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THE SUSTAINABILITY OF COVID-19-MOTIVATED ALTERNATIVES TO ARREST

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INTRODUCTION

The COVID-19 pandemic has driven criminal justice leaders to rapidly consider and implement a host of new strategies in an effort to save lives. Given that the coronavirus spreads readily through face-to-face contact, especially in close quarters, the number of individuals processed through the criminal justice system is of particular concern. In response, jurisdictions have turned to a variety of alternatives to arrest intended to reduce the frequency and duration of interpersonal contact. Led by the increased use of citation in lieu of arrest, this shift also included measures such as minimizing police stops for minor offenses, and changes in the way citizens' complaints are processed.

While the introduction of these measures was promising, their status as largely reactionary to the pandemic threatens their potential longevity. This report follows a previous study that detailed alternative-to-arrest measures motivated by COVID-19 as well as public reporting on these policies, and considers their possible future.¹ In particular, it discusses the

rollback of some of these policy changes and what legislators and criminal justice leaders may be able to do to preserve alternatives to arrest moving forward.

COVID-19-RELATED ALTERNATIVES TO ARREST

As the name suggests, the aim of alternatives to arrest is to respond to otherwise arrest-eligible situations without resorting to criminal custody, whenever doing so would improve outcomes. These strategies run the gamut from law enforcement officers issuing a citation to commence criminal proceedings instead of conducting an arrest, to the elimination of a law enforcement response altogether, often with another social service or behavioral health organization filling the response void. In response to COVID-19, far and away the most commonly adopted strategy was the expansion of citation programs, often referred to as "cite and release." These citation programs came in two flavors: explicit guidance for certain offenses or a vaguer directive for officers to use discretion more frequently. Apart from these programs, jurisdictions also refused to prosecute certain offenses or refused to admit new individuals to jails in an effort to direct law enforcement officers toward the wider use of alternatives to arrest. The adoption or expansion of these policies was not confined to any particular part of the United States. Instead, they arose in at least 40 states and the District of Columbia, including conservative and liberal jurisdictions as well as urban, suburban and rural ones.²

These changes fared relatively well in the popular press. Stories typically included quotes and other statements from law enforcement officials detailing a new policy, which allowed them to help guide the policy's depiction.³ Although these officials frequently expressed a degree of defensiveness about the policy's possible impact on crime or the community, criticism was relatively rare in these stories. Finally, after a rush of reporting in March and April of 2020, articles on these policy shifts declined in frequency precipitously thereafter.⁴

LONGEVITY OF NEW ALTERNATIVES TO ARREST

The number of arrests averted by these policies will be tied to their longevity, with those repealed quickly unlikely to have a significant, lasting impact on their communities. As emergency measures, one might expect that the fate of these policies would be strongly connected to that emergency and therefore especially vulnerable to reversal. Indeed, a handful of reports from as early as April 2020 confirm some of these suspicions and illustrate the precariousness of some of these policies. For example, after asking local police in March to cite and release more individuals charged with misdemeanors, the sheriff in Gallatin County, Montana end-

ed this request in April.⁵ When questioned, the sheriff stated: “We feel comfortable we can get back to normal business.”⁶ Authorities in Lincoln County, Oregon likewise felt that an improving COVID-19 situation in June justified a return to its old policy.⁷ In Philadelphia, Pennsylvania, on the other hand, an uptick in property crimes, rather than COVID-19, resulted in the revocation of its expanded cite and release policy.⁸

Most jurisdictions, however, had no such reporting on the status of their new alternative-to-arrest policies. In an effort to obtain additional information, R Street followed up directly with the jurisdictions with an identified COVID-19-motivated alternative-to-arrest policy to determine which policies remain in place and how the officials responsible for them perceived them. This follow-up included an initial email requesting comment on whether the policy was still in place, how they would rate the success of the policy thus far and whether they intended to keep the policy after COVID-19 was no longer a crisis. Jurisdictions that did not respond to these emails received phone calls in an attempt to ask the same set of questions.

Around a third of those contacted replied. The most notable reactions were those of defensiveness or outright hostility, which mirrored some of the tone and substance of law enforcement officials’ public comments in initial news stories.⁹ These reactions also frequently included a refusal to give a response at all. This mixture of attitudes and nonanswers would appear to support the notion that law enforcement officials remain wary of the public reception or support for these policies.

Among those with more responsive answers, the clear trend was to view these new policies as purely a response to COVID-19 rather than as part of a broader attempt to reform the criminal justice system. As a result, officials largely tied the policy to pandemic conditions rather than criminal justice outcomes. For example, officials in Jefferson County, Alabama restored prior department policy on jail admissions as soon as COVID-19 case counts dropped in the jurisdiction.¹⁰ Likewise, authorities in Wilmington, North Carolina confirmed a return to their pre-pandemic practices for stops and arrests, stating that their shift in such practices was always considered a temporary response to COVID-19 and “riots.”¹¹ Others similarly highlighted the policies as temporary and stated that they had already run their course or were expected to expire with the pandemic.¹²

Though the view that COVID-19-inspired policy changes would end with the pandemic dominated the received responses, it was not universal. For example, in Almeida County, California, the justice system’s response to COVID-19 included a judicial zero bail order as well as the expanded use of citations. The results of these policies have been mixed, however, with initial reductions in the jail pop-

ulation proving only temporary. Moving forward, officials expect to learn from these experiences; while alternatives to arrest will likely be a part of those plans, their exact nature will likely be different from the COVID-19-motivated changes.¹³

RECOMMENDATIONS FOR POLICYMAKERS

The early results on the staying power of the COVID-19-motivated shifts in alternative-to-arrest policies suggest that such advances may be fleeting without the right kinds of supports. The first major impediment to longer-lasting policies is the unilateral nature with which most were instituted. After all, the flipside of the incredible discretion that many law enforcement agencies can leverage to change policies and practices quickly is that they can just as easily revert to the previous status quo. At the same time, these processes are rarely public or subject to meaningful debate; a policy can quietly change without anyone outside of a police station having an opportunity to voice their opposition.

A potential cure for this issue is to move the policy process from executive officials to legislative ones. While the complexity of legislative action can make initial policy shifts more difficult to enact, this same process can protect them from future revocation. At the state level, legislators wield the power to set the parameters of the authority to issue citations, one of the most frequently used alternatives to arrest. In addition to enumerating which offenses are eligible, they can also create presumptions in favor of citation use and define which exceptions might apply to a particular situation. Thus, lawmakers who support citation in lieu of arrest policies could greatly increase the policies’ use and sustainability by expanding the list of eligible offenses, ensuring that the default—at least for lower-level offenses—is a citation rather than an arrest and making any exceptions discretionary rather than mandatory. Likewise, they can strengthen these policies and programs by adding data collection and analysis to protect against unintended side effects that threaten to undermine alternatives to arrest, including net-widening, racial and ethnic disparities, and unacceptable changes to failure to appear or crime rates.

While the bulk of this legislative work must occur at the state level, local legislative officials may also play an important role in these changes. The example of San Marcos, Texas is illustrative. Although local officials had no ability to alter which offenses appeared as citation-eligible in the Texas Code of Criminal Procedure, they could control how law enforcement officers exercised their discretion in relation to those offenses already listed.¹⁴ To this end, its city council passed a new ordinance in response to COVID-19 directing its law enforcement officers to issue a citation in lieu of an arrest for a variety of offenses, including petty theft, driving with an invalid license and some Class C misdemeanors.¹⁵

This maneuver aimed to bring the actual issuance of citations in San Marcos closer to its theoretical potential under state law. The relative permanence of this move, as opposed to those initiated by law enforcement officials, was highlighted by resistance from some law enforcement officials who expressed frustration with their inability to alter the policy.¹⁶ With most states simply authorizing rather than requiring law enforcement to use citations, other local officials could follow this example and ensure that their own law enforcement officials do not ignore citations in advantageous circumstances allowable under existing law.¹⁷

In addition, the risk of any policy implemented in response to a particular crisis is that leaders may be tempted to roll it back as soon as the emergency has subsided without considering the policy's merits in less turbulent times. This particular issue has a fairly straightforward, albeit often difficult to implement, remedy: a holistic review of a policy's effects that includes data collection and analysis.

The more challenging issue arises when leaders choose not to engage in this sort of review due to preconceived notions about the policy. Unfortunately, that is exactly what appears to have occurred in relation to some of the COVID-19-motivated alternative-to-arrest policy shifts. A few of the law enforcement agencies in R Street's sample seized upon only modest improvements in COVID-19 infection numbers as a reason to eliminate their new alternatives-to-arrest policy rather than waiting for the crisis to actually pass. Such a rush to judgment, coupled with the defensiveness with which so many law enforcement agencies rolled out these changes, would seem to indicate some degree of discomfort with these policies in the first place.¹⁸ This, in turn, may point to a deeper arrest-centric culture within law enforcement that can be hard to shake and with which policymakers seeking to advance alternatives to arrest must contend.

One possible solution to the defensiveness and skepticism expressed by law enforcement officials is to share, shift or eliminate some of the response burden that these officials must currently shoulder alone. This could make alternatives to arrest more sustainable by empowering additional stakeholders and reducing the ability of any one group to abruptly change course or undermine efforts. Possible legislative efforts to this end include permitting behavioral health professionals to utilize civil custody authorities and trimming marginal violations from the criminal code. At the local level, officials could emulate and build upon efforts to route non-law enforcement professionals to behavioral health related calls for assistance and otherwise leverage technology to reduce police-civilian interactions, as a few jurisdictions did in the wake of COVID-19.¹⁹

CONCLUSION

The frequency with which jurisdictions throughout the United States turned to alternatives to arrest to help mitigate the devastating impact of COVID-19 is encouraging. The ability of alternatives to arrest to reduce the duration of or eliminate many face-to-face interactions and potentially prevent unnecessary detentions in packed and unhygienic jails make such policies a natural pandemic response. Their benefits, including potential cost savings and outcome improvements, however, are not tied uniquely to COVID-19. The relatively quick backtracking by a few of the jurisdictions implementing new measures in response to COVID-19 is therefore a cause of concern for the sustainability and ultimate expansion of these kinds of efforts.

The need for these strategies will not disappear with the COVID-19 pandemic, whenever that day comes. An arrest remains a costly and disruptive event, which can serve as both a disproportionate and unnecessary response to many of the roughly 10 million situations each year in the United States that end with a person in criminal custody.²⁰ The rapid deployment of new alternatives to arrest since the start of the pandemic has shown that many of these encounters need not end with an arrest or, in some instances, any face-to-face interaction between law enforcement officials and civilians. Building off of these lessons should be a priority for legislators and law enforcement officials alike. With the right kind of structural changes and supports for these alternatives to arrest, a more limited and effective criminal justice system could emerge as one silver lining from our current hardships.

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