their lives. A public defender noted the tension between advocating for more significant change and having an appreciation for a "net improvement over the status quo," stating, "I am not in the business of systemic change; I am in the business of helping clients choose off a menu of case outcome options given to us by prosecutors."[179]

Scholars note that abolition movements are committed to long-term change, but also to reducing harm in the present.[180] While criticizing the progressive prosecutor movement's ability to enact foundational change, Stahly-Butts and Akbar also describe engaging in prosecutorial electoral politics as one tool for building collective, long-term power.[181] Rather than a victory in and of itself, a win in ousting or electing a particular prosecutor is a tactic in "building the power of the collective to negotiate with the new prosecutor and the long-term battle to shift power away from prosecutors."[182]

In jurisdictions where the concept of institutionalized diversion has taken popular hold, through established diversion courts or legislative mandates, individuals who administer diversion programs should critically evaluate their programs.[183] Because popular narratives and stigma towards individuals with mental illness and SUD are rampant, it is essential that lawyers, judges, and policymakers familiarize themselves with the clinical nature of these conditions and data about how the criminal legal system exacerbates these health needs when making decisions in representation, prosecution, and sentencing.

At the very least, diversion programs seeking to support individuals with SUD and mental illness should be based in evidence and tailored to an individual's needs. Research shows that abstinence-based approaches to

[178] *See* Covert, *supra* note 54, at 221. For example, Massachusetts District Attorneys are required by law to establish diversion programs that intend to direct defendants from incarceration and towards services. MASS. GEN. LAWS ch. 12, § 34 (2026). This may appear to be a progressive, positive step, if we assume the intent behind this provision comes from a place of wanting to limit the harms of incarceration. But this also raises the question of why district attorneys are viewed as the best agents for connecting the people they are charged with punishing to health services.

[179] Covert, *supra* note 54, at 193-94.

[180] Morgan, *supra* note 112, at 1214-15 ("Adopting a harm-reduction approach serves to ensure that abolitionists do not end up so concerned with the *theory* of abolition that they fail to consider the *practice* of abolition.").

[181] Stahly-Butts & Akbar, *supra* note 119, at 1570-71.

[182] *Id.* at 1575.

[183] *See, e.g.*, MASS. GEN. LAWS ch. 12, § 34 (2026) (requiring all Massachusetts District Attorneys to establish diversion programs).

opioid use disorder are ineffective, given that recurrences are understood by clinicians and scholars as a key aspect of recovery.[184] Medications for SUD are also essential for recovery, though not always embraced or understood by diversion program administrators.[185] Programs that are too burdensome for a person's practical ability to comply, like daily attendance at methadone clinics, can set an individual up for failure in a diversion program and reinitiate their criminal charges.[186] Many people cannot entertain the concept of treatment because they fail to have their basic needs met, like shelter and food, and thus diversion programs should be premised on the understanding that people need these needs fulfilled before they are able to enter treatment.[187]

Diversion programs should not be cost-prohibitive or revenue-generating machines, where the cost of participation functionally excludes people experiencing poverty and who cannot secure their basic needs. These programs should be funded by state or federal actors, rather than from the pockets of individuals seeking to participate in them. For example, some drug-based diversion programs are funded by Medicaid expansion.[188] Cook County also finances its diversion process, supporting five thousand defendants per year in cost-free diversion programs.[189] Diversion should not operate as a means to extract additional resources from defendants, where they trade fines and fees for a more lenient outcome, and the funds are returned to prosecutors and law enforcement to further their activities.[190]

Diversion may have a value add where it offers better outcomes than if the case traversed through traditional criminal legal adjudication.[191] This incremental reform could be an intermediary step to reduce the harms of the criminal legal system and immediately provide practitioners, like prosecutors, defense attorneys, and judges, with a tool for better supporting

[184] DiClemente & Crisafulli, *supra* note 158, at 60-61.

[185] Aritürk et al., *supra* note 67, at 69.

[186] *Id.* at 66.

[187] *Id.*

[188] Kimpel, *supra* note 41, at 463.

[189] *Id.*

[190] *Id.* at 494. Even with this recommendation, I note that there is some internal tension: The radical reform framework suggests reforms should not give resources and legitimacy to the system causing harm, and by arguing that diversion should not charge individuals, states and district attorneys' offices could call for greater resources to implement diversion programs. Then again, the framework is meant to be a helpful tool in focusing our efforts towards the greater goal of prison abolition, rather than to definitively say whether a solution should be implemented. *See* Stahly-Butts & Akbar, *supra* note 119, at 1552 (noting few reforms will fulfill all five elements of radical reform framework).

[191] *See* Sibley, *supra* note 87, at 2274.

criminal defendants. Even if diversion is an intermediary approach, more energy, resources, and attention should be directed towards non-carceral solutions.

### B. *Paradigm Shift: Embracing an Abolitionist-Public Health Ethos and Agenda*

Mental illness and SUD are complex conditions that require understanding, treatment, and multifaceted supports beyond what the criminal legal system can offer. When analyzing the efficacy of diversion programs as a reform effort, scholars conclude that community-based resources to address mental health or SUD are preferable to a court-administered program, because "they deal with causation while keeping defendants' criminal records clean," and because there are no collateral consequences of a criminal record, "they give defendants true second chances."[192] The Sequential Intercept Model ("SIM") is a framework that maps six intervention points for people with health needs as they progress through the criminal legal system.[193] Many scholars studying diversion advocate for the provision of health services at the earliest intercepts, to bypass law enforcement and criminal legal involvement and its collateral consequences.[194]

The United States should move its consciousness towards a vision of collective care and support, increasing opportunities for people to receive healthcare for their needs, rather than criminalizing health conditions and locking people away. We should converge abolitionist goals with larger, systemic public health efforts. This Section will describe three avenues for pursuing a joint abolitionist-public health approach: (1) a theoretical, cross-disciplinary reorientation; (2) large-scale legislative change; and (3) community organizing for care.

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[192] Smith, *supra* note 7, at 413.

[193] These intervention points (or intercepts) are: (0) community services; (1) law enforcement; (2) initial court hearings and detention; (3) jails or specialty courts; (4) re-entry from jail or prison; and (5) community corrections (including parole or probation). *See* Aritürk et al., *supra* note 67, at 67.

[194] *See id.* (noting SIM's six intercepts each present opportunity for diversion to treatment for individuals with behavioral health needs); Collins, *Beyond*, *supra* note 60, at 243 (highlighting SIM principles advocate for treatment services as early as possible when person faces involvement in criminal legal system); Kelly & White, *supra* note 19, at 32 (advocating for cross-sector collaboration to support individuals with SUD along earliest intercepts of model).

1. Cross-Disciplinary Reframing of Criminality and How to Approach Health Conditions

Politicians, scholars, practitioners, and the general public must decouple SUD and mental illness from perceptions of criminality. All of us have been socialized to fear crime victimization, through the rise of tough-on-crime policies throughout the past few decades,[195] news headlines meant to seize attention, and the abundance of true crime tales and storylines across popular media. This conditioned many of us to believe that policing, carceral settings, and an abundance of criminal laws keep us safe. However, research demonstrates that fear related to crime is the result of cognitive biases and not supported by reality.[196] This conditioning can lead people to overestimate the prevalence of crime if they make a judgment based on the flow of information related to crime they receive in the news.[197] People with mental illness are routinely, and mistakenly, stigmatized as dangerous, and have been for centuries.[198]

Moving away from an instinct to criminalize people who we might implicitly view as dangerous or in need of incapacitation will require recognition of our biases, unlearning, and a significant shift in our policies. This is not an easy task, given that politicians routinely rely on calls for increased public safety measures to support their campaigns[199] and the entire criminal legal system is rooted in the long-lasting legacy of American slavery.[200] Just this past July, the Trump Administration released an Executive Order titled "Ending Crime and Disorder on America's Streets,"[201] which inaccurately conflated homelessness, mental health needs, and SUD with violent behavior.[202] This order also rejected many evidence-based

[195] *The Rise of Mass Incarceration*, VERA, https://www.vera.org/ending-mass-incarceration/ causes- of- mass- incarceration [https:// perma.cc/ NAN9- F5KJ] (last visited May 8, 2026) (noting U.S. incarceration rate grew by 400% from 1970 through 2000, partially due to rise of tough on crime policies beginning in 1970).

[196] *See* Adam K. Fetterman, Carter D. Baker & Brian P. Meier, *Crime in Your Area: Use of Neighborhood Apps Is Associated with Inaccurate Perceptions of Higher Local Crime Rates*, 13 PSYCH. POPULAR MEDIA 269, 270-72 (2024) (noting link between media consumption and enhanced fears of crime not reflective of neighborhood conditions).

[197] *Id.* at 270.

[198] Swanson & Rosenberg, *supra* note 16, at 54 (describing fear of people with mental illness dates back to ancient times and traditions).

[199] William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 529-30 (2001).

[200] *See* sources cited *supra* note 31 (linking Black Codes, vagrancy laws, and convict leasing to the criminal legal system's racialized origins).

[201] Exec. Order No. 14321, 90 Fed. Reg. 35817 (July 24, 2025).

[202] *Contrast id.* ("Endemic vagrancy, disorderly behavior, sudden confrontations, and violent attacks have made our cities unsafe."), *with* Swanson & Rosenberg, *supra* note 16,

public health approaches, including housing first policies and harm reduction approaches to SUD,[203] favoring incapacitation through civil commitment instead.[204]

However, embracing public health approaches and modes of thought across government leadership, healthcare providers, the courts, and our communities can assist with this task. First, social determinants of health ("SDOH") are a key public health concept that can guide reform efforts. SDOH are conditions in people's lives that shape health risks, outcomes, and inequities.[205] These can include access to housing, healthcare, economic stability, education, and community support.[206] The law itself is viewed as a determinant of health, where unmet legal needs are health-harming.[207] In addition, the life course approach to public health describes how adverse childhood experiences ("ACEs") can affect individuals' health for the rest of their life.[208] ACEs include witnessing or being the target of violence, having parents who are incarcerated, and living with family members who experience mental health and substance use challenges.[209] These factors cause trauma, affect one's ability to obtain education or employment, and put individuals at risk of developmental and interpersonal challenges later in life.[210] A life course approach and an understanding of ACEs can explain disparities in access to economic opportunities, stable housing, and

at 56-58 (explaining Epidemiologic Catchment Area study showed increased relative risk of violence from those with serious mental health needs but extremely low absolute risk with 97% not engaging in violent behavior).

[203] *See, e.g.*, *Homelessness-Jail Cycle*, *supra* note 46 (describing effectiveness of housing first approach); Jack Tsai, *Is the Housing First Model Effective? Different Evidence for Different Outcomes*, 110 AM. J. PUB. HEALTH 1376, 1376-77 (2020) (same); Morgan Coulson & Melissa Hartman, *What Is Harm Reduction?*, JOHNS HOPKINS BLOOMBERG SCH. PUB. HEALTH (Feb. 16, 2022), https://publichealth.jhu.edu/2022/what-is-harm-reduction.

[204] *See* Exec. Order No. 14321, 90 Fed. Reg. at 35817-18.

[205] *See Social Determinants of Health*, HEALTHY PEOPLE 2030, https://odphp.health.gov/healthypeople/ priority-areas/ social-determinants-health [https://perma.cc/ 462S-QTLD] (last visited May 8, 2026).

[206] *Id.*

[207] *See generally* Samantha Bent Weber & Dawn Pepin, *Why Law Is a Determinant of Health*, 50 STETSON L. REV. 401 (2021) (arguing law structures social, political, and economic conditions affecting health).

[208] *About Adverse Childhood Experiences*, CDC (Mar. 2, 2026), https://www.cdc.gov/aces/about/index.html [https://perma.cc/5SL9-VPDM]; *see also* Nancy L. Jones et al., *Life Course Approaches to the Causes of Health Disparities*, 109 AM. J. PUB. HEALTH 548, 552 (2019) (advocating for life course perspective into interventions addressing health disparities).

[209] CDC, *supra* note 208.

[210] *Id.*

education, which are all factors that contribute to people's proximity to the criminal legal system and levels of mass incarceration.[211] All these public health concepts can shape a nuanced understanding of how existing systems (like the criminal legal system) harm health and drive mass incarceration, and how governments' "policy-driven deprivation of critical resources" also causes these outcomes.[212]

This understanding can drive new partnerships. For example, if we truly embrace that law is a social determinant of health, we can build creative, cross-sector collaborative efforts and improve both health and legal outcomes. Medical-legal partnerships ("MLPs") arose out of this understanding that health needs are often related to social needs that can be addressed with legal tools. In this model, lawyers work with health care providers to use legal tools to address an individual's social determinants of health.[213] Lawyers can support individuals struggling financially by appealing denials of food stamps, cash benefits, and disability benefits, or assist individuals in maintaining stable housing by combating evictions and substandard living conditions.[214] MLPs are still relatively scarce, and law and healthcare typically operate in discrete silos.[215] State legislators, legal practitioners, and healthcare providers should explore MLPs as an effort to strengthen health and legal services and to prevent the "need" for incarceration later, especially for marginalized individuals with mental health needs or SUD.

Public health reframing can support lawyers and actors who are presently working within the criminal court system: public defenders, prosecutors, judges, and others can start recognizing the accumulation of social factors and health needs in defendants that pass through the courts, instead of viewing them as inherently bad actors that require incapacitation. These theories can also help actors across all sectors embrace the understanding that mental illness and SUD must be addressed as health conditions, rather than

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[211] *See* ASHLEY NELLIS, SENTENCING PROJECT, MASS INCARCERATION TRENDS 14 (2024), https://www.sentencingproject.org/app/uploads/2024/05/Mass-Incarceration-Trends.pdf [https://perma.cc/6SDK-23AX] (suggesting we should revise how we think about "people who commit crime," such as by understanding "structural disadvantages that permeate American society leading to disparate economic, education, housing, and health outcomes").

[212] Fleming et al., *supra* note 122, at 10.

[213] *How Legal Services Help the Health Care System Address Social Needs*, NAT'L CTR. FOR MED.-LEGAL P'SHIP, https://medical-legalpartnership.org/response/i-help [https://perma.cc/BL7R-JAK6] (last visited May 8, 2026).

[214] *Id.*

[215] *See Impact*, NAT'L CTR. FOR MED.-LEGAL P'SHIP, https://medical-legalpartnership.org/impact [https://perma.cc/D34A-LPE9] (last visited May 8, 2026) (stating MLPs helped only 75,000 individuals in 2024).

viewing them as factors that cause crime or as conditions that the criminal legal system is adequately prepared to address.

2. Legislative Changes in Criminal and Health Law

We underfund and deprioritize mental health and substance use care, which is a reason diversion programs may never be successful at achieving their goals. Resource limitations, like the lack of available mental health and substance use treatment programs, lead evaluators of diversion programs to ask the question of "diversion to what[?]"[216] Researchers note that "[w]ithout public investments to increase treatment capacity, choice of treatment options, and the representativeness of the health and human services workforce, diversion programs cannot provide ethical care to participants, especially to those from marginalized communities."[217] Legislative change is an essential tool for improving health outcomes, and this Section describes two concurrent efforts: decriminalization of drug use and mental health conditions and building robust health coverage and access.

*Decriminalization.* States should explore decriminalizing drug use and possession, as well as behaviors exhibited by people experiencing mental health crises. Data demonstrate that states with higher rates of admission to drug treatment programs have lower rates of incarceration, suggesting that individuals with SUD and mental illness can completely bypass the criminal legal system with sufficient supports in place.[218] A strong behavioral health treatment system would serve as the ultimate preventative measure by addressing health needs in the healthcare system.[219]

As mentioned in Section I.A, states have vast ranges of laws that target people with mental health needs and SUD, bringing them within the specter of the criminal legal system. When faced with major public health crises, such as the prevalence of mental health conditions and the opioid crisis, states may resort to using law enforcement to incapacitate people facing health

[216] Aritürk et al., *supra* note 67, at 67.

[217] *Id.* at 73.

[218] Smith, *supra* note 7, at 418 (indicating states with higher rates of drug treatment than national average incarcerate one hundred per one hundred thousand fewer people than states with drug treatment rates lower than national average).

[219] Aritürk et al., *supra* note 67, at 67. It is important to still critically evaluate noncriminal solutions from governmental institutions: Many still rely on surveillance and social control. Weisburd discusses how noncriminal actors, even those typically considered benign (like schools and social workers) can use punitive strategies, like gatekeeping supportive programs on the grounds that individuals are morally undeserving of such support. *See* Kate Weisburd, *The Carceral Home*, 103 B.U. L. REV. 1879, 1926 (2023).

challenges, rather than address the root cause of their needs.[220] With the established infrastructure of the criminal legal system, it is simply easier to put people behind bars, rather than connect an individual to therapies and fulfill what might be a wide range of unmet social needs. In the same vein, states that have experimented with decriminalization policies have observed the challenges that arise when such decriminalization measures are implemented while the state concurrently fails to provide sufficient treatment options and to address other social determinants of health, like housing.[221]

For example, Oregon decriminalized possession of small amounts of drugs through a ballot measure in 2020, subjecting individuals to a fine or a health assessment for violating drug laws rather than incarceration.[222] After the voter measure passed, Portland began to experience surges in unsheltered homelessness, homicides, and overdose deaths, to which Mayor Ted Wheeler responded by banning encampments and increasing the city's police presence to crack down on the tumult.[223] Only three years later, Oregon passed legislation re-implementing criminal penalties for drug possession.[224] When reflecting on Oregon's attempt, Mayor Wheeler emphasized the lack of behavioral health infrastructure and treatment availability as reasons why Oregon's decriminalization effort struggled, but expressed optimism that robust health care supports could establish decriminalization as a viable policy in the future.[225] Oregon's example should not suggest that non-criminal solutions do not work, but rather that policymakers should recognize that efforts to divest from the criminal legal system while failing to build up infrastructure addressing the root causes of why people are criminalized in the first place will frustrate their efforts.

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[220] *Homelessness-Jail Cycle*, *supra* note 46 (indicating people with mental health and/or SUD needs can get caught in homelessness-jail cycle preventing them from accessing services and stability). *See generally* NAZGOL GHANDNOOSH & CASEY ANDERSON, SENTENCING PROJECT, OPIOIDS: TREATING AN ILLNESS, ENDING A WAR 15 (2017), https://www.sentencingproject.org/app/uploads/2022/08/Opioids-Treating-an-Illness-Ending-a-War.pdf [https://perma.cc/N73E-A3TA] (describing history of opioid crisis and how some states have responded by implementing harsh criminal penalties for drug use and possession).

[221] *See, e.g.*, Mike Baker, *Oregon Is Recriminalizing Drugs. Here's What Portland Learned.*, N.Y. TIMES (Apr. 1, 2024), https://www.nytimes.com/2024/04/01/us/oregon-drug-law-portland-mayor.html.

[222] Kelly & White, *supra* note 19, at 38-39.

[223] Baker, *supra* note 221.

[224] *Id.*

[225] *Id.* Mayor Wheeler, while reflecting on Oregon's decriminalization efforts, described the necessity of "do[ing] the hard work to build the behavioral health infrastructure that was lacking." *Id.*

*Improving Health Coverage and Access to Care.* States can also focus on leveraging Medicaid.[226] As this Note goes to press, many critical health programs and public health efforts related to mental health and SUD are at risk at both the federal and state level. In July 2025, Congress passed a budget reconciliation bill that authorized over $1 trillion in cuts to Medicaid over ten years by reducing federal contributions to the state-administered programs and instituting onerous eligibility requirements designed to remove millions of recipients from the program.[227] Given these regressive changes at the federal level, responsibility for improving health care access and public health efforts will now fall more squarely on the shoulders of the states, and they should focus on mitigating the harms of these cuts for populations most impacted.

Medicaid has historically been the largest funder of behavioral healthcare nationwide, and an estimated 80-90% of people who are incarcerated would qualify for Medicaid post-release, showing that Medicaid is crucial for people who face higher risk of criminal legal system involvement and mental illness or SUD.[228] The remaining ten states that have not opted to expand their Medicaid programs should do so in order to increase funding available for addressing state health priorities and to improve access to coverage for residents.[229] Under the Affordable Care Act, states are permitted to provide

[226] *See generally Medicaid & CHIP Coverage*, HEALTHCARE.GOV, https://www.healthcare.gov/ medicaid- chip [https:// perma.cc/ 6FGF- X2AK] (providing background on programs).

[227] Rhiannon Euhus, Elizabeth Williams, Alice Burns & Robin Rudowitz, *Allocating CBO's Estimates of Federal Medicaid Spending Reductions Across the States: Enacted Reconciliation Package*, KFF (July 23, 2025), https://www.kff.org/medicaid/issue-brief/allocating-cbos-estimates-of-federal-medicaid-spending-reductions-across-the-states-senate-reconciliation-bill [https://perma.cc/RX7N-FSP7]. Many of the Medicaid cuts are financed by requiring all states to collect information about recipients' compliance with work requirements or whether they qualify for an applicable exemption. *Id.* Because 92% of Medicaid recipients already work or have an exemption, it is expected that millions will lose their coverage simply because of the administrative burden of documenting and reporting work hours. *See* Elizabeth Hinton & Robin Rudowitz, *5 Key Facts About Medicaid Work Requirements*, KFF (Feb. 18, 2025), https://www.kff.org/medicaid/issue-brief/5-key-facts-about-medicaid-work-requirements [https://perma.cc/B46N-N9RF].

[228] Emily Widra, Blog, *Why States Should Change Medicaid Rules to Cover People Living Prison*, PRISON POL'Y INITIATIVE (Nov. 28, 2022), https://www.prisonpolicy.org/blog/2022/11/28/medicaid [https://perma.cc/3SYT-KNBM]; Heather Saunders, *A Look at Substance Use Disorders (SUD) Among Medicaid Enrollees*, KFF (Feb. 17, 2023), https://www.kff.org/mental-health/issue-brief/a-look-at-substance-use-disorders-sud-among-medicaid-enrollees [https://perma.cc/6NEB-9YVH].

[229] Sherry A. Glied & Mark A. Weiss, *Impact of the Medicaid Coverage Gap: Comparing States That Have and Have Not Expanded Eligibility*, COMMONWEALTH FUND (Sep. 11, 2023), https://www.commonwealthfund.org/publications/issue-briefs/2023/sep/

Medicaid coverage to individuals with incomes up to 138% of the federal poverty level, including coverage for mental health and SUD services.[230]

A study demonstrated that states that had expanded their Medicaid programs were six times more likely to address social determinants of health in their treatment programs for opioid use disorder, acknowledging that their Medicaid population likely faces social, economic, and environmental factors that they require support for to promote optimal health, beyond their baseline medical needs.[231] Medicaid expansion funding has also been leveraged by states to connect people with physical and behavioral services upon their release from incarceration, and could also be used for better support of these individuals prior to significant engagement with the criminal legal system.[232]

In addition, states can take advantage of statutory flexibilities in Medicaid to care for people with mental health needs and SUD. Medicaid demonstration projects, authorized by Section 1115 of the Social Security Act,[233] allow states to pilot programs related to behavioral health and social determinants of health, and have frequently emphasized mental health and SUD.[234] For example, the District of Columbia Medicaid Behavioral Health Transformation Demonstration began in 2019 and leveraged Section 1115 to achieve three overarching goals: (1) to expand Medicaid behavioral health services and supports in D.C.; (2) to improve outcomes for individuals with SUD, especially opioid use disorders; and (3) to support a more "person-centered, integrated, and coordinated system of physical and behavioral

impact-medicaid-coverage-gap-comparing-states-have-and-have-not [https://perma.cc/64KY-46YT].

[230] Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 2001(a), 124 Stat. 119, 271 (2010) (codified as amended in 42 U.S.C. § 1396(a)); Ji Eun Chang, Cory E. Cronin, Zoe Lindenfeld, José A. Pagán & Berkeley Franz, *Association of Medicaid Expansion and 1115 Waivers for Substance Use Disorders with Hospital Provision of Opioid Use Disorder Services: A Cross Sectional Study*, BMC HEALTH SERVS. RSCH., Dec. 2023, at 1, 2.

[231] *Id.* at 6.

[232] CHRISTIAN HEISS, STEPHEN A. SOMERS & MARK LARSON, MILBANK MEM'L FUND, COORDINATING ACCESS TO SERVICES FOR JUSTICE-INVOLVED POPULATIONS 2 (Aug. 2016), https://www.milbank.org/wp-content/uploads/2016/09/MMF_CoordinatingAccess-FINAL-1.pdf [https://perma.cc/24YQ-4D96].

[233] 42 U.S.C. § 1315.

[234] *See Medicaid Waiver Tracker: Approved and Pending Section 1115 Waivers by State*, KFF (Mar. 9, 2026), https://www.kff.org/ medicaid/ issue-brief/ medicaid-waiver-tracker- approved- and-pending-section-1115-waivers-by-state [https://perma.cc/9TK2-54PM].

healthcare for Medicaid beneficiaries."[235] This demonstration sought to achieve these goals by expanding treatment options for people with serious mental illness and/or SUD; improving the quality of behavioral health care; promoting continuity of care and outcomes for beneficiaries through care transition, coordination, and employment support systems; and bolstering crisis treatment programs, among other efforts.[236]

An evaluation of the project nearly five years after the demonstration began indicated that D.C. had been successful in several of its goals, including increasing the number of crisis services and improving access to community-based health services, despite interruptions caused by COVID-19.[237] Not only does the D.C. demonstration indicate how targeted efforts to improve mental health for Medicaid recipients can be helpful, other Medicaid waivers have shown tailored interventions to support individuals in close proximity to the criminal legal system. More than half of the states have developed and implemented Reentry Section 1115 waivers, which seek to waive Medicaid's Inmate Exclusion Policy to provide transitional care for incarcerated people prior to the release.[238] Based on these successes, states should develop and pilot Medicaid demonstration projects focused specifically on individuals at high-risk of contact with the criminal legal system and on directing them to health and social services. These waivers could serve as quasi-diversion, except with the goal of bypassing the criminal legal system altogether.

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[235] REKHA VARGHESE ET AL., AM. INSTS. FOR RSCH., MEDICAID BEHAVIORAL HEALTH TRANSFORMATION DEMONSTRATION: DRAFT INITIAL INTERIM EVALUATION REPORT 2 (2024), https://dhcf.dc.gov/sites/default/files/dc/sites/dhcf/page_content/attachments/DRAFT%201115%20Interim%20Eval%20Report_For%20public%20comment%20%28f5553319-61fe-4165-8e83-2a0cdc26a984%29.pdf.

[236] *Id.*

[237] D.C. DEP'T OF HEALTH CARE FIN., DISTRICT OF COLUMBIA SECTION 1115 MEDICAID DEMONSTRATION RENEWAL REQUEST 7 (June 6, 2024), https://dhcf.dc.gov/sites/default/files/dc/sites/dhcf/page_content/attachments/DC%201115%20Renewal%20Application_20240606.pdf [https://perma.cc/2ZJQ-SALQ].

[238] Gabrielle de la Guéronnière, *Mapping Medicaid Reentry*, LEGAL ACTION CTR. (Sep. 2025), https://www.lac.org/resource/mapping-medicaid-reentry [https://perma.cc/5CQS-FN UX] (noting over half of states have developed or in process of creating Reentry Health waivers); John Card & Elizabeth Kaplan, *Using Medicaid 1115 Reentry Waivers to Improve the Health of People Leaving Incarceration*, HEALTHAFFAIRS (Sep. 23, 2024), https:// www.healthaffairs.org/content/forefront/using-medicaid-1115-reentry-waivers-improve-heal th-people-leaving-incarceration (describing statutory flexibilities Reentry Health waiver takes advantage of).

3. Leveraging the Power of Communities for SUD and Mental Health Needs

Beyond a societal shift in how we view crime and health, and structural change to our legal regime, caring for each other within our local communities is an effective means of change. Because the above tools focus on using the legislative process to bolster social programs, changing political winds can alter the viability of these avenues for supporting individuals living with mental illness or SUD. For example, different presidential administrations may have different priorities with respect to how they approve new Medicaid demonstration waivers.[239] While the Biden policy agenda signaled to states the importance of addressing social determinants of health, promoting continuity of care, and not conditioning Medicaid coverage on fulfilling work requirements,[240] the second Trump Administration immediately started withdrawing several of the Biden-era executive orders establishing these priorities,[241] before further implementing a policy agenda that created work requirements for a vast swath of Medicaid recipients.[242]

When addressing SUD and promoting mental health across the population, we can encourage individuals to rely on their communities, rather than solely institutions, to care for one another. The United States has a documented trend of individualism, which can contribute to high levels of loneliness, and in turn is associated with increased rates of mental health conditions and SUD.[243] The idea that community care and mutual reliance can eliminate the need for significant state oversight and intervention, such as criminal

[239] *See, e.g.*, Elizabeth Hinton, Amaya Diana & Robin Rudowitz, *Medicaid Waiver Priorities Under the Trump and Biden-Harris Administrations*, KFF (Sep. 6, 2024), https://www.kff.org/medicaid/issue-brief/medicaid-waiver-priorities-under-the-trump-and-biden-harris-administrations [https://perma.cc/9LSJ-R9ND].

[240] *Id.*

[241] Madeline Morcelle, *President Trump's Day One Actions Threaten Medicaid and the ACA*, NAT'L HEALTH L. PROGRAM (Jan. 27, 2025), https://healthlaw.org/president-trumps-day -one-actions-threaten-medicaid-and-the-aca [https://perma.cc/LZF9-YBXK].

[242] Euhus et al., *supra* note 227.

[243] *See, e.g.*, Elizabeth M. Ross, *What Is Causing Our Epidemic of Loneliness and How Can We Fix It?*, HARV. GRADUATE SCH. EDUCATION (Oct. 25, 2024), https://www.gse.harvard.edu/ideas/usable-knowledge/24/10/what-causing-our-epidemic-loneliness-and-how-can-we-fix-it [https://perma.cc/35L6-3C8R]. Top public health experts in the United States have spoken at length about the health impacts of loneliness and isolation in this country and have prioritized addressing them at the national scale. *See generally* OFF. OF THE SURGEON GEN., OUR EPIDEMIC OF LONELINESS AND ISOLATION: THE U.S. SURGEON GENERAL'S ADVISORY ON THE HEALING EFFECTS OF SOCIAL CONNECTION AND COMMUNITY (2023), https://www.hhs.gov/sites/default/files/surgeon-general-social-connection-advisory.pdf [https://perma.cc/MG3A-L82U].

oversight of health issues through diversion, is a key underpinning of many abolitionist writings.[244]

As members of families, schools, and communities, all of us can play a role in looking out for one another. While improved access to health coverage and freedom from criminal restraint are much-needed changes that require significant intervention at the state and federal levels, it is also crucial for individuals to have trusted connections who can recognize signs of mental illness and/or SUD and can direct them to resources. Community members who have strong social ties to a person experiencing a mental health or a SUD crisis can intervene before they are criminalized.[245] Moreover, increasing connectedness among communities builds power, which can translate to broader political action, led by the people who are most harmed by policies. As discussed in Section II.A, building and shifting power is a core tenet of Stahly-Butts and Akbar's radical reform framework.[246] Many other legal scholars discuss de-emphasizing reliance on the courts in favor of building power and care within communities as methods for creating change led by those who are most impacted by our current systems.[247]

Beyond the concrete support we can offer to each other, efforts to strengthen communities and their ability to care for their members are solutions that have recorded health benefits. Community support can eliminate or mitigate risk factors that exacerbate mental illness and SUD: For example, stable, positive relationships are protective factors against poor mental health.[248] Social and community context is one domain of the social determinants of health, and includes the strength of relationships with

[244] *See, e.g.*, Morgan, *supra* note 112, at 1205.

[245] *See id.*

[246] Stahly-Butts & Akbar, *supra* note 119, at 1559 ("Radical reforms are about more than the demands themselves; it matters who articulated the demands, which organizing efforts and organizations pushed for them, and what ongoing space the demands create for collective learning and governance.").

[247] *About Movement Lawyering*, MOVEMENT L. LAB, https://www.movementlawlab.org/about/ movement-lawyering [https:// perma.cc/ PQN3-975V] (last visited May 8, 2026) (introducing concept of movement lawyering and positing "organized communities, not isolated lawsuits, drive transformational change"); Alexi Nunn Freeman & Jim Freeman, *It's About Power, Not Policy: Movement Lawyering for Large-Scale Social Change*, 23 CLINICAL L. REV. 147, 150 (2016) (describing how organizers seek to disrupt fundamental imbalances of power that have caused harm for their communities, while simultaneously building community power to develop public policy that matches community's needs).

[248] *See, e.g.*, *About Mental Health*, CDC (June 9, 2025), https://www.cdc.gov/mental-health/about/index.html [https://perma.cc/DK8Q-NUEG] (acknowledging risk factors for poor mental health include adverse childhood experiences and experiencing violence, while protective factors include "strong social connection and stable, positive relationships").

family, friends, coworkers, and community members.[249] Many evidence-based programs to strengthen communities and prevent violence recognize that increasing access to education at an early age, building supportive family environments that prioritize healthy youth development, and supplying youth with relationships to caring adults are just a few methods of creating safer communities.[250] In this way, community support can serve as a protective health factor and a meta-preventative measure to address the incidence of mental illness and SUD in the population, far before these people are at risk of facing policing and criminalization.

## CONCLUSION

Diversion for people with SUD and mental illness, while intended as an effort to direct people and resources away from the criminal legal system, reinforces reliance on the same system it seeks to counter to address issues of health and safety. This reliance constrains a more nuanced understanding of what we call crime and the pursuit of creative solutions to address health without policing and incarceration. When thinking about ultimate goals of health, well-being, and safety, it is essential to move away from solutions that allocate resources and legitimacy to the criminal legal system, and towards building up health care infrastructure and availability.

SUD and mental illness can be challenging conditions to live with. But we are lucky to live in a country where research, medicine, and increased understanding have developed treatment options for addressing these health needs, providing people with tools to live whole, integrated, and healthy lives. At their core, abolition and public health share common values that can help guide this type of reform, namely, recognizing people's humanity and eschewing isolation in favor of community. We can and should choose solutions that are rooted in evidence, empathy, and care for people's health, rather than in police, surveillance, and carceral settings.

[249] *Social and Community Context*, HEALTHY PEOPLE 2030, https://odphp.health.gov/healthypeople/objectives-and-data/browse-objectives/social-and-community-context [https://perma.cc/4Y9M-G3HM] (last visited May 8, 2026).

[250] Swanson & Rosenberg, *supra* note 16, at 63 (noting roots of violence include poverty, racism, discrimination, and lack of access to key services, and evidence-based policies for preventing violence include building supportive community environments).