

DRUG COURT DISCRIMINATION: DISCRETIONARY  
ELIGIBILITY CRITERIA IMPEDES THE LEGISLATIVE  
GOAL TO PROVIDE EQUAL AND EFFECTIVE ACCESS  
TO TREATMENT ASSISTANCE

*Kalyn Heyen*<sup>†</sup>

TABLE OF CONTENTS

INTRODUCTION .....	2510
I. BACKGROUND .....	2513
A. <i>The United States’s Initial Approach to Substance Use Disorder</i> ....	2513
B. <i>The Utilization of United States Drug Courts in Response</i> .....	2515
1. The Functioning of United States Drug Courts .....	2515
2. An Illustration of the Drug Court Process .....	2517
3. Eligibility Criteria.....	2519
C. <i>The Reality of United States Drug Courts</i> .....	2521
1. Discriminatory Results .....	2521
2. Counterintuitive Effects.....	2523
3. Problematic Recidivism.....	2526
D. <i>Successful International Approaches to Substance Use Disorder</i> .....	2528
1. Switzerland.....	2528
2. Canada.....	2530
II. ANALYSIS.....	2531
A. <i>Eligibility Criteria Likely Results in Divergence from Legislative Intent</i> .....	2531

---

<sup>†</sup> Articles Editor, *Cardozo Law Review* (Vol. 43); J.D. Candidate (May 2022), Benjamin N. Cardozo School of Law; B.A., University of Notre Dame (2016). I would like to thank Professor Kate Levine for her helpful feedback through the writing process and invaluable guidance to think critically about our criminal system. I would also like to thank my colleagues at *Cardozo Law Review* for their assistance in preparing this Note for publication. Finally, I would like to thank my family and friends for their unending support. This Note is dedicated to a cherished friend gone too soon because of substance use disorder.

B. <i>Eligibility Criteria Likely Make Certain Drug Courts Susceptible to Equal Protection Claims</i> .....	2534
C. <i>Eligibility Criteria Are in Tension with Sentencing Guidelines</i> .....	2535
III. PROPOSAL.....	2537
A. <i>Targeted Eligibility Criteria</i> .....	2537
B. <i>Structural Changes to Enhance Targeted Eligibility Criteria</i> .....	2538
CONCLUSION .....	2541

### INTRODUCTION

The United States opened its first “narcotic farm” in Lexington, Kentucky, in 1935.<sup>1</sup> The facility, commonly referred to as Narco, opened to self-committing drug offenders to employ a novel focus on medical treatment as opposed to incarceration.<sup>2</sup> Narco was intended to address a ballooning prison population—half of whom were incarcerated due to drug-related offenses<sup>3</sup>—and demands by prison wardens to separate “unruly, drug-addicted prisoners” from the overall prison population.<sup>4</sup> But what began as a radical attempt to rehabilitate instead of incarcerate devolved into a “prisoners-as-guinea-pigs” model,<sup>5</sup> wherein facilitators readdicted individuals to study substance use disorder<sup>6</sup> and tested new drugs on individuals to determine their safety prior to release to the general public.<sup>7</sup> In return for their participation, individuals were offered time off of sentences and even

<sup>1</sup> Clary Estes, *The Narcotic Farm and the Little Known History America’s First Prison for Drug Addicts*, FORBES (Nov. 18, 2019, 5:00 AM), <https://www.forbes.com/sites/claryestes/2019/11/18/the-narcotic-farm-and-the-little-known-history-americas-first-prison-for-drug-addicts/?sh=3a571f2f7b3b> [<https://perma.cc/7DVQ-FGUP>].

<sup>2</sup> See *id.*; NANCY D. CAMPBELL, JP OLSEN & LUKE WALDEN, *THE NARCOTIC FARM: THE RISE AND FALL OF AMERICA’S FIRST PRISON FOR DRUG ADDICTS* 12 (S. Limestone Books 2021) (2008).

<sup>3</sup> See Estes, *supra* note 1.

<sup>4</sup> CAMPBELL, OLSEN & WALDEN, *supra* note 2, at 12.

<sup>5</sup> Estes, *supra* note 1.

<sup>6</sup> This Note will use the term “substance use disorder” in place of “addiction” or “substance abuse.” Research demonstrates that using supportive, health-focused terms is more beneficial than past language associated with and perpetuating stigma. See *Words Matter: The Language of Addiction*, P’SHIP TO END ADDICTION (June 2017), <https://drugfree.org/article/shouldnt-use-word-addict> [<https://perma.cc/FT46-5JSF>].

<sup>7</sup> Estes, *supra* note 1. Despite the controversy surrounding these experiments, it is noteworthy that the results remained useful to the scientific community and led to the development of methadone, which is an essential component of medically assisted rehabilitation today. See CAMPBELL, OLSEN & WALDEN, *supra* note 2, at 18–26.

compensation in the form of drugs.<sup>8</sup> The complicated, controversial nature of the drug experimentation performed on Narco participants led to the facility's ultimate closure in 1976.<sup>9</sup> This first and lesser-known foray into the provision of an alternative to incarceration for individuals with substance use disorder offers an early precursor to future governmental attempts—which today take the form of the modern drug court.

Drug courts are specialized, problem-solving courts that divert offenders with alcohol and drug dependency into a specialized court docket program.<sup>10</sup> The theory behind problem-solving courts is to target crimes that are identifiably interwoven with broader social issues and attempt to address the underlying problem.<sup>11</sup> Because they offer a response other than confinement for drug-related offenses, they are categorized as an alternative to incarceration.<sup>12</sup> Access to drug court programs is typically premised on prosecutorial referral, fulfillment of eligibility criteria, and medical evaluation.<sup>13</sup> Programs involve strict court supervision and mandatory treatment regimens, the successful completion of which is rewarded with the dismissal of charges or no-time sentences on reduced charges.<sup>14</sup> Participants who fail to comply are often met with graduated sanctions and even potential dismissal from the program.<sup>15</sup>

The first drug court was created in Miami-Dade County, Florida, in 1989.<sup>16</sup> Judge Herbert Klein took a one-year leave of absence to address the severe impact of drug offenses on the Dade County court

---

<sup>8</sup> See *All Things Considered: America's First Drug-Treatment Prison Revisited*, NPR (Nov. 1, 2008), <https://www.npr.org/2008/11/01/96437766/americas-first-drug-treatment-prison-revisited> [<https://perma.cc/3QKJ-2XLT>]; Estes, *supra* note 1.

<sup>9</sup> See CAMPBELL, OLSEN & WALDEN, *supra* note 2, at 27.

<sup>10</sup> See OFF. OF JUST. PROGRAMS, U.S. DEP'T OF JUST., NCJ 238527, DRUG COURTS (2021). Drug courts have been created within both the state and federal court systems.

<sup>11</sup> See *Problem-Solving Courts*, ADMIN. OFF. OF PA. CTS. (Oct. 2015), <https://www.pacourts.us/Storage/media/pdfs/20210224/033217-problemsolvingcourts-001748.pdf> [<https://perma.cc/JQC4-XWWS>].

<sup>12</sup> These responses may include placement in a noncustodial setting for a set term, probation, court supervision, community service, placement in a halfway house or sober-living facility, fines, and mandatory treatment or training. BRANDON MARTIN & RYKEN GRATTET, PUB. POL'Y INST. OF CAL., ALTERNATIVES TO INCARCERATION IN CALIFORNIA 2 (2015), [https://www.ppic.org/wp-content/uploads/content/pubs/report/R\\_415BMR.pdf](https://www.ppic.org/wp-content/uploads/content/pubs/report/R_415BMR.pdf) [<https://perma.cc/NN6J-9WK6>].

<sup>13</sup> See *infra* Section I.B.2.

<sup>14</sup> Josh Bowers, *Contraindicated Drug Courts*, 55 UCLA L. REV. 783, 784 (2008).

<sup>15</sup> See *id.* at 784–85.

<sup>16</sup> See NAT'L INST. OF JUST., U.S. DEP'T OF JUST., NCJ 142412, MIAMI'S "DRUG COURT": A DIFFERENT APPROACH 10–11 (1993); GERALD F. UELMEN & ALEX KREIT, 2 DRUG ABUSE AND THE LAW SOURCEBOOK § 16:1 (2022).

system.<sup>17</sup> Klein felt that although the current system—arrest, followed by a plea bargain for a guilty plea and time served—saved the court time and resources up front, the long-term effects were costly because the offender was likely to be arrested again.<sup>18</sup> The mounting convictions, often with increasing severity, would eventually result in prison time.<sup>19</sup> Klein’s year of study resulted in the idea of the modern drug court, based on the theory that the system would be better off investing a year in treatment and close surveillance up front, so as to reduce long-term costs of repeat offenses and incarceration.<sup>20</sup>

Similar drug court programs were soon established throughout the state and federal court systems.<sup>21</sup> In response to this widespread adoption, the National Association of Drug Court Professionals (NADCP) formed in 1993 and attempted—in partnership with the Department of Justice—to define universal “key components” of drug court programs.<sup>22</sup> Today, the use of drug courts as a solution to mass incarceration remains widely prevalent and supported in discourse across the political spectrum.<sup>23</sup> There are now over thirty-five hundred drug courts in the United States,<sup>24</sup> with a presence in every state.<sup>25</sup>

Due to this proliferation, it is important to understand how drug courts are operating and whether the results are consistent with intentions.<sup>26</sup> In practice, drug courts underserve minority communities

---

<sup>17</sup> See NAT’L INST. OF JUST., *supra* note 16, at 10–11; UELMEN & KREIT, *supra* note 16, at § 16:1.

<sup>18</sup> See UELMEN & KREIT, *supra* note 16, § 16:1.

<sup>19</sup> See *id.*

<sup>20</sup> See *id.*

<sup>21</sup> See *id.*; see also OFF. OF JUST. PROGRAMS, *supra* note 10.

<sup>22</sup> UELMEN & KREIT, *supra* note 16, § 16:1; see also *infra* notes 215–17 and accompanying text.

<sup>23</sup> In a 2020 presidential debate, Joe Biden referred to drug courts twice in response to questions on criminal justice reform and substance use disorders. See *Debate Transcript: Trump, Biden Final Presidential Debate Moderated by Kristen Welker*, USA TODAY (Oct. 23, 2020, 10:02 AM) [hereinafter *Biden Debate Remarks*], <https://www.usatoday.com/story/news/politics/elections/2020/10/23/debate-transcript-trump-biden-final-presidential-debate-nashville/3740152001> [<https://perma.cc/RWZ3-GB7C>].

<sup>24</sup> See OFF. OF JUST. PROGRAMS, *supra* note 10.

<sup>25</sup> Michael M. O’Hear, *Rethinking Drug Courts: Restorative Justice as a Response to Racial Injustice*, 20 STAN. L. & POL’Y REV. 463, 478 (2009); C. WEST HUDDLESTON, III, DOUGLAS B. MARLOWE & RACHEL CASEBOLT, NAT’L DRUG CT. INST., PAINTING THE CURRENT PICTURE: A NATIONAL REPORT CARD ON DRUG COURTS AND OTHER PROBLEM-SOLVING COURT PROGRAMS IN THE UNITED STATES 2, 4 (2008). For a mapping of drug treatment courts by state, see *Treatment Court Map*, NAT’L DRUG CT. RES. CTR., [https://ndcrc.org/wp-content/NDCRC\\_Court\\_Map](https://ndcrc.org/wp-content/NDCRC_Court_Map) [<https://perma.cc/Y3LT-VF8G>].

<sup>26</sup> See *infra* Section I.B.

2022]

## DRUG COURT DISCRIMINATION

2513

and remain unrepresentative of the U.S. prison population as a whole.<sup>27</sup> Minority participants are significantly less likely to be accepted into a drug court program, and even if they are able to gain access, they are also less likely to successfully complete the program.<sup>28</sup> Some of the most problematic components of U.S. drug courts are the discretion afforded by eligibility criteria and the shortcomings of the eligibility criteria themselves—leading to a divergence of drug courts from the legislative intent of assisting communities most in need.<sup>29</sup> At a minimum, drug court program admissions and operations must be altered to eliminate any disparate impact and ensure the success of all participants.<sup>30</sup>

This Note proceeds in three Parts. Part I of this Note begins with the historical U.S. approach to substance use disorder, followed by an analysis of the creation and proliferation of drug courts and an assessment of their effects and results. Part II analyzes three key flaws of drug courts as a result of discretionary eligibility criteria: first, the divergence of drug courts from legislative intent; second, the susceptibility of drug courts to state equal protection claims, which furthers the significance of their disparate impact; and third, the tension of drug court eligibility criteria with sentencing guidelines. Finally, Part III argues that if drug courts are to remain, the eligibility criteria must be revised to target high-need, high-risk individuals, alongside the implementation of additional structural improvements to assist in making such a shift successful.<sup>31</sup>

## I. BACKGROUND

A. *The United States's Initial Approach to Substance Use Disorder*

In the nineteenth century, physicians viewed substance use disorder as a disease and treated individuals as deserving of treatment.<sup>32</sup>

---

<sup>27</sup> See *infra* Section I.C.1.

<sup>28</sup> See *infra* Section I.C.1.

<sup>29</sup> See *infra* Part II.

<sup>30</sup> See *infra* Part III.

<sup>31</sup> For a challenge to the procedural fairness and institutional legitimacy threats posed in the broader context of various specialized criminal courts, see Shanda K. Sibley, *The Unchosen: Procedural Fairness in Criminal Specialty Court Selection*, 43 CARDOZO L. REV. 2261, 2295–308 (2022). Professor Sibley also proposes and analyzes four alternative approaches to program selection, highlighting the need for targeted, intentional eligibility criteria. *Id.* at 147–53.

<sup>32</sup> See Josh Bowers & Daniel Abrahamson, *Kicking the Habit: The Opioid Crisis, America's Addiction to Punitive Prohibition, and the Promise of Free Heroin*, 80 OHIO ST. L.J. 787, 792–93

This approach included medication-assisted treatment<sup>33</sup> and extended to the provision of public addiction maintenance clinics in various cities.<sup>34</sup> The ideology of treatment as a disease soon came under attack, however, which was reflected by the shifting mindset in the legislation subsequently passed.<sup>35</sup> The transition began with a tax on the production and distribution of cocaine and opioids, instituted by the Harrison Narcotics Tax Act of 1914.<sup>36</sup> The Act did allow doctors to continue prescribing for dependent, medication-assisted treatment,<sup>37</sup> but a series of Supreme Court cases functionally ended medication-assisted treatment by removing the exemption for medical distribution intended to “satisfy the craving.”<sup>38</sup> The last medication-assisted treatment clinic closed in 1925.<sup>39</sup>

The shift to a criminal view of substance use disorder was evidenced by the imposition of mandatory minimum sentences for drug possession in the Narcotic Control Act of 1956.<sup>40</sup> The Act called for lengthier penalties, such as a minimum sentence of five to twenty years

---

(2019); David T. Courtwright, *The Hidden Epidemic: Opiate Addiction and Cocaine Use in the South, 1860–1920*, 49 J.S. HIST. 57, 72 (1983).

<sup>33</sup> See *Information About Medication-Assisted Treatment (MAT)*, FDA (Feb. 14, 2019), <https://www.fda.gov/drugs/information-drug-class/information-about-medication-assisted-treatment-mat> [<https://perma.cc/5V7U-R5QJ>] (“Medication-assisted treatment (MAT) is the use of medications in combination with counseling and behavioral therapies, . . . and can help some people to sustain recovery.”). Three drugs are currently approved by the FDA, including methadone—the drug tested on Narco participants. See *id.*; CAMPBELL, OLSEN & WALDEN, *supra* note 2, at 26.

<sup>34</sup> See Bowers & Abrahamson, *supra* note 32, at 794 (stating that these “clinics in New York City, Los Angeles, New Orleans, Shreveport, Atlanta, New Haven, Albany, and Jacksonville . . . operated aboveground, granting prescriptions”); Courtwright, *supra* note 32, at 58–59.

<sup>35</sup> See *infra* notes 36–42 and accompanying text.

<sup>36</sup> Harrison Narcotics Tax Act of 1914, Pub. L. No. 63-223, ch. 1, 38 Stat. 785 (1914) (repealed 1970).

<sup>37</sup> See *id.* § 2(a).

<sup>38</sup> See *United States v. Behrman*, 258 U.S. 280, 286, 288 (1922) (removing intent requirement for violation of Harrison Narcotics Tax Act of 1914); *Webb v. United States*, 249 U.S. 96, 99–100 (1919) (prohibiting doctor from prescribing habitual user a dose of morphine intended to keep patient comfortable and not to “cure . . . the habit”); *Jin Fuey Moy v. United States*, 254 U.S. 189, 194 (1920) (removing from the exemption distributions “intended to cater to the appetite or satisfy the craving of one addicted”), *overruled in part* by *Funk v. United States*, 290 U.S. 371, 387 (1933). The only redemptive case during this time period was *Linder v. United States*, 268 U.S. 5, 18 (1925) (acknowledging that addicts are “diseased” and that physician dispensation in good faith “for relief of conditions incident to addiction” is not improper).

<sup>39</sup> Bowers & Abrahamson, *supra* note 32, at 796.

<sup>40</sup> Narcotic Control Act of 1956, Pub. L. No. 84-728, ch. 629, 70 Stat. 567 (1956) (repealed 1970); see also *Estes*, *supra* note 1.

for the importation of marijuana.<sup>41</sup> The legislative movement toward criminalization was consummated by the official declaration of the “war on drugs” by President Richard Nixon in 1971.<sup>42</sup> Nixon created federal drug control agencies, pushed for more mandatory sentencing, and requested the use of no-knock warrants.<sup>43</sup> The 1980s and 1990s were subsequently defined by “[d]rug [h]ysteria and [s]kyrocketing [i]ncarceration [r]ates.”<sup>44</sup> Today, one-fifth of the state and federal prison population is incarcerated on drug-related offenses, totaling approximately 450,000 individuals on any given day.<sup>45</sup> While the pendulum is now shifting toward more workable drug policy,<sup>46</sup> current, complex drug laws remain problematic—especially when drug court programs are touted as an adequate solution.<sup>47</sup>

## B. *The Utilization of United States Drug Courts in Response*

### 1. The Functioning of United States Drug Courts

In response to increasing incarceration rates due to drug-related offenses, states and localities employ numerous variations of the original drug court program that began in Miami-Dade County.<sup>48</sup> They are all generally designed to achieve the same outcome—to reduce drug relapse and, ultimately, criminal recidivism.<sup>49</sup> They are centered on the idea that drug use and drug trafficking affect public health, decrease societal welfare, increase unemployment and crime, and corrupt law enforcement.<sup>50</sup> Nonadversarial teams including judges, prosecutors,

---

<sup>41</sup> Craig Turner, Note, *Kant’s Categorical Imperative and Mandatory Minimum Sentencing*, 8 WASH. U. JURIS. REV. 235, 242–43 (2016).

<sup>42</sup> See *Thirty Years of America’s Drug War: A Chronology*, PBS, <https://www.pbs.org/wgbh/pages/frontline/shows/drugs/cron> [<https://perma.cc/D9CE-5UHW>].

<sup>43</sup> *A History of the Drug War*, DRUG POL’Y ALL., <https://drugpolicy.org/issues/brief-history-drug-war> [<https://perma.cc/N7GP-D3PV>].

<sup>44</sup> *Id.*

<sup>45</sup> Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2020*, PRISON POL’Y INITIATIVE (Mar. 24, 2020), <https://www.prisonpolicy.org/reports/pie2020.html> [<https://perma.cc/5N8N-GT23>].

<sup>46</sup> See *id.*; *A History of the Drug War*, *supra* note 43.

<sup>47</sup> See *Biden Debate Remarks*, *supra* note 23; Estes, *supra* note 1.

<sup>48</sup> See generally OFF. OF JUST. PROGRAMS, *supra* note 10.

<sup>49</sup> *Id.*

<sup>50</sup> See CHRISTOPHER J. COYNE & ABIGAIL R. HALL, CATO INST.: POL’Y ANALYSIS, NO. 811, FOUR DECADES AND COUNTING: THE CONTINUED FAILURE OF THE WAR ON DRUGS 3 (2017), <https://www.cato.org/sites/cato.org/files/pubs/pdf/pa-811-updated.pdf> [<https://perma.cc/6C46-DLYJ>].

defense attorneys, social workers, and treatment professionals generally manage the drug court process and program.<sup>51</sup> Once a participant is enrolled in the program, the majority utilize the abstinence model<sup>52</sup> as opposed to medication-assisted treatment.<sup>53</sup>

The federal government leaves individual communities to address substance use disorder as best they can.<sup>54</sup> The 2019 federal budget allocated \$1.137 billion to the National Institute for Drug Abuse (NIDA), which constitutes 0.026% of the \$4.4 trillion budget.<sup>55</sup> For context, NIDA has estimated the cost of substance use disorders to surpass “\$740 billion a year in healthcare, crime, and lost productivity,” thus, the federal budget covers only 0.15% of the estimated cost.<sup>56</sup> As a result, states have been rapidly expanding drug courts, either through centralized state legislation or by leaving the creation of drug courts up to individual jurisdictions within the state, resulting in the over three thousand different drug courts present in the United States today.<sup>57</sup>

Because drug court programs are localized efforts, each drug court varies in operation,<sup>58</sup> targeted populations, resources, and management.<sup>59</sup> Drug court program models generally fall into one of three categories.<sup>60</sup> In the first model, “pre-plea/pre-adjudication,” prosecution is deferred for the drug court program and, if the defendant fails to complete the program, they retain the ability to challenge the charges.<sup>61</sup> In the second model, “post-plea/pre-adjudication,” a guilty plea is necessary to enter the drug court program, but is held in abeyance.<sup>62</sup> If the defendant is successful in the program, the charges are dismissed; and if the defendant is unsuccessful, the charges are

---

<sup>51</sup> *Overview of Drug Courts*, NAT'L INST. OF JUST. (July 22, 2020), <https://nij.ojp.gov/topics/articles/overview-drug-courts> [<https://perma.cc/5MU5-XBRV>].

<sup>52</sup> DRUG POL'Y ALL., *DRUG COURTS ARE NOT THE ANSWER: TOWARD A HEALTH-CENTERED APPROACH TO DRUG USE* 12–13 (2011).

<sup>53</sup> See *infra* notes 179–82 and accompanying text.

<sup>54</sup> See Estes, *supra* note 1.

<sup>55</sup> See *id.*

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

<sup>57</sup> See OFF. OF JUST. PROGRAMS, *supra* note 10.

<sup>58</sup> See UELMEN & KREIT, *supra* note 16, § 16:2.

<sup>59</sup> See OFF. OF JUST. PROGRAMS, *supra* note 10.

<sup>60</sup> CYNTHIA HUJAR ORR ET AL., NAT'L ASS'N OF CRIM. DEF. LAWS., *AMERICA'S PROBLEM-SOLVING COURTS: THE CRIMINAL COSTS OF TREATMENT AND THE CASE FOR REFORM* 17 (2009).

<sup>61</sup> See *id.*; Eric J. Miller, *Embracing Addiction: Drug Courts and the False Promise of Judicial Interventionism*, 65 OHIO ST. L.J. 1479, 1489, 1513–14 (2004); UELMEN & KREIT, *supra* note 16, § 16:2. In this model, defendants may be required to waive some procedural rights. *Id.*

<sup>62</sup> See ORR ET AL., *supra* note 60, at 17; Miller, *supra* note 61, at 1489, 1513–14; UELMEN & KREIT, *supra* note 16, § 16:2.



2022]

DRUG COURT DISCRIMINATION

2517

entered and a sentence is imposed.<sup>63</sup> In the third and final model, “post-adjudication,” the defendant is convicted before entering the treatment program.<sup>64</sup> Upon successful completion of the program, some drug courts allow participants to have the conviction expunged, while others leave the conviction in place, but the participant need not complete the suspended sentence.<sup>65</sup>

## 2. An Illustration of the Drug Court Process

In the Oklahoma Drug Court Act, the Oklahoma Legislature included an extensive overview of the state’s expectations for the operation of its local drug courts, which provides a helpful illustration of the process post-arrest.<sup>66</sup> Within four days, the arresting officer must file a criminal case record with the district attorney, and the district attorney must then file an information within the following twenty-four hours.<sup>67</sup> The sheriff, designee, or police chief then preliminarily evaluates the eligibility of the offender.<sup>68</sup> This initial review requires that the offender (1) is not charged with a crime of violence against any person; (2) has no prior violent felony conviction within the last ten years; (3) is not charged with a violation of the Trafficking in Illegal Drugs Act; (4) has committed a felony offense; and (5) admits to having, or appears to or is known to have, a substance use disorder.<sup>69</sup> Upon determination of potential eligibility, the offender must complete a voluntary eligibility form, which includes provisions such as the waiver of rights to a speedy trial and a statement acknowledging that the plea agreement will specify the penalty imposed in the event of a completion or failure of the program.<sup>70</sup>

Next, an initial hearing is held, during which the district attorney considers the offender’s admission.<sup>71</sup> If the district attorney objects,

---

<sup>63</sup> See *supra* note 62. In this model, defendants may also be required to waive some procedural rights. Miller, *supra* note 61, at 1513–14.

<sup>64</sup> See ORR ET AL., *supra* note 60, at 17; UELMEN & KREIT, *supra* note 16, § 16:2.

<sup>65</sup> UELMEN & KREIT, *supra* note 16, § 16:2.

<sup>66</sup> OKLA. STAT. tit. 22, §§ 471–472 (2021).

<sup>67</sup> *Id.* § 471.1(E).

<sup>68</sup> *Id.* § 471.2(A).

<sup>69</sup> The statute uses the terminology “substance abuse addiction” to describe the drug use. *Id.* § 471.2(A)(1)–(5).

<sup>70</sup> *Id.* § 471.2(B).

<sup>71</sup> *Id.* § 471.3(A).

traditional prosecution of the offender proceeds.<sup>72</sup> If there is no objection, the court refers the offender for a drug court investigation to determine final eligibility.<sup>73</sup> Once referred for investigation, the offender's ability to benefit from the program is considered through screening and personal interviews, resulting in the completion of a staff recommendation and treatment plan that is provided to the court, district attorney, defense attorney, and offender.<sup>74</sup> Then, the defense attorney and district attorney must approve the plan and negotiate the terms of the plea.<sup>75</sup> In this timeline, the negotiation of the terms of punishment occurs prior to the hearing to finalize the eligibility determination.<sup>76</sup> Information obtained during the investigation may not be used in the pending criminal case.<sup>77</sup>

Finally, no less than three and no more than seven days from the initial hearing, a final hearing is held to complete the eligibility determination.<sup>78</sup> The court retains the discretion to extend the time period between the initial and final hearing.<sup>79</sup> The district attorney or defense attorney may object to the plea agreement.<sup>80</sup> The court is left with the ultimate decision as to whether to proceed with prosecution or require further negotiation.<sup>81</sup> If the court accepts the plea agreement, the offender is immediately transferred into the program.<sup>82</sup> If admission is denied because the offender is deemed ineligible, the case is returned to the criminal prosecution process.<sup>83</sup> Eligibility depends on the determinations made by the supervising staff of the drug court program, who are instructed by statute to consider whether the offender “[w]ould benefit from the drug court program” and “[i]s appropriate for the drug court program”—questions left to the supervising staff's

---

<sup>72</sup> *Id.* § 471.3(C). A prosecutor's veto of admission of a defendant to a drug court was held not to violate separation of powers. *Woodward v. Morrissey*, 991 P.2d 1042, 1044–46 (Okla. Crim. App. 1999).

<sup>73</sup> Tit. 22, § 471.3(B). Since it did not permit prosecutorial or judicial manipulation of case assignments, the automatic transfer of cases meeting specific criteria to a drug court was held not to violate due process. *State v. Riley*, 731 So. 2d 409 (La. Ct. App. 1999).

<sup>74</sup> Tit. 22, § 471.4(A)–(C).

<sup>75</sup> *Id.* § 471.4(D).

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* § 471.5(A).

<sup>78</sup> *Id.* §§ 471.4(E), 471.6(A)–(B).

<sup>79</sup> *Id.* § 471.4(E).

<sup>80</sup> *Id.* § 471.6(C).

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* § 471.6(D).

<sup>83</sup> *Id.* § 471.6(E). The denial of access to drug courts is treated similarly to that of parole and is not considered a due process right. *See C.D.C. v. State*, 821 So. 2d 1021, 1025 (Ala. Crim. App. 2001).

interpretation and discretion.<sup>84</sup> While many states do not define the procedure so specifically, the Oklahoma model provides an example of the typical process in practice—from arrest to drug court admission.<sup>85</sup>

Once offenders are admitted, drug court programs follow a common approach of judicial supervision of compliance with the treatment regimen prescribed.<sup>86</sup> The treatment regimens vary, but include frequent drug testing and court appearances.<sup>87</sup> Often, the judge establishes the hearing schedule, and the district attorney is not required to attend.<sup>88</sup> The drug court judge makes all decisions and requires progress reports and periodic reviews, as specified by the treatment plan established.<sup>89</sup> Failures in drug court programs generally include positive drug tests, rearrest, and absence from court appearances.<sup>90</sup> Failures result in sanctions that can include a jail term, and multiple failures lead to excusal from the program and the imposition of the sentence.<sup>91</sup>

### 3. Eligibility Criteria

Eligibility requirements vary depending on the drug court.<sup>92</sup> One common requirement is a demonstration that the potential participant has a substance use problem. This requirement has been criticized because it creates a strong incentive for defendants to mislead regarding their drug use in order to access the alternative to incarceration, and drug courts themselves have an incentive to admit offenders with less drug use because funding is often conditioned on successful graduation rates.<sup>93</sup> One defendant-favorable development is that information obtained in treatment interviews of the defendant cannot be used in later criminal proceedings, as it violates the privilege against self-

---

<sup>84</sup> Tit. 22, § 471.4(A)(1)–(2); *see also infra* Section I.B.3.

<sup>85</sup> *See* UELMEN & KREIT, *supra* note 16, § 16:2.

<sup>86</sup> *See* O’Hear, *supra* note 25, at 478.

<sup>87</sup> *See id.*; Morris B. Hoffman, Commentary, *The Drug Court Scandal*, 78 N.C. L. REV. 1437, 1463 (2000). In Oklahoma, drug court programs are required to include random substance use testing and provisions for noncompliance, including but not limited to increased supervision, urinalysis testing, intensive treatment, short-term confinement not to exceed five days, and revocation from the program. Tit. 22, § 471.1(G).

<sup>88</sup> *See, e.g.*, tit. 22, § 471.7(C).

<sup>89</sup> *See, e.g., id.* § 471.7(A).

<sup>90</sup> *See* O’Hear, *supra* note 25, at 478; Hoffman, *supra* note 87, at 1463.

<sup>91</sup> *See* O’Hear, *supra* note 25, at 478–79; Hoffman, *supra* note 87, at 1463.

<sup>92</sup> UELMEN & KREIT, *supra* note 16, § 16:2.

<sup>93</sup> *See id.*

incrimination.<sup>94</sup> The eligibility criteria have been criticized for a discretionary “cherry-picking” effect—they limit drug court participants to individuals determined most likely to succeed, making it difficult to evaluate the merits of the programs based on empirical data.<sup>95</sup>

In Massachusetts, eligibility determination guidance is set forth in the state’s Adult Drug Court Manual.<sup>96</sup> The typical threshold requirements for drug court eligibility are considered in Massachusetts, such as requirements relating to the offender’s criminal history.<sup>97</sup> Massachusetts also enumerates less common factors, such as “the nature of the current offense, . . . drug of choice, [and] residency.”<sup>98</sup> The California Legislature sets forth comparably vague eligibility criteria by excluding persons with a history of violence and persons whose treatment provider concludes are “unamenable” to any form of drug treatment.<sup>99</sup> This format—atypical, vague factors added to the end of a list of typical eligibility criteria—is common in state guidance.<sup>100</sup>

An alternative example is the Oklahoma Legislature’s approach to drug courts.<sup>101</sup> The state defines drug courts as structured judicial intervention for eligible offenders, requiring successful completion of the plea agreement.<sup>102</sup> Each district court in Oklahoma is authorized to establish a drug court program,<sup>103</sup> and seventy-three of the seventy-seven counties have done so.<sup>104</sup> As is typical for drug courts, violent criminal offenses render an offender ineligible for a drug court

---

<sup>94</sup> State v. Plouffe, 329 P.3d 1255 (Mont. 2014).

<sup>95</sup> DRUG POL’Y ALL., *supra* note 52, at 10.

<sup>96</sup> EXEC. OFF. OF THE TRIAL CT., COMMONWEALTH OF MASS., ADULT DRUG COURT MANUAL: A GUIDE TO STARTING AND OPERATING ADULT DRUG COURTS IN MASSACHUSETTS (2015), <https://www.mass.gov/doc/adult-drug-court-manual/download> [https://perma.cc/SMP5-9WL4].

<sup>97</sup> *See id.* at 15.

<sup>98</sup> *Id.*

<sup>99</sup> CAL. HEALTH & SAFETY CODE § 11375.7(c) (West 2022).

<sup>100</sup> *See, e.g., id.* (distinguishing nature of offense as a disqualifying factor); EXEC. OFF. OF THE TRIAL CT., *supra* note 96, at 15 (distinguishing residency as a disqualifying factor); MINN. JUD. BRANCH, MINNESOTA CORNERSTONE DRUG COURT POLICY MANUAL, [https://www.mncourts.gov/Documents/5/Public/Drug\\_Court/MCDC%20Documents/CMNPR\\_Policy\\_12-12.pdf](https://www.mncourts.gov/Documents/5/Public/Drug_Court/MCDC%20Documents/CMNPR_Policy_12-12.pdf) [https://perma.cc/9YBC-SWL6] (distinguishing gang affiliation and transportation availability to attend drug court program as disqualifying factors).

<sup>101</sup> OKLA. STAT. tit. 22, § 471.1 (2021).

<sup>102</sup> *Id.* § 471.1(A).

<sup>103</sup> *Id.* § 471.1(B).

<sup>104</sup> *Oklahoma Drug Courts*, OKLA. DEP’T MENTAL HEALTH & SUBSTANCE ABUSE SERVS., <https://oklahoma.gov/odmhsas/recovery/criminal-justice/drug-courts.html> [https://perma.cc/SK9N-HPS7].

2022]

*DRUG COURT DISCRIMINATION*

2521

program.<sup>105</sup> The Oklahoma Legislature's approach is unique in the amount of discretion it leaves open ended, delegating the determination of further eligibility restrictions and requirements to the discretion of each individual, local drug court.<sup>106</sup> This authorization explicitly states that "[n]othing in the Oklahoma Drug Court Act shall be construed to require a drug court to consider every offender with a treatable condition or [substance use disorder] even if the controlling offense is eligible."<sup>107</sup> When eligibility criteria are combined with a knowing statement that not all offenders may access drug court-treatment programs, it highlights the challenges with such a system.<sup>108</sup>

*C. The Reality of United States Drug Courts*

While U.S. drug courts are intended to reduce recidivism and leave our communities better off,<sup>109</sup> these programs have problematic, unintended consequences.<sup>110</sup> Drug courts have historically been unrepresentative of the overall prison population and have the counterintuitive effect of increasing time spent incarcerated. In addition, drug courts discourage the proliferation of resources for substance use disorders beyond the criminal system.<sup>111</sup> In the absence of drug courts, offenders are often referred to social workers or to treatment, and this demand could push public policy and support for greater resources.<sup>112</sup> Instead, the process resides within the criminal system, further from public view and separated from public policy pressure to more directly address the problems.<sup>113</sup>

*1. Discriminatory Results*

Drug court participants are unrepresentative of minority populations in the overall U.S. prison population. A comprehensive

---

<sup>105</sup> Tit. 22, § 471.1(C).

<sup>106</sup> *See id.*

<sup>107</sup> *Id.*

<sup>108</sup> *See id.*; *see also infra* Section I.C.

<sup>109</sup> *See supra* notes 49–50 and accompanying text.

<sup>110</sup> *See infra* Sections I.C.1–I.C.3 for a discussion of the unintended consequences, including but not limited to discriminatory access, poor graduation rates, increased time spent interacting with the criminal system, and misleading statistics evaluating effectiveness.

<sup>111</sup> *See* UELMEN & KREIT, *supra* note 16, § 16:3.

<sup>112</sup> *Id.*

<sup>113</sup> *See id.*

study conducted in 2008 surveyed state and territorial drug court coordinators.<sup>114</sup> The findings revealed that nationally, only 21% of drug court participants were Black, but 39% of jail inmates and 44% of prison inmates were Black.<sup>115</sup> The same study also highlighted that nationally, only 10% of drug court participants were Hispanic, Latino, or Latina, but these groups represented 16% of jail inmates and 20% of prison inmates.<sup>116</sup> On a smaller scale, one specific example is a Massachusetts drug court in which so few minorities were enrolled that as of 2015, 87% of participants were non-Hispanic white individuals, a population which represented only two-thirds of criminal convictions.<sup>117</sup> In an interview, Ira Packer, the director of the Massachusetts Center for Excellence for Specialty Courts, stated: “We know that there’s disproportionate representation, but we’re frankly not at a point where we can indicate what might be causing that . . . .”<sup>118</sup> The underrepresentation of minority individuals in drug court–treatment programs highlights the need for a reimagination of how individuals are referred to and admitted into drug courts, beginning with less discretionary eligibility criteria.<sup>119</sup>

The inherent disparity of drug courts is further exacerbated by the lower success rates of minorities who are able to reach this alternative to incarceration. On a national scale, some drug courts have failure rates of Black participants that are over thirty percentage points higher than white participants.<sup>120</sup> In Texas, one drug court graduated white participants at a rate of 65%, whereas the Black graduation rate was 46%.<sup>121</sup> In Missouri drug courts, the white graduation rate was 55%, whereas the Black graduation rate was 22%.<sup>122</sup> When drug courts are being used as a solution to overincarceration, it is crucial that they are

---

<sup>114</sup> Douglas B. Marlowe, *Achieving Racial and Ethnic Fairness in Drug Courts*, 49 CT. REV. 40, 42 (2013).

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> See Shira Schoenberg, *Participants in Massachusetts’ Drug Courts Are Overwhelmingly White*, MASSLIVE (Apr. 20, 2016, 12:01 PM), [https://www.masslive.com/politics/2016/04/participants\\_in\\_machusetts.html](https://www.masslive.com/politics/2016/04/participants_in_machusetts.html) [<https://perma.cc/M2Q6-A7JP>].

<sup>118</sup> *Id.*

<sup>119</sup> See *infra* Section III.A.

<sup>120</sup> O’Hear, *supra* note 25, at 480 (citing STEVEN BELENKO, NAT’L CTR. ON ADDICTION & SUBSTANCE ABUSE AT COLUM. UNIV., RESEARCH ON DRUG COURTS: A CRITICAL REVIEW 2001 UPDATE 27 (2001)).

<sup>121</sup> John Robert Gallagher & Elizabeth A. Wahler, *Racial Disparities in Drug Court Graduation Rates: The Role of Recovery Support Groups and Environments*, 18 J. SOC. WORK PRAC. ADDICTIONS 113, 115 (2018).

<sup>122</sup> *Id.*

equally accessible and function in a manner that fosters successful treatment.

## 2. Counterintuitive Effects

Drug courts counterintuitively increase interactions with, and time spent within, the criminal system.<sup>123</sup> During participation in a drug court–treatment program, incarceration is utilized as one of the graduated sanctions for failure to comply with the treatment program agreed upon.<sup>124</sup> In one Santa Clara drug court, participants who successfully completed the drug court program were incarcerated for an average of fifty-one days throughout its tenure.<sup>125</sup> In one Baltimore drug court, participants in the program spent an average of fifty-five days incarcerated.<sup>126</sup> While the typical expectation of drug courts is an alternative to incarceration, incarceration is in fact often part of the drug court regime. Participants who might not have pled guilty to the charges, but for the potential access this provided to a drug court, might not have otherwise spent time in jail.<sup>127</sup>

The situation for individuals who fail out of drug court programs is even more dire.<sup>128</sup> In the “post-plea” models, the conviction is reduced or overturned only upon successful completion of the program; and failure to complete the program, including relapse, can mean the offender then faces traditional sanctions.<sup>129</sup> As a result, the individual who has now relapsed is removed from treatment and incarcerated because of the guilty plea—an option the offender might not have chosen had they not been trying to reach the drug court.<sup>130</sup> And further, relapse indicates the need for modified treatment and presents unique dangers, but it is at this point in time that the drug court system moves the individual from a treatment program to incarceration.<sup>131</sup> The total

---

<sup>123</sup> See UELMEN & KREIT, *supra* note 16, § 16:3.

<sup>124</sup> O’Hear, *supra* note 25, at 478–79.

<sup>125</sup> *Id.* at 481 (citing SCOTT EHLERS & JASON ZIEDENBERG, JUST. POL’Y INST., PROPOSITION 36: FIVE YEARS LATER 20 (2006)).

<sup>126</sup> *Id.* (citing Denise C. Gottfredson, Stacy S. Najaka & Brook Kearley, *Effectiveness of Drug Treatment Courts: Evidence from a Randomized Trial*, 2 CRIMINOLOGY & PUB. POL’Y 171, 183 tbl.4 (2003)).

<sup>127</sup> See *id.* at 480–81.

<sup>128</sup> *Id.* at 481.

<sup>129</sup> See UELMEN & KREIT, *supra* note 16, § 16:3.

<sup>130</sup> See *id.*

<sup>131</sup> See NAT’L INST. ON DRUG ABUSE, U.S. DEP’T OF HEALTH & HUM. SERVS., NIH PUB. NO. 20-DA-5605, DRUGS, BRAINS, AND BEHAVIOR: THE SCIENCE OF ADDICTION 23 (2020). Relapse is

time spent interacting with the criminal system is also longer, as it consists of all the time spent in the drug court program in addition to the full sentence.<sup>132</sup> Said differently, the punishment is now for the underlying crime and the failures in the drug treatment court.<sup>133</sup> The conviction will also cause greater difficulty for the offender upon release from incarceration in the form of employment difficulties, no right to vote, and no access to public housing or food stamps—all of which pose greater risk to an individual with a history of substance use.<sup>134</sup>

*Morgan v. State* provides an example of the problematic sentencing that may result from an attempt to gain access to drug courts.<sup>135</sup> Morgan agreed to a plea agreement in which termination from the drug court program would result in three concurrent life sentences.<sup>136</sup> Upon removal from the program, Morgan sought to withdraw the plea agreement.<sup>137</sup> While the Oklahoma Court of Criminal Appeals denied his request, Judge Dana Kuehn's concurring opinion illuminates the problematic ways drug courts alter the offender's decision making and interaction with the criminal system. As Kuehn notes, the trial judge in *Morgan* referred to plea-negotiated life sentences in drug courts as "cruel and unusual punishment."<sup>138</sup> In her view, if the offender's criminal record warranted life in prison, then it should have been contemplated, to begin with, whether the offender was doomed to fail in a drug court program.<sup>139</sup> According to Kuehn, judges have the ability to make the determination that the plea negotiation is inappropriate, thus avoiding this unnecessary punishment: "A life sentence for non-violent crimes based upon a drug court plea shocks the conscience."<sup>140</sup>

Drug courts are also criticized for their "net-widening" effect.<sup>141</sup> The theory is that once a drug court is established in a locality, the

---

a normal part of recovery that indicates the need to change treatment approaches. *Id.* An individual is particularly susceptible to overdose during a stage of relapse because the body is no longer adapted to the level of drugs ingested prior to treatment, heightening the risk of an adverse reaction. *See id.*

<sup>132</sup> See O'Hear, *supra* note 25, at 480–81; Bowers & Abrahamson, *supra* note 32, at 793.

<sup>133</sup> O'Hear, *supra* note 25, at 481.

<sup>134</sup> See UELMEN & KREIT, *supra* note 16, § 16:3.

<sup>135</sup> *Morgan v. State*, No. C-2017-184 (Okla. Crim. App. July 5, 2018), <https://www.oscn.net/dockets/GetDocument.aspx?ct=appellate&bc=1040397411&cn=C-2017-184&fmt=pdf> [<https://perma.cc/CM7R-QH2F>].

<sup>136</sup> *Id.* at 1–2.

<sup>137</sup> *Id.* at 2.

<sup>138</sup> *Id.* at 1 (Kuehn, J., concurring).

<sup>139</sup> *Id.* at 3.

<sup>140</sup> *Id.* at 1–3.

<sup>141</sup> See O'Hear, *supra* note 25, at 483–84.



number of offenders arrested and charged for drug-related crimes rapidly increases because policy makers and prosecutors believe that there is a helpful system in which to place these offenders.<sup>142</sup> In Denver, the number of drug cases almost tripled two years after its first drug court was established.<sup>143</sup> This leaves individuals who have committed their first offense worse off because they may not have otherwise had the interaction with the criminal system, and these first-time offenders are ironically some of the only individuals eligible to participate in and justify the need for drug court programs.<sup>144</sup>

It is important to consider drug courts in the context of “status courts.”<sup>145</sup> The term “status courts,” coined by Erin Collins, is used to refer to criminal or quasi-criminal courts that are dedicated to defendants who belong to a particular status group.<sup>146</sup> Through the examples of courts specifically dedicated to veterans or women, Collins posits that status courts are problematic in that by singling out a particular group, there is a “moral sorting” of those worthy of better treatment, which counterintuitively distracts from systemic reform.<sup>147</sup> Separating out those worthy of better treatment reduces public interest in addressing the more widespread, foundational issues of the system.<sup>148</sup>

While there are obvious distinctions from courts dedicated to women and veterans, the basic premise of the problematic sorting that “status courts” allow is applicable to drug courts.<sup>149</sup> By permitting certain individuals with substance use disorder to receive treatment disparately,<sup>150</sup> we are sorting these individuals out of the problematic system that overincarcerates individuals with substance use disorders.<sup>151</sup> The significance of a “status court” that disproportionately sorts white individuals out of the prison system is arguably more problematic than those that sort out individuals based on a clearer set

---

<sup>142</sup> See *id.* at 483.

<sup>143</sup> *Id.*; see also Morris B. Hoffman, *The Rehabilitative Ideal and the Drug Court Reality*, 14 FED. SENT’G REP. 172, 174 (2002).

<sup>144</sup> See O’Hear, *supra* note 25, at 483–84; see also *supra* Section I.B.3.

<sup>145</sup> See Erin R. Collins, *Status Courts*, 105 GEO. L.J. 1481 (2017).

<sup>146</sup> See *id.* at 1483–84.

<sup>147</sup> See *id.* at 1504–07.

<sup>148</sup> See UELMEN & KREIT, *supra* note 16, § 16:3. For similar criticisms of the net-widening effect and status court sorting in specialized criminal courts, see Sibley, *supra* note 31, at 144.

<sup>149</sup> See Collins, *supra* note 145, at 1504–07. Drug courts are unique in that they encompass treatment of substance use disorder, and this treatment is integral to graduation from the program. However, these courts are all similar in that the intended purpose is to sort individuals out of the regular criminal system to acknowledge a specialized situation.

<sup>150</sup> See *id.* at 1505–06.

<sup>151</sup> See *id.* at 1505.

of qualifications.<sup>152</sup> When drug courts disproportionately assist white offenders, they distract from the reality that Black drug offenders are convicted and incarcerated at rates far higher than white offenders.<sup>153</sup> In practice, drug courts are instead often viewed as stigmatizing.<sup>154</sup> Three criminologists described the Las Vegas drug court as “hostile . . . towards some defendants who had failed to comply with court practices, [and] degrad[ing] [to] these offenders in a public arena.”<sup>155</sup> Thus, if a sorting of potential participants is going to take place, it is important to reconsider how this sorting is accomplished.<sup>156</sup>

### 3. Problematic Recidivism

The model of treating substance use disorder as a crime, as opposed to a disease, has proved ineffective. Incarceration due to drug-related offenses has increased tenfold since 1980, demonstrating that enhanced punishments have not deterred drug-related crimes, and larger systemic and societal issues remain to be confronted.<sup>157</sup> Drug courts have also not yielded successful results.<sup>158</sup> In 2004, approximately 70,000 individuals participated in drug courts at a given time, with an annual graduation rate of only approximately 16,000.<sup>159</sup> More recently, the five-year Multi-Site Adult Drug Court Evaluation found no statistically significant reduction in incarceration for participants after eighteen months.<sup>160</sup>

Even studies that demonstrate poor graduation rates are misleading as to the extent of the problem. From the outset, participants in drug court programs are “cherry pick[ed]” based on expected success and the nature of the crime committed.<sup>161</sup> Even when selecting only the

---

<sup>152</sup> See *id.* at 1506–07.

<sup>153</sup> See O’Hear, *supra* note 25, at 464–66.

<sup>154</sup> See *id.* at 486–87.

<sup>155</sup> *Id.* at 486 (citing Terance D. Miethe, Hong Lu & Erin Reese, *Reintegrative Shaming and Recidivism Risks in Drug Court: Explanations for Some Unexpected Findings*, 46 CRIME & DELINQ. 522, 536–37 (2000)).

<sup>156</sup> See *infra* Part III.

<sup>157</sup> See Judith Grant, *A Profile of Substance Abuse, Gender, Crime, and Drug Policy in the United States and Canada*, 48 J. OFFENDER REHAB. 654, 655 (2009).

<sup>158</sup> See O’Hear, *supra* note 25, at 480 (citing C. WEST HUDDLESTON, III, KAREN FREEMAN-WILSON, DOUGLAS B. MARLOWE & AARON ROUSSELL, NAT’L DRUG CT. INST., PAINTING THE CURRENT PICTURE: A NATIONAL REPORT CARD ON DRUG COURTS AND OTHER PROBLEM SOLVING COURT PROGRAMS IN THE UNITED STATES 7 (2005)).

<sup>159</sup> See *id.*

<sup>160</sup> DRUG POL’Y ALL., *supra* note 52, at 14.

<sup>161</sup> *Id.* at 2.

participants most likely to succeed, significant doubt remains as to whether recidivism rates are reduced in the long term and whether these courts instead leave participants worse off for trying.<sup>162</sup> By cherry-picking participants most likely to complete substance use treatment, resources are not directed toward individuals most in need of intensive, expensive medical treatment.<sup>163</sup> Instead of receiving treatment, those with the most severe substance use disorders are likely to be imprisoned.<sup>164</sup>

One major defense of drug courts is centered on the costs saved by drug courts, as opposed to long-term incarceration.<sup>165</sup> This argument discounts that community-based treatment remains significantly more affordable than both drug courts and traditional incarceration.<sup>166</sup> A Washington State study evaluated the public benefits in terms of “reduced crime for every dollar spent” of prison treatment, drug courts, and community-based treatment.<sup>167</sup> Drug court treatment resulted in benefits of \$2.10 and prison treatment resulted in benefits of \$5.88.<sup>168</sup> With savings nine times that of drug courts, community treatment resulted in \$18.52 in benefits.<sup>169</sup> Thus, drug courts offer a limited alternative to a much more affordable option.<sup>170</sup>

Even if the counterintuitive effects of drug courts were corrected, drug courts are not currently a sustainable solution.<sup>171</sup> Twenty-nine people are arrested for a drug law violation for every one individual granted access to a drug court.<sup>172</sup> Were drug courts to be fully scaled to cover all possession arrests, taking the midrange of the completion rates

---

<sup>162</sup> See *id.*

<sup>163</sup> See UELMEN & KREIT, *supra* note 16, § 16:3.

<sup>164</sup> See *id.* This assumes that individuals who have committed multiple or violent offenses, or are using more intense substances, likely have a more severe disorder. This also assumes that if referred to a drug court, individuals with severe substance use disorder are the least likely to be deemed a strong candidate in the medical and professional evaluations and are thus also more likely to be denied access.

<sup>165</sup> See *id.* § 16:1.

<sup>166</sup> See *id.* § 16:3; see also DRUG POL’Y ALL., *supra* note 52, at 15.

<sup>167</sup> UELMEN & KREIT, *supra* note 16, § 16:3. But see *Do Drug Courts Work? Findings from Drug Court Research*, NAT’L INST. OF JUST. (May 11, 2008), <https://nij.ojp.gov/topics/articles/do-drug-courts-work-findings-drug-court-research> [<https://perma.cc/JFC8-T6RK>] (noting the typical cost-savings argument in favor of the drug court model).

<sup>168</sup> UELMEN & KREIT, *supra* note 16, § 16:3.

<sup>169</sup> *Id.*

<sup>170</sup> See *id.*

<sup>171</sup> See DRUG POL’Y ALL., *supra* note 52, at 7; CELINDA FRANCO, CONG. RSCH. SERV., R41448, DRUG COURTS: BACKGROUND, EFFECTIVENESS, AND POLICY ISSUES FOR CONGRESS 8 (2010) (noting that as of 2009, drug courts served only ten percent of offenders *eligible* for drug courts).

<sup>172</sup> DRUG POL’Y ALL., *supra* note 52, at 7.

would still result in a minimum of 500,000 individuals being ejected from the program and ultimately interacting with the penal system for a longer time period than if they would have remained in the traditional criminal system.<sup>173</sup> The inability of drug courts to assist such a significant portion of offenders highlights the need for an alternative solution in the long term.<sup>174</sup> What's more, the number of operating drug courts is also at an all-time high, yet the United States just announced the first twelve-month period in which there were over 100,000 overdose deaths in the country.<sup>175</sup>

#### D. *Successful International Approaches to Substance Use Disorder*

##### 1. Switzerland

Substance use became undeniably problematic in Zurich in the 1970s, when heavy drug users began to gather in the city center.<sup>176</sup> In response, the Swiss government imposed severe “criminal sanctions for the possession, consumption, and sale of illegal drugs” in the early 1980s.<sup>177</sup> However, enforcement was difficult, and police began to tolerate consumption in controlled areas, such as parks.<sup>178</sup> The city of Zurich contacted direct-service organizations to increase coordination to help drug users, which led to the adoption of harm-reduction programs.<sup>179</sup> The Federal Office of Public Health supported the development of over three hundred harm-reduction programs and authorized heroin-assisted treatment trials for controlled consumption.<sup>180</sup>

Swiss drug policy today remains focused on harm reduction through programs such as needle exchange programs and drug

---

<sup>173</sup> See *id.*; see also Maia Szalavitz, *How America Overdosed on Drug Courts*, PAC. STANDARD (May 3, 2017), <https://psmag.com/news/how-america-overdosed-on-drug-courts> [<https://perma.cc/8Y27-EBJ8>].

<sup>174</sup> See DRUG POL'Y ALL., *supra* note 52, at 7.

<sup>175</sup> See Press Release, CDC, Drug Overdose Deaths in the U.S. Top 100,000 Annually (Nov. 17, 2021), [https://www.cdc.gov/nchs/pressroom/nchs\\_press\\_releases/2021/20211117.htm](https://www.cdc.gov/nchs/pressroom/nchs_press_releases/2021/20211117.htm) [<https://perma.cc/RD88-W5D3>].

<sup>176</sup> See Miriam Wolf & Michael Herzig, *Inside Switzerland's Radical Drug Policy Innovation*, STAN. SOC. INNOVATION REV. (July 22, 2019), [https://ssir.org/articles/entry/inside\\_switzerlands\\_radical\\_drug\\_policy\\_innovation](https://ssir.org/articles/entry/inside_switzerlands_radical_drug_policy_innovation) [<https://perma.cc/Y8NW-7FV7>].

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> See *id.*

<sup>180</sup> See *id.*

consumption rooms—strategies that aim to lessen the harm of substance use disorder.<sup>181</sup> Switzerland’s goal is to maximize users who receive treatment, which includes the immediate provision of treatment when an individual enters a facility and the option for patients to opt out of inpatient programs when they are not the best fit.<sup>182</sup> The focus of law enforcement has also been narrowed to major dealers, a decision largely rooted in expert observation of the positive effects generated by a supportive interaction between law enforcement officers and individuals with substance use disorders.<sup>183</sup>

Switzerland’s efforts have been successful.<sup>184</sup> In approximately twenty years in Switzerland, overdose deaths decreased by 50%, HIV infections decreased by 65%, and new heroin users decreased by 80%.<sup>185</sup> Switzerland has also seen a major 98% drop in burglaries and theft during this concurrent shift.<sup>186</sup> The relocation of usage to designated safe-injection sites is beneficial to both the public and the users by opening up the city center for other activities and simultaneously providing drug users with medical supervision to prevent overdose.<sup>187</sup> Switzerland’s success is partially attributed to the intentional design of placing resources near known locations of heavy usage.<sup>188</sup> Switzerland’s efforts, in totality, have drastically reduced drug usage and the harm to individuals that results from untreated drug usage.<sup>189</sup> The proliferation of community programs and safe-injection sites has led to a reduction in crime and theft that is unparalleled by the same number of programs proliferated in the United States, but in the form of drug courts.<sup>190</sup>

---

<sup>181</sup> See Taylor Knopf, *Switzerland Couldn’t Stop Drug Users. So It Started Supporting Them.*, N.C. HEALTH NEWS (Jan. 21, 2019), <https://www.northcarolinahealthnews.org/2019/01/21/switzerland-couldnt-stop-drug-users-so-it-started-supporting-them> [https://perma.cc/RUX7-ELJ2]; Stephanie Nebehay, *Swiss Drug Policy Should Serve as Model: Experts*, REUTERS (Oct. 25, 2010, 12:06 PM), <https://www.reuters.com/article/us-swiss-drugs/swiss-drug-policy-should-serve-as-model-experts-idUSTRE69O3VI20101025> [https://perma.cc/6DXQ-38A5].

<sup>182</sup> See Knopf, *supra* note 181.

<sup>183</sup> See *id.*

<sup>184</sup> See Wolf & Herzig, *supra* note 176; Nebehay, *supra* note 181 (“We had to change perspective and introduce the notion of public health. We extended a friendly hand to drug addicts and brought them out of the shadows . . .”).

<sup>185</sup> Wolf & Herzig, *supra* note 176.

<sup>186</sup> See Knopf, *supra* note 181.

<sup>187</sup> See *id.*

<sup>188</sup> See *id.*

<sup>189</sup> See Wolf & Herzig, *supra* note 176.

<sup>190</sup> See Knopf, *supra* note 181.

## 2. Canada

Canada's approach to substance use is more comparable to that of the United States in that Canada has also employed drug courts in response.<sup>191</sup> However, there are minor but notable differences between U.S. and Canadian drug courts. Similar to U.S. drug courts, offenders submit an application to the drug court program after an arrest, and the application is considered alongside an eligibility assessment and treatment personnel interviews to determine medical needs.<sup>192</sup> The conclusion is then presented to a drug court judge.<sup>193</sup> In order to participate, the offender must plead guilty to the crime and then make regular court appearances, submit to drug testing, and comply with the program.<sup>194</sup> Participation typically lasts twelve to eighteen months, and includes three months of complete abstinence in order to graduate.<sup>195</sup> After completion, the participant receives a noncustodial sentence under the original charge.<sup>196</sup> One significant difference is the decreased emphasis on total abstinence in Canada's drug courts and the employment of harm-reduction strategies,<sup>197</sup> due to findings that prohibition counterintuitively leads to more overdose and drug-related illness.<sup>198</sup>

In order to receive funding, Canadian drug courts must report quantifiable metrics to the Department of Justice's Drug Treatment Court Information System (DTCIS).<sup>199</sup> Drug courts are funded by the Drug Treatment Court Funding Program (DTCCFP), established as part of the Treatment Action Plan of National Anti Drug Strategy.<sup>200</sup> DTCCFP funding is conditioned on drug court data reporting requirements, including program effectiveness and reach of targeted groups, such as "serious drug [addiction], lower socio-economic profile, multiple needs

---

<sup>191</sup> See *Drug Treatment Court Funding Program*, DEP'T OF JUST. CAN. (Aug. 20, 2021), <https://www.justice.gc.ca/eng/fund-fina/gov-gouv/dtc-ttt.html> [<https://perma.cc/D488-HJ3F>].

<sup>192</sup> See *id.*

<sup>193</sup> See *id.*

<sup>194</sup> See *id.*

<sup>195</sup> *Id.*

<sup>196</sup> See EVALUATION DIV., DEP'T OF JUST. CAN., DRUG TREATMENT COURT FUNDING PROGRAM EVALUATION: FINAL REPORT 5 (2015).

<sup>197</sup> DEP'T OF JUST. CAN., *supra* note 191.

<sup>198</sup> See COYNE & HALL, *supra* note 50, at 4.

<sup>199</sup> DTCIS is a tool used by Canada's Department of Justice to manage drug court programs, and funding recipients in turn use the program to meet reporting requirements. See EVALUATION DIV., *supra* note 196, at 13 n.3. Despite initial obstacles to DTCIS data integrity and completeness, further revisions are planned after marked improvement over time. See *id.* at 81–82.

<sup>200</sup> See DEP'T OF JUST. CAN., *supra* note 191.

2022]

## DRUG COURT DISCRIMINATION

2531

and lack of adequate housing.”<sup>201</sup> Canadian drug courts also follow the lead of Swiss drug courts by utilizing community partners.<sup>202</sup> Community partners address participant needs such as housing, stable employment, and job training.<sup>203</sup> By providing for these other factors, Canada’s drug courts are able to help participants that the United States eliminates from the programs based on likelihood of success.<sup>204</sup> Therefore, while the graduation rate remains below 35%,<sup>205</sup> the success rate of Canada’s drug courts does not have the same cherry-picking issue of U.S. drug court statistics. There is also quantifiable improvement in quality of life for individuals in Canadian drug courts who may not ultimately graduate.<sup>206</sup> Even of the 65% of participants who fail to graduate and thus return to the court system, a majority report quality-of-life improvements such as local community support, housing, and substance use maintenance improvement.<sup>207</sup> U.S. drug courts would benefit from a closer analysis of the funding mechanisms and community-partner programs utilized in Canada in order to improve success rates and require diversity, thus preventing the current disparate impacts.<sup>208</sup>

## II. ANALYSIS

A. *Eligibility Criteria Likely Results in Divergence from Legislative Intent*

In California, drug courts are organized by county and created through the Comprehensive Drug Court Implementation Act of 1999.<sup>209</sup> Oversight is provided by the State Department of Alcohol and Drug Programs.<sup>210</sup> Under the Drug Court Partnership Act of 1998, a steering committee was established to fund cost-effective local drug

---

<sup>201</sup> EVALUATION DIV., DEP’T OF JUST. CAN., NATIONAL ANTI-DRUG STRATEGY IMPLEMENTATION EVALUATION: FINAL REPORT 26 (2010).

<sup>202</sup> See EVALUATION DIV., *supra* note 196; *DTC Program*, CANADIAN ASS’N DRUG TREATMENT CT. PROS., <https://cadtc.org/dtc-program-title> [<https://perma.cc/QM2N-3CJ5>].

<sup>203</sup> See EVALUATION DIV., *supra* note 196.

<sup>204</sup> In contrast, U.S. drug courts allow external factors such as “residency” to limit the ability to access treatment programs. See, e.g., EXEC. OFF. OF THE TRIAL CT., *supra* note 96, at 15.

<sup>205</sup> See DEP’T OF JUST. CAN., *supra* note 191.

<sup>206</sup> See *id.*

<sup>207</sup> *Id.*

<sup>208</sup> See *supra* Section I.C.

<sup>209</sup> CAL. HEALTH & SAFETY CODE §§ 11970–11974 (West 2022).

<sup>210</sup> *Id.* § 11970(b).

court systems.<sup>211</sup> The county authority to create a local drug court is found in California Health and Safety Code section 11971(a)(1).<sup>212</sup> A county alcohol and drug program administrator, alongside the presiding judge in the county, work together to develop the procedural operation of the drug court program.<sup>213</sup> Drug court programs must include graduated sanctions, individual and group therapy, urinalysis testing, court monitoring and supervision, and educational or vocational counseling.<sup>214</sup>

In creating the statutory authority to implement a drug court program, the California Legislature made its intent explicitly clear—that drug courts are to be designed and operated in accordance with the “Key Components” of drug courts, as developed by the NADCP and the Drug Court Standards Committee.<sup>215</sup> Most notably, the “Key Components” document referenced by the California Legislature includes performance benchmarks that consider whether the designs and systems are sensitive to and relevant to race.<sup>216</sup> To receive federal funding, programs must comply with the “Key Components” defined by the NADCP.<sup>217</sup>

The NADCP best practice standards guide further evidences the disparity between drug courts in practice and their expected objectives.<sup>218</sup> Per the NADCP, best practices include the importance of equity and inclusion—specifically, equivalent access and equivalent retention.<sup>219</sup> If any criterion “has the unintended effect of differentially restricting access for members of a group that has historically experienced discrimination,” the drug court must increase representation, absent a showing it would threaten public safety or

---

<sup>211</sup> See *id.* § 11970(c).

<sup>212</sup> *Id.* § 11971(a)(1) (“At its option, a county may provide a program authorized by this article.”).

<sup>213</sup> *Id.* § 11971(b).

<sup>214</sup> CAL. PENAL CODE § 1000.5(a)(1) (West 2022).

<sup>215</sup> See HEALTH & SAFETY § 11972 (“It is the intent of the Legislature that drug court programs be designed and operated in accordance with the document entitled ‘Defining Drug Courts: The Key Components,’ developed by the National Association of Drug Court Professionals and Drug Court Standards Committee . . .”).

<sup>216</sup> See NAT’L ASS’N OF DRUG CT. PROS. & DRUG CT. STANDARDS COMM., NCJ 205621, DEFINING DRUG COURTS: THE KEY COMPONENTS 10 (reprt. 2004) (1997) (“Treatment designs and delivery systems are sensitive and relevant to issues of *race* . . .”) (emphasis added).

<sup>217</sup> ORR ET AL., *supra* note 60, at 16.

<sup>218</sup> See 1 NAT’L ASS’N OF DRUG CT. PROS., ADULT DRUG COURT BEST PRACTICE STANDARDS (rev. ed. 2018).

<sup>219</sup> See *id.* at 11–14.



program effectiveness.<sup>220</sup> These affirmative steps are necessary to ensure historically discriminated-against groups are provided equal representation in drug courts.<sup>221</sup>

The NADCP also recommends that drug courts target offenders who are at a substantial risk of reoffending.<sup>222</sup> Instead, the eligibility criteria set forward in California Health and Safety Code section 11375.7(c) is most likely to exclude high-risk, high-need offenders because it excludes persons with a history of violence and persons whose treatment provider concludes are “unamenable to any and all forms of drug treatment.”<sup>223</sup> By explicitly providing for the exclusion of individuals with a history of violence or showing of lack of amenability to treatment, the treatment program leaves out the most high-risk, high-need offenders.<sup>224</sup>

Lastly, the California statutory scheme leaves room for the discretionary possibility of removal, akin to the problematic sanctions-based approach previously discussed.<sup>225</sup> California drug courts also likely fail to achieve equivalence in retention due to ambiguous program removal criteria.<sup>226</sup> If a drug court finds that an offender is not performing satisfactorily, is not benefitting from the education or treatment, has been convicted of certain crimes, or has engaged in certain criminal conduct, then the court reinstates the criminal charges.<sup>227</sup> These removal criteria do not sufficiently ensure equal treatment of minority groups to provide that they are not removed from drug court programs at a disproportionate rate.<sup>228</sup>

Further, while a positive test for use of a controlled substance is not intended to be grounds for dismissal under California Health and Safety Code section 11375.7(b), California drug courts are still given the leeway to remove an offender for a positive test if the offender “is not making progress in the program.”<sup>229</sup> Thus, while discretion appears to be limited by the statutory prohibition on sanctioning a positive test, a workaround exists and allows for drug courts to exercise discretion,<sup>230</sup>

---

<sup>220</sup> *Id.* at 11.

<sup>221</sup> *See id.* at 13–14.

<sup>222</sup> *See id.* at 5.

<sup>223</sup> CAL. HEALTH & SAFETY CODE § 11375.7(c) (West 2022).

<sup>224</sup> *See id.*

<sup>225</sup> *See id.* § 11375.7(b).

<sup>226</sup> *See* CAL. PENAL CODE § 1000.5(b) (West 2022).

<sup>227</sup> *Id.*

<sup>228</sup> *See supra* Section I.C.1.

<sup>229</sup> HEALTH & SAFETY § 11375.7(b).

<sup>230</sup> *See id.*

which in turn runs contrary to the legislative intent to ensure that drug courts are not discriminatory toward groups most in need of treatment.<sup>231</sup>

B. *Eligibility Criteria Likely Make Certain Drug Courts Susceptible to Equal Protection Claims*

In certain states, offenders not provided access to drug treatment court programs have a legitimate equal protection claim. One drug court in Minnesota is the Minnesota Cornerstone Drug Court (MCDC), a collaboration between two counties.<sup>232</sup> The MCDC targets “adult, non-violent, felony level offenders . . . [who] have been diagnosed chemically dependent and determined to be high risk/high need.”<sup>233</sup> Disqualifying factors for the MCDC include certain controlled substances used, violent offenses, gang membership or affiliation, or personal factors, including but not limited to transportation problems in attending the drug court program.<sup>234</sup>

Minnesota is a unique case study for drug courts because it demonstrates a potential variation in equal protection law to which drug courts may be susceptible.<sup>235</sup> In *State v. Russell*, the Minnesota Supreme Court noted in its analysis that statistical proof of discriminatory impact, in combination with other relevant factors from the statute’s history, may require strict scrutiny under the Minnesota Constitution.<sup>236</sup> In *Russell*, crimes involving crack cocaine called for stiffer sentences, as opposed to lighter sentences for crimes involving cocaine powder.<sup>237</sup> The defendants alleged that these sentences resulted in a disproportionate impact on African Americans.<sup>238</sup> The court pointed to statistical evidence of the racial disparity in the populations—that 96.6% of individuals charged for possession of crack

---

<sup>231</sup> See NAT’L ASS’N OF DRUG CT. PROS., *supra* note 218, at 5.

<sup>232</sup> MINN. JUD. BRANCH, *supra* note 100.

<sup>233</sup> *Id.* at 5.

<sup>234</sup> *Id.* at 6–7.

<sup>235</sup> See *State v. Russell*, 477 N.W.2d 886, 888 n.2 (Minn. 1991); HENRY W. MCCARR & JACK S. NORDBY, 9 MINNESOTA PRACTICE SERIES: CRIMINAL LAW AND PROCEDURE § 47:53 (4th ed. 2021) (explaining the tripartite equal protection test in Minnesota, including its potential application “where the enforcement of a facially valid law has discriminatory effects”).

<sup>236</sup> See *Russell*, 477 N.W.2d at 888 n.2.

<sup>237</sup> See *id.* at 887.

<sup>238</sup> *Id.* at 887; see also Jeffery A. Kruse, Note, *Substantive Equal Protection Analysis Under State v. Russell, and the Potential Impact on the Criminal Justice System*, 50 WASH. & LEE L. REV. 1791, 1791 (1993) (citing *Russell*, 477 N.W.2d at 888 n.2).

cocaine were Black, in contrast to the 79.6% of individuals charged for possession of powder cocaine who were white.<sup>239</sup>

The Minnesota Supreme Court's holding in *Russell* diverged from that of the United States Supreme Court in *Washington v. Davis* in which the Court held that a racially disproportionate impact does not establish a violation of the federal Equal Protection Clause.<sup>240</sup> When discriminatory intent is unproven, the Court requires the federal equal protection challenge to pass only rational basis review, significantly decreasing the chance of the plaintiff prevailing on the merits.<sup>241</sup> In *Russell*, the Minnesota Supreme Court applied a heightened standard to determine the sufficiency of equal protection claims rooted in disparate impact.<sup>242</sup> The reasoning of the Minnesota Supreme Court in rejecting the United States Supreme Court's approach was rooted in the idea that "[t]here comes a time when we cannot and must not close our eyes when presented with evidence that certain laws, regardless of the purpose for which they were enacted, discriminate unfairly on the basis of race."<sup>243</sup> Therefore, in state courts that conduct a more exacting review of the challenged conduct, there remains an opportunity to challenge drug court programs with a substantial, disproportionate impact on equal protection grounds.<sup>244</sup>

### C. Eligibility Criteria Are in Tension with Sentencing Guidelines

The vague eligibility criteria frequently used to assess potential drug court participants is in tension with federal sentencing guidelines. While the creation of specialized federal courts has long been opposed by the Judicial Conference of the United States, the federal court system and Department of Justice reentry programs have growing support for the utilization of features of drug courts.<sup>245</sup> The President's Commission on Combating Drug Addiction and the Opioid Crisis recommended that every federal judicial district establish a federal drug court.<sup>246</sup> In

---

<sup>239</sup> *Russell*, 477 N.W.2d at 887 n.1.

<sup>240</sup> *See id.* at 889–91; *Washington v. Davis*, 426 U.S. 229, 242 (1976).

<sup>241</sup> *See Washington*, 426 U.S. at 242.

<sup>242</sup> *See Kruse*, *supra* note 238, at 1809–10.

<sup>243</sup> *Russell*, 477 N.W.2d at 888 n.2. *But see* Randall Kennedy, *The State, Criminal Law, and Racial Discrimination: A Comment*, 107 HARV. L. REV. 1255, 1261–70 (1994) (arguing the shortcomings of the Minnesota approach and declaring that it makes invalidation "virtually preordained").

<sup>244</sup> *See Russell*, 477 N.W.2d at 888 n.2.

<sup>245</sup> *Id.* at 4.

<sup>246</sup> *Id.* at 5.

Massachusetts, state drug courts have also proliferated—the district court operates twenty-eight of the state’s thirty-one drug courts.<sup>247</sup>

Drug courts potentially conflict with the Sentencing Reform Act of 1984 (SRA), which requires neutrality as to socioeconomic status, education, employment, and family or community ties.<sup>248</sup> For example, if a drug court employs vague eligibility criteria such as “residency” and “drug of choice,”<sup>249</sup> it arguably departs from the neutrality requirements of the SRA.<sup>250</sup> The consideration of “residency” inherently includes socioeconomic status and community ties, and likely implicitly includes education and employment—all of which are not meant to be considered.<sup>251</sup> This Massachusetts drug court eligibility criterion also contradicts the very first two sentences outlining participant eligibility—that it is important that the criteria be clear and objective, and that vague requirements can lead to unintentionally disparate treatment.<sup>252</sup> As noted above, 87% of participants in Massachusetts’s drug courts are white, demonstrating that these vague criteria cause, at least in part, disparate treatment in drug courts in violation of the state’s very own guidance.<sup>253</sup>

Another example includes the eligibility restrictions of Minnesota drug courts—gang membership or affiliation, as well as transportation problems in attending the drug court program.<sup>254</sup> The ability for an offender to access transportation to the program is inherently rooted in socioeconomic status because it requires participants to have the financial ability to either own a means of transportation or pay for public transportation regularly.<sup>255</sup> Likewise, gang membership or affiliation is not neutral with respect to family or community ties, which are largely driven by gang affiliation in certain neighborhoods.<sup>256</sup> As a result, drug court access is denied based on factors inapposite to general sentencing principles.<sup>257</sup>

---

<sup>247</sup> *Drug Courts*, MASS.GOV (Oct. 7, 2021), <https://www.mass.gov/info-details/drug-courts#locations> [<https://perma.cc/ZB2K-MDL3>].

<sup>248</sup> 28 U.S.C. § 994(d); see also *Simplification Draft Paper*, U.S. SENT’G COMM’N, <https://www.ussc.gov/research/research-and-publications/simplification-draft-paper-2> [<https://perma.cc/P5TP-LQ9G>].

<sup>249</sup> See *supra* notes 96–100 and accompanying text.

<sup>250</sup> See *Simplification Draft Paper*, *supra* note 248.

<sup>251</sup> See *id.*

<sup>252</sup> See EXEC. OFF. OF THE TRIAL CT., *supra* note 96, at 15.

<sup>253</sup> See Schoenberg, *supra* note 117.

<sup>254</sup> See MINN. JUD. BRANCH, *supra* note 100.

<sup>255</sup> See *id.*

<sup>256</sup> See *id.*

<sup>257</sup> See *Simplification Draft Paper*, *supra* note 248.

## III. PROPOSAL

As these various case studies demonstrate, the disproportionately white population of state and federal drug courts leads to a multitude of challenges—divergence from legislative intent, potential susceptibility to equal protection challenges, and tension with sentencing guidance.<sup>258</sup> If the United States remains committed to drug courts as the solution for mass incarceration of drug-related offenses, then (1) eligibility criteria must be more targeted; and (2) successful components of other countries' drug court models must be incorporated in the United States to ensure success in a shift to targeted eligibility criteria.

A. *Targeted Eligibility Criteria*

The Bureau of Justice Assistance and the National Institute of Justice collaborated in 2011 and set forward components to consider based on drug court successes.<sup>259</sup> One of the recommendations included prioritizing offenders demonstrating both (1) high risk and (2) high drug dependence.<sup>260</sup> High-risk offenders are individuals that tend to have the least likelihood of success in the program and typically require the most intensive, sustained treatment program available.<sup>261</sup> The idea underlying a targeted approach is that singling out the individuals most in need will maximize drug court–treatment program impact and return on investment.<sup>262</sup> Despite such recommendations dating back over a decade, eligibility criteria for drug courts remain vague and discretionary,<sup>263</sup> and the continued disparate impact highlights the need to make revisions.<sup>264</sup>

---

<sup>258</sup> See *supra* Part II.

<sup>259</sup> See BUREAU OF JUST. ASSISTANCE & NAT'L INST. OF JUST., NCJ 248701, TRANSLATING DRUG COURT RESEARCH INTO PRACTICE: SEVEN PROGRAM DESIGN FEATURES: ADULT DRUG COURT PRINCIPLES, RESEARCH, AND PRACTICE 1 (2019) [hereinafter PROGRAM DESIGN].

<sup>260</sup> See *id.* at 6.

<sup>261</sup> See DOUGLAS B. MARLOWE, NAT'L DRUG CT. INST., 1 DRUG COURT PRACTITIONER FACT SHEET: TARGETING THE RIGHT PARTICIPANTS FOR ADULT DRUG COURTS 2 (2012), [https://www.ndci.org/wp-content/uploads/2018/09/Targeting\\_Part\\_I.pdf](https://www.ndci.org/wp-content/uploads/2018/09/Targeting_Part_I.pdf) [https://perma.cc/H8QH-98U9].

<sup>262</sup> See PROGRAM DESIGN, *supra* note 259, at 6–7.

<sup>263</sup> See *supra* Section I.B.3.

<sup>264</sup> See *supra* Section I.C.1.

B. *Structural Changes to Enhance Targeted Eligibility Criteria*

Following the lead of Canadian drug courts, U.S. drug court federal funding should be conditioned on much more stringent guidelines that factor in whether the drug court program population is representative of the population of individuals who would benefit from access to the program.<sup>265</sup> Like Canada's model, this would emphasize quantifiable measures of success and diversity of enrollees in order to receive funding.<sup>266</sup> All programs, as a condition of funding, should be responsible for developing site-specific, results-based evaluation and accountability frameworks to maintain funding eligibility, a variation of the reporting metrics required to maintain DTCCFP funding in Canada.<sup>267</sup> This would be an improvement from the current funding that is conditioned on the vague "Key Components" set forward by the NADCP.<sup>268</sup> The funding and continued support of drug courts should be reliant on proving out an inherently fair and effective drug court program.<sup>269</sup>

Community partners are vastly underutilized in providing housing, stable employment, and job training to participants,<sup>270</sup> despite the "[f]orging [of] partnerships" with community-based organizations as one of the "Key Components" defined by the NADCP, a condition of federal drug court funding.<sup>271</sup> Partnerships could provide solutions to disqualifying factors, such as "transportation problems" in the MCDC, that explicitly exclude individuals who do not have certain resources necessary to attend the program and are therefore deemed ineligible on that basis alone.<sup>272</sup> Community partners would also enhance the effectiveness of the treatment received in drug courts, because they would provide a more comprehensive medical plan to assist offenders and equip them with the tools to decrease the likelihood of recidivism.<sup>273</sup> This would also integrate drug courts into society more

---

<sup>265</sup> EVALUATION DIV., *supra* note 201.

<sup>266</sup> *Id.*

<sup>267</sup> *Id.*

<sup>268</sup> See *supra* notes 215–17 and accompanying text.

<sup>269</sup> EVALUATION DIV., *supra* note 201.

<sup>270</sup> Cf. EVALUATION DIV., *supra* note 196; EVALUATION DIV., *supra* note 201, at 3–4.

<sup>271</sup> See NAT'L ASS'N OF DRUG CT. PROS. & DRUG CT. STANDARDS COMM., *supra* note 216, at 23.

<sup>272</sup> See MINN. JUD. BRANCH, *supra* note 100, at 7.

<sup>273</sup> Cf. Knopf, *supra* note 181 (discussing Switzerland utilizing this plan); EVALUATION DIV., *supra* note 201, at 3–4 (discussing Canada utilizing this plan).

broadly, as opposed to the current model that continues to stigmatize individuals and sort them into the criminal system.<sup>274</sup>

Finally, a shift in methodology to harm reduction is important so that the treatment, on a basic level, is evidence based and effective.<sup>275</sup> Various other countries already follow this approach, and it has proven effective in improving living conditions of individuals with substance use disorders, even if they do not ultimately and successfully complete the drug court program.<sup>276</sup> Moving away from the abstinence model would ensure that even if graduation rates are not improved, the program would still serve a purpose to individual offenders and society.<sup>277</sup>

One example of a shift to harm reduction is creating safe-injection sites, which provide medical supervision for drug consumption.<sup>278</sup> These sites have been proven to dramatically reduce the chance of overdose and overdose-related deaths<sup>279</sup> and to be one of the most useful tools in combating crime and community disruption from substance use issues<sup>280</sup>—achieving many of drug courts' primary goals. This strategy has been deployed abroad by at least eight countries, including Switzerland and Canada.<sup>281</sup> A myriad of positive results has been reported, including drastic reductions in deaths due to overdose, thousands of referrals to social and health services, hundreds of admissions to local detoxification services, reduced public injection and related litter, and no adverse impacts on communities in which the sites are located.<sup>282</sup>

Despite demonstrated success, the use of safe-injection sites in the United States has been met with hostility<sup>283</sup> and a lengthy, controversial

---

<sup>274</sup> Cf. Knopf, *supra* note 181.

<sup>275</sup> See *supra* Section I.D.

<sup>276</sup> See, e.g., Knopf, *supra* note 181.

<sup>277</sup> See *supra* Section I.D.

<sup>278</sup> See Elana Gordon, *What's the Evidence that Supervised Drug Injection Sites Save Lives?*, NPR (Feb. 21, 2019), <https://www.npr.org/sections/health-shots/2018/09/07/645609248/whats-the-evidence-that-supervised-drug-injection-sites-save-lives> [<https://perma.cc/4AY7-VPDC>].

<sup>279</sup> See Knopf, *supra* note 181. One supervised injection site in Canada has had no deaths on site and responded to over six thousand overdoses. Gordon, *supra* note 278.

<sup>280</sup> See Gordon, *supra* note 278.

<sup>281</sup> See EBERHARD SCHATZ & MARIE NOUGIER, INT'L DRUG POL'Y CONSORTIUM, DRUG CONSUMPTION ROOMS: EVIDENCE AND PRACTICE 5–6 (2012). Safe-injection sites are also commonly referred to as drug consumption rooms. See *id.* at 1.

<sup>282</sup> See *id.* at 5–6; see also *Overdose Prevention Centers*, SHATTERPROOF, <https://www.shatterproof.org/our-work/advocacy/about-the-issues/supervised-drug-consumption-sites> [<https://perma.cc/5FJ6-3J3P>].

<sup>283</sup> Negative, stigmatized language in reference to safe-injection sites is rampant in the media, demonstrating the harm of “status courts” and a lack of understanding as to why drug courts are

legal battle.<sup>284</sup> Philadelphia announced the opening of Safehouse, the United States's first safe-injection site, in 2018—estimating the project would save between twenty-five and seventy-six lives a year—but a two-year legal battle with President Donald Trump's Department of Justice ensued.<sup>285</sup> After a federal district judge ruled in Safehouse's favor, the nonprofit announced it planned to proceed with the opening,<sup>286</sup> but the government appealed the ruling and Safehouse struggled to secure funding and a location.<sup>287</sup> New York City instead became the first city in the United States to open supervised injection sites in November 2021, opening two sites that are projected to save 130 lives per year.<sup>288</sup> During only their first day in operation, the facilities reported two overdose reversals by staff.<sup>289</sup>

While New York City proceeded with the openings, the federal legal issue that thwarted Philadelphia's efforts remains significant, as the same legal challenge may arise against New York's sites.<sup>290</sup> At issue

---

not more successful. See, e.g., Howard Husock, *Free-for-All Sends "OD"ious Message to Drug Addicts at NYC "Safe Injection Sites,"* N.Y. POST (Nov. 30, 2021, 10:42 PM), <https://nypost.com/2021/11/30/nyc-safe-injection-sites-sends-odious-message-to-drug-addicts> [<https://perma.cc/367C-HAH3>] (criticizing these sites as a "[f]ree-for-all" for "[d]rug addicts" to use to "shoot up").

<sup>284</sup> See Jeremy Roebuck & Aubrey Whelan, *Justice Department Reevaluating Supervised Injection Sites After Its Yearslong Effort to Block One in Philly,* PHILA. INQUIRER (Feb. 9, 2022), <https://www.inquirer.com/news/safe-injection-sites-safehouse-philadelphia-justice-department-20220209.html> [<https://perma.cc/2WRA-AY94>].

<sup>285</sup> See Bobby Allyn & Michaela Winberg, *All Things Considered: Philadelphia Nonprofit Opening Nation's 1st Supervised Injection Site Next Week,* NPR (Feb. 27, 2020, 11:41 AM), <https://www.npr.org/2020/02/26/809608489/philadelphia-nonprofit-opening-nations-first-supervised-injection-site-next-week> [<https://perma.cc/N3Q4-WH9S>].

<sup>286</sup> Michaela Winberg, *Philly's Safehouse to Open Nation's First Supervised Injection Site After Judge Clearance,* BILLY PENN (Feb. 25, 2020, 4:50 PM), <https://billypenn.com/2020/02/25/nothing-procedurally-improper-safehouse-injection-site-gets-judges-final-clearance> [<https://perma.cc/CRB3-9MT4>].

<sup>287</sup> See *id.*

<sup>288</sup> See Manisha Krishnan, *New York Opens First Safe Injection Sites in the US,* VICE (Nov. 30, 2021, 8:59 AM), <https://www.vice.com/en/article/3abbpw/safe-injection-site-new-york-city> [<https://perma.cc/LAAS-CEQ3>].

<sup>289</sup> See Jeffery C. Mays & Andy Newman, *Nation's First Supervised Drug-Injection Sites Open in New York,* N.Y. TIMES (Nov. 30, 2021), <https://www.nytimes.com/2021/11/30/nyregion/supervised-injection-sites-nyc.html> [<https://perma.cc/KY5T-PLSH>].

<sup>290</sup> Whether these safe-injection sites will face legal challenges, and whether the Biden Department of Justice will shift the government's stance on these sites, remains unclear and will likely vary with executive administration. Compare Brian Mann & Caroline Lewis, *All Things Considered: New York City Allows the Nation's 1st Supervised Consumption Sites for Illegal Drugs,* NPR (Nov. 30, 2021, 3:54 PM), <https://www.npr.org/2021/11/30/1054921116/illegal-drug-injection-sites-nyc> [<https://perma.cc/BSJ8-CRXH>] (noting refusal by Biden Administration to endorse the sites as a public health strategy), with Jennifer Peltz & Michael Balsamo, *Justice Dept. Signals It May Allow Safe Injection Sites,* AP NEWS (Feb. 8, 2022), <https://apnews.com/article/business-health-new-york-c4e6d999583d7b7abce2189fba095011> (last visited June 26, 2022)



in *United States v. Safehouse* was whether 21 U.S.C. § 856, which makes it unlawful to knowingly open, maintain, manage, or control any place for the purpose of manufacturing, distributing, or using a controlled substance, applies to safe-injection sites.<sup>291</sup> The district court held that § 856 did not apply to safe-injection sites.<sup>292</sup> Relying on the legislative intent to outlaw “crack houses,” the court noted that to read the statute “to apply to medical purposes and efforts to combat drug abuse would take the statute well beyond what it aimed to criminalize.”<sup>293</sup> The Third Circuit, however, reversed course, holding that despite other noble purposes, Safehouse also had a significant purpose that its visitors use drugs, and thus it violated § 856.<sup>294</sup> The continued delineation in schools of thought on harm reduction is prominently on display in these cases, with certain judges viewing the sites as being utilized for “drug use,” while others view them as being utilized for “medical care.”<sup>295</sup>

By altering funding conditions, increasing the use of community partners, and shifting toward more scientifically based treatment methods, drug courts—when using eligibility criteria targeted toward the most high-need, high-risk individuals—are much more likely to find success for individual participants, minority communities, and society as a whole.<sup>296</sup>

## CONCLUSION

Beginning with *Narco* and continuing through today’s modern drug court, the United States has a complex history of attempting to understand substance use disorder and address the problem beyond incarceration and the penal system.<sup>297</sup> An understanding of how decentralized drug court systems work in practice highlights the disparate nature of drug courts, which are unable to achieve legislative intent, ensure equal protection under state constitutions, and follow

---

(noting that Justice Department is now “evaluating” these facilities and considering “appropriate guardrails”).

<sup>291</sup> 985 F.3d 225, 229 (3d Cir.), *cert. denied mem. sub nom. Safehouse v. Dep’t of Just.*, 142 S. Ct. 345 (2021).

<sup>292</sup> *United States v. Safehouse*, 408 F. Supp. 3d 583, 585–86 (E.D. Pa. 2019).

<sup>293</sup> *Id.* at 613–14.

<sup>294</sup> *See Safehouse*, 985 F.3d at 238.

<sup>295</sup> *Compare id.* at 229 (noting the utilization for “drug use”), *with Safehouse*, 408 F. Supp. 3d at 586 (noting the utilization for “medical care”).

<sup>296</sup> *See supra* Section I.D.

<sup>297</sup> *See supra* Sections I.A–I.B.

sentencing principles in good faith.<sup>298</sup> If the proliferation of the modern drug court is to continue, the eligibility criteria must be more targeted to high-need, high-risk individuals, alongside broader structural changes to enhance the likelihood of success of both the drug court programs and individual participants.<sup>299</sup> These reforms would attempt to address the current underrepresentation of minority populations and assist drug courts in achieving their intent, which is to successfully reduce overdose deaths, decrease recidivism, and improve social welfare.

---

<sup>298</sup> See *supra* Part II.

<sup>299</sup> See *supra* Part III.