

## Drug Courts: The Risk of an Increased Number of Drug-related Arrests and Long Jail Sentences

Wayne A. Comstock  
*University of Iowa College of Law*

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### Recommended Citation

Wayne A. Comstock, *Drug Courts: The Risk of an Increased Number of Drug-related Arrests and Long Jail Sentences*, 13 U. MIA Race & Soc. Just. L. Rev. 1 ()

Available at: <https://repository.law.miami.edu/umrsjlr/vol13/iss1/3>

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# Drug Courts: The Risk of an Increased Number of Drug-related Arrests and Long Jail Sentences

Wayne A. Comstock

*ABSTRACT: In June 1971, President Richard Nixon declared a War on Drugs. As the War on Drugs continued throughout the 1980s, drug-related convictions increased, leading to overcrowding in prisons across the United States. Drug courts operate as an alternative to incarceration in which criminal defendants enter court mandated drug treatment programs. Judges monitor the progress of drug court participants through scheduled status hearings. However, contrary to their purpose, drug courts may contribute to incarceration by presenting the risk of an increased number of drug-related arrests in those jurisdictions that have implemented drug courts and long jail sentences imposed as sanctions for repeated violations. This Article explores solutions to curb the potential drug-related arrests and long jail sentences, namely (1) the decriminalization of drug offenses, (2) providing greater funding to outside treatment programs, (3) removing incarceration as a sanction, and (4) permitting violent offenders to enter drug court programs.<sup>1</sup>*

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<sup>1</sup> Wayne Comstock obtained his J.D. from the University of Iowa College of Law in 2023. He would like to thank Professor Dean Strang for his assistance in writing this Article.

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## I. INTRODUCTION

In June 1971, President Richard Nixon declared a War on Drugs.<sup>2</sup>As the War on Drugs continued throughout the 1980s, drug-related convictions significantly increased at both the state and federal level,<sup>3</sup> which, in turn, led to overcrowding in prisons across the United States.<sup>4</sup> To alleviate this overcrowding, the criminal justice system implemented drug courts as an alternative to incarceration.<sup>5</sup> In 1989, Dade County, Florida implemented the first drug court in the United States,<sup>6</sup> and as of 2017, “there are more than 3,100 drug courts in the U.S., up from just one in 1989 and 665 in 2000. Half of all U.S. counties now have at least one operating drug court.”<sup>7</sup>

Drug court advocates cite several public policy rationales in support of drug courts including that drug courts: (1) offer greater supervision when compared to probation, (2) handle drug-related cases more seriously than the criminal justice system did prior to the implementation of drug court, (3) “hold offenders to a higher degree of accountability for noncompliance with conditions of probation[,]” (4) increase coordination between community providers, thus reducing overlap between service providers, and (5) free other courts from handling drug-related offenses.<sup>8</sup> However, such rationales ignore that drug courts may contribute to incarceration by presenting the risks of both an increased number of drug-related arrests in jurisdictions that have implemented drug courts<sup>9</sup> and longer jail sentences for repeated violations as compared to the sentence of the initial charge.<sup>10</sup> For example, in the largest counties in Texas, drug arrests increased by 50% in the five years following the implementation

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<sup>2</sup> *A History of the Drug War*, DRUG POL’Y ALL., <https://drugpolicy.org/issues/brief-history-drug-war>.

<sup>3</sup> Joel Gross, Comment, *The Effects of Net-Widening on Minority and Indigent Drug Offenders: A Critique of Drug Courts*, 10 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 161, 165 (2010).

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

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

<sup>6</sup> JUST. POL’Y INST., ADDICTED TO COURTS: HOW A GROWING DEPENDENCE ON DRUG COURTS IMPACTS PEOPLE AND COMMUNITIES 2 (2011), [https://justicepolicy.org/wp-content/uploads/justicepolicy/documents/addicted\\_to\\_courts\\_final.pdf](https://justicepolicy.org/wp-content/uploads/justicepolicy/documents/addicted_to_courts_final.pdf).

<sup>7</sup> Jag Davies, *Expanding Drug Courts Won’t Help Ease the Opioid Crisis*, STAT NEWS (Nov. 1, 2017), <https://www.statnews.com/2017/11/01/drug-courts-opioid-crisis/>.

<sup>8</sup> Denise C. Gottfredson & M. Lyn Exum, *The Baltimore City Drug Treatment Court: One-Year Results from a Randomized Study*, 39 J. RSCH. CRIME & DELINQ. 337, 339 (2002).

<sup>9</sup> William Werkmeister, *Drug Courts: Are They All They Are Cracked Up to Be?*, KENNEDY SCH. REV. (June 26, 2015), <https://ksr.hkspublications.org/2015/06/26/drug-courts-are-they-all-they-are-cracked-up-to-be/>.

<sup>10</sup> Maia Szalavitz, *How America Overdosed on Drug Courts*, PAC. STANDARD MAG. (May 3, 2017), <https://psmag.com/news/how-america-overdosed-on-drug-courts>.

of drug court.<sup>11</sup> In addition, some drug court participants “have spent up to 10 years . . . on charges that would otherwise have resulted in a few months in jail.”<sup>12</sup> This Article will conclude by exploring solutions to the potential risks of an increased number of drug-related arrests<sup>13</sup> and long jail sentences.<sup>14</sup> Such solutions include: (1) the decriminalization of drug-related offenses, (2) greater funding for treatment programs outside of drug courts, (3) removing incarceration as a drug court sanction, and (4) eliminating federal funding for state drug courts.

## II. THE HISTORY OF DRUG COURTS IN THE UNITED STATES

This Part will outline the history of drug courts in the United States, including how drug courts operate, who may enroll in drug courts, the requirements of federal funding, and how drug courts abroad compare to those in the United States. The implementation of drug courts in the United States can be linked to the War on Drugs.<sup>15</sup> In the 1960s, American citizens protested United States involvement in the Vietnam War, and drug use became associated with “youthful rebellion, social upheaval, and political dissent.”<sup>16</sup> In June 1971, President Richard Nixon declared a War on Drugs, which granted greater power to federal drug control agencies.<sup>17</sup> As a result of the War on Drugs, drug-related arrests and convictions significantly increased.<sup>18</sup> “The number of people behind bars for nonviolent drug law offenses increased from 50,000 in 1980 to over 400,000 by 1997.”<sup>19</sup> The increase in drug-related convictions resulted in overcrowding in prison populations, which led states to implement drug courts as a way to alleviate overcrowding and rehabilitate drug users.<sup>20</sup>

In 1989, Dade County, located in Florida’s Eleventh Judicial Circuit, implemented the first drug court in the United States.<sup>21</sup> The drug court earned a reputation for its innovative procedures and emphasis on collaboration.<sup>22</sup> It developed a philosophy based on therapeutic

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<sup>11</sup> Werkmeister, *supra* note 8.

<sup>12</sup> Szalavitz, *supra* note 9.

<sup>13</sup> Werkmeister, *supra* note 8.

<sup>14</sup> Szalavitz, *supra* note 9.

<sup>15</sup> Gross, *supra* note 2, at 165.

<sup>16</sup> *A History of the Drug War*, *supra* note 1.

<sup>17</sup> *Id.*

<sup>18</sup> Gross, *supra* note 2, at 165.

<sup>19</sup> *A History of the Drug War*, *supra* note 1.

<sup>20</sup> Gross, *supra* note 2, at 165.

<sup>21</sup> Arthur J. Lurigio, *The First 20 Years of Drug Treatment Courts: A Brief Description of Their History and Impact*, 72 FED. PROB. 1, 3–4 (2008).

<sup>22</sup> *Id.*

jurisprudence,<sup>23</sup> which examines the effect of courts and court personnel on participant well-being.<sup>24</sup> The Miami-Dade County Drug Court offers drug treatment to participants, which became the model for drug courts in other jurisdictions.<sup>25</sup> By 2004, states implemented 1,600 drug courts across the United States,<sup>26</sup> and as of 2017, 3,100 drug courts existed nationwide.<sup>27</sup> Drug courts operate in all fifty states, the District of Columbia, Guam, and Puerto Rico.<sup>28</sup>

#### A. *How Drug Courts Operate*

Drug courts typically involve either a pre-conviction track, also known as a diversion track, or a post-conviction track.<sup>29</sup> A pre-conviction track drug court “enrolls[s] offenders into treatment shortly after arrest and dismisses[es] charges on their graduation from the program.”<sup>30</sup> Compare a pre-conviction track drug court to a post-conviction track drug court, where the court “intervene[s] after defendants have been tried and convicted, offering deferred or suspended sentences to those who complete treatment programs.”<sup>31</sup> Post-conviction drug courts require participants to plead guilty in order to enroll, with the benefit of expungement after graduation from the drug court.<sup>32</sup> For most drug court participants, however, the conviction is never expunged, leading to a number of restrictions related to child custody, voting rights, student aid, and other areas.<sup>33</sup> Some drug courts, like the Baltimore City Drug Treatment Court, instead offer a combination of both approaches.<sup>34</sup> As of 2011, only 7% of all drug courts utilize a pre-conviction track compared with the 59% of drug courts that use a post-conviction track and the 19% that use both models.<sup>35</sup>

Generally, individuals are eligible for drug court when charged with either a drug or nonviolent offense.<sup>36</sup> Additionally, drug court participants “must . . . either test[] positive for drugs or have a history of substance

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<sup>23</sup> *Id.* at 4.

<sup>24</sup> *The Concept of Therapeutic Jurisprudence*, AUSTRALIAN INST. JUD. ADMIN. INC., <https://aija.org.au/research/resources/the-concept-of-therapeutic-jurisprudence/>.

<sup>25</sup> Lurigio, *supra* note 20, at 4.

<sup>26</sup> Gross, *supra* note 2, at 165.

<sup>27</sup> Davies, *supra* note 6.

<sup>28</sup> Gottfredson & Exum, *supra* note 7, at 340.

<sup>29</sup> *Id.* at 341.

<sup>30</sup> *Id.* at 338.

<sup>31</sup> *Id.*

<sup>32</sup> Davies, *supra* note 6.

<sup>33</sup> *Id.*

<sup>34</sup> Gottfredson & Exum, *supra* note 7, at 338.

<sup>35</sup> JUST. POL’Y INST., *supra* note 5, at 3.

<sup>36</sup> *Id.*

abuse at the time of arrest.”<sup>37</sup> Drug court participation lasts between six months up to one year, depending on whether more time is needed to graduate.<sup>38</sup> Drug courts differ from traditional courts in that drug courts are not adversarial.<sup>39</sup> Judges, defense counsel, and prosecutors collaborate with one another for the purpose of rehabilitation, with the judge’s role being to “ensure the defendant’s treatment and rehabilitation, rather than merely determining guilt or innocence.”<sup>40</sup>

By focusing on rehabilitation, drug courts hope to integrate participants back into society.<sup>41</sup> A judge is further responsible for monitoring a defendant’s progress by scheduling status checks where a judge will review parole and probation reports to determine compliance with the drug court’s parameters.<sup>42</sup> Drug court participants are required to check in regularly, and such a requirement purportedly provides credibility to drug courts.<sup>43</sup> Usually, drug courts reward compliance with “verbal praise, certificates or other tokens of approval, as well as moving to the next level of supervision, which may include less frequent visits to the court.”<sup>44</sup> However, judges punish noncompliance through sanctions which range from verbal admonishment to jail time.<sup>45</sup> To graduate from drug court, participants must be drug- and arrest-free for a certain amount of time, as well as meet other requirements such as securing housing or employment.<sup>46</sup>

### B. Drug Court Participants

Drug courts are generally limited to “people arrested on a petty drug law violation or property offense.”<sup>47</sup> Many of the petty drug law violations are for marijuana possession.<sup>48</sup> In 2007, the National Drug Court Institute “found marijuana to be the most prevalent drug of choice among

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<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> Gross, *supra* note 2, at 166.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> Gottfredson & Exum, *supra* note 7, at 339.

<sup>43</sup> Mangesh Duggal, *Long May You Run: Drug Courts in the Twenty-First Century*, 21 BERKELEY J. CRIM. L. 126, 144 (2016).

<sup>44</sup> JUST. POL’Y INST., *supra* note 5, at 3.

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

<sup>46</sup> *Id.*

<sup>47</sup> DRUG POL’Y ALL., DRUG COURTS ARE NOT THE ANSWER: TOWARD A HEALTH-CENTERED APPROACH TO DRUG USE 5 (2011), [https://drugpolicy.org/sites/default/files/Drug%20Courts%20Are%20Not%20the%20Answer\\_Final2.pdf](https://drugpolicy.org/sites/default/files/Drug%20Courts%20Are%20Not%20the%20Answer_Final2.pdf)

<sup>48</sup> *Id.* at 4.

participants in at least 25 percent of drug courts surveyed nationwide.”<sup>49</sup> Drug court critics believe that, by limiting eligibility to drug and nonviolent offenses, drug courts limit their ability to improve public safety.<sup>50</sup>

The results of a 2008 survey concluded that 88% of all drug courts nationwide excluded individuals with violent offense convictions and 50% excluded individuals on parole, probation, or with other pending criminal charges.<sup>51</sup> National surveys of drug courts show that, “[i]n 2005, of the 1.47 million arrests involving those at risk of drug abuse or dependence, only 109,291 or 7.5 percent were eligible for drug court.”<sup>52</sup> The number of drug court participants pales in comparison with the number of prisoners admitted into state prisons for drug-related offenses.<sup>53</sup> As of 2011, over 55,000 defendants enter drug court annually.<sup>54</sup> In 2008, state prisons admitted 194,000 defendants on drug-related convictions.<sup>55</sup> “[T]here is one drug court for every 26 drug court participants –and, for every one drug court participant, there are 29 other people arrested for a drug law violation who are not in a drug court.”<sup>56</sup>

Drug court participants are also required to abstain from drug use while enrolled in drug court.<sup>57</sup> Currently, the United States is experiencing an opioid crisis,<sup>58</sup> and those individuals struggling with opioid addiction need medication-assisted treatment.<sup>59</sup> Medication-assisted treatment involves “the use of medications in combination with counseling and behavioral therapies”<sup>60</sup> to help prevent relapse.<sup>61</sup> Medication-assisted treatment enables those suffering from opioid addiction to eventually become completely tolerant to it.<sup>62</sup> When a drug court participant learned

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

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> Duggal, *supra* note 42, at 156.

<sup>53</sup> JUST. POL’Y INST., *supra* note 5, at 1.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> DRUG POL’Y ALL., *supra* note 46, at 7.

<sup>57</sup> Szalavitz, *supra* note 9.

<sup>58</sup> Christine Mehta, *How Drug Courts Are Falling Short*, OPEN SOC’Y FOUNDS. (June 7, 2017), <https://www.opensocietyfoundations.org/voices/how-drug-courts-are-falling-short>.

<sup>59</sup> *Id.*

<sup>60</sup> *Information about Medication-Assisted Treatment (MAT)*, FDA (Feb. 14, 2019), <https://www.fda.gov/drugs/information-drug-class/information-about-medication-assisted-treatment-mat>.

<sup>61</sup> Mehta, *supra* note 57.

<sup>62</sup> Szalavitz, *supra* note 9.



that he would be forced to detox in jail, he remarked, “I really don’t want to detox in jail . . . I’ve detoxed in jail before . . . they don’t care if I die.”<sup>63</sup>

However, drug court judges oppose medication-assisted treatment in favor of abstinence under the mistaken belief that drug addiction constitutes the swapping of addictions.<sup>64</sup> Nationwide, drug court judges become frustrated when seeing “the same individuals repeatedly appear[] in [drug] court.”<sup>65</sup> Such beliefs and attitudes stand in direct opposition to the role drug court judges serve.<sup>66</sup>

Some have referred to the role of judges in such courts as “cheerleaders and social workers as much as jurists.” Participation in drug courts require judges to possess a working knowledge of scientific theories of addiction, to be knowledgeable about the local treatment options available for drug court clients, while at the same time recognizing that there is a need to defer to drug treatment professionals when necessary. Drug court judges are typically more directly and personally involved in monitoring and supervising the lives, treatment, and recovery of clients than are judges in traditional courts.<sup>67</sup>

At the heart of the tension between a drug court judge’s beliefs and the role he or she serves are the contradictory models underlying drug courts.<sup>68</sup> The disease model behind drug addiction assumes that drug users use drugs compulsively while the rational action model behind punishment assumes that individuals act in accordance with a cost-benefit analysis.<sup>69</sup> The competing models result in drug court participants receiving court mandated treatment through a medical lens while the symptoms underlying the treatment are addressed through a penal lens.<sup>70</sup> “The person admitted into drug court is regarded as not fully rational and only partially responsible for their drug use; yet the same person is considered sufficiently rational and responsible to respond to the ‘carrots

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<sup>63</sup> Marianne Møllmann and Claudia Rader, *Neither Justice nor Treatment: Drug Courts in the United States*, PHYSICIANS FOR HUMAN RIGHTS, Jun. 2017, at 11.

<sup>64</sup> *Id.*

<sup>65</sup> DRUG POL’Y ALL., *supra* note 46, at 5.

<sup>66</sup> Eric L. Jensen & Clayton Mosher, *Adult Drug Courts: Emergence, Growth, Outcome Evaluations, and the Need for a Continuum of Care*, 42 IDAHO L. REV. 443, 448 (2006).

<sup>67</sup> *Id.*

<sup>68</sup> DRUG POL’Y ALL., *supra* note 46, at 16.

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

<sup>70</sup> *Id.*

and sticks' . . . of drug court.”<sup>71</sup> Drug courts are unable to successfully implement the competing models, which results in many drug court participants failing drug court altogether.<sup>72</sup>

### C. *The Trojan Horse – Federal and State Funding*

Federal funding is the primary reason drug courts do not admit violent offenders.<sup>73</sup> “Drug courts that receive federal discretionary grants are required to focus on people accused of nonviolent offenses and those without a violent record.”<sup>74</sup> Federal funding is tied to standards promulgated by the National Association of Drug Court Professionals (NADCP) known as “key components.”<sup>75</sup> In addition to the NADCP standards, the ABA published its own standards to supplement the NADCP guidelines.<sup>76</sup>

In order for state drug courts to receive federal funding, Congress conditioned funding on adoption of the NADCP standards.<sup>77</sup> As recently as 2017, the federal government invested 40 million into drug courts annually.<sup>78</sup> In 2018, President Trump signed into law \$70 million for drug treatment courts.<sup>79</sup> However, significant drug court spending happens at the state level as well.<sup>80</sup> For example, New Jersey receives the highest amount of state funding for drug courts.<sup>81</sup> In 2006, New Jersey allocated \$21 million for drug courts, with the average annual cost for a drug participant totaling \$11,379.<sup>82</sup> In total, states spend \$138 million annually on drug courts.<sup>83</sup>

The amount of funding the federal government gives to drug courts results in drug courts cherry picking participants.<sup>84</sup> In other words, drug courts choose defendants “without prior or significant criminal records and with lesser addictions” because drug courts operate under the fear they

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<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> JUST. POL’Y INST., *supra* note 5, at 21.

<sup>74</sup> *Id.*

<sup>75</sup> Eric J. Miller, *Embracing Addiction: Drug Courts and the False Promise of Judicial Interventionism*, 65 OHIO ST. L.J. 1479, 1489–90 (2004).

<sup>76</sup> *Id.* at 1490.

<sup>77</sup> *Id.*

<sup>78</sup> FAIR & JUST PROSECUTION, RECONCILING DRUG COURTS, DECARCERATION, AND HARM REDUCTION 4 (2021), <https://fairandjustprosecution.org/wp-content/uploads/2021/02/FJP-Drug-Courts-Issue-Brief.pdf>.

<sup>79</sup> *Historic Funding for Treatment Courts*, NADCP, <https://www.nadcp.org/historic-funding-for-treatment-courts/>.

<sup>80</sup> JUST. POL’Y INST., *supra* note 5, at 22.

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

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 13.

<sup>84</sup> *Id.* at 21.

will be defunded if they do not show success.<sup>85</sup> A drug court judge in Denver, Colorado described federal funding and drug courts as the means to “provide the federal government with an attractive vehicle through which to interfere unduly with the traditional role of state and local governments in dealing with crime.”<sup>86</sup> Further, according to the Justice Policy Institute, “[o]nly 7% of people arrested for a drug offense who are at risk of substance abuse will qualify for drug court.”<sup>87</sup> Consequently, drug courts leave those individuals most in need of drug treatment without access to treatment.<sup>88</sup> Cherry picking also results in people of color being less likely to be admitted into drug court.<sup>89</sup> Even if admitted, people of color have an increased likelihood of being arrested, which can result in drug court termination.<sup>90</sup>

#### D. Drug Court Models Abroad

Beginning in early 2000s, several western countries implemented drug courts modeled after the United States.<sup>91</sup> This Section will compare Canada, England, and Australia to the United States.

##### 1. Canada

In Canada, Toronto implemented the first drug court in 1998.<sup>92</sup> As of 2010, six Canadian drug courts are in operation: Toronto (December 1998), Vancouver (December 2001), Edmonton (December 2005), Winnipeg (January 2006), Ottawa (March 2006), and Regina (October 2006).<sup>93</sup> The Toronto drug court uses a harm-reduction model, unlike the United States, which uses the abstinence model.<sup>94</sup> Under the harm-reduction model, a drug court participant’s use of illegal drugs will not result in a sanction, and a participant graduates from drug court “when he or she has achieved a positive lifestyle change.”<sup>95</sup>

The Canadian model follows the model used in the United States in several key respects.<sup>96</sup> Drug courts in Canada have pre-conviction and

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<sup>85</sup> *Id.*

<sup>86</sup> Morris B. Hoffman, Commentary, *The Drug Court Scandal*, 78 N.C.L. REV. 1437, 1528 (2000).

<sup>87</sup> JUST. POL’Y INST., *supra* note 5, at 21.

<sup>88</sup> *Id.*

<sup>89</sup> Davies, *supra* note 6.

<sup>90</sup> JUST. POL’Y INST., *supra* note 5, at 23.

<sup>91</sup> Duggal, *supra* note 42, at 171–72.

<sup>92</sup> Kimberly Y.W. Holst, *A Good Score?: Examining Twenty Years of Drug Courts in the United States and Abroad*, 45 VAL. U.L. REV. 73, 83 (2010).

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 83–84.

<sup>96</sup> *Id.* at 84.

post-conviction tracks.<sup>97</sup> However, unlike drug courts in the United States that do not generally admit violent offenders,<sup>98</sup> Canadian drug courts reserve the post-conviction track for “[o]ffenders with a more serious criminal record.”<sup>99</sup> Similar to the United States, drug court participants are required to make scheduled court appearances, and judges reserve the right to impose sanctions.<sup>100</sup> Sanctions range from verbal admonishment to expulsion, and rewards may include a reduced “number of required court appearances.”<sup>101</sup> With regards to treatment, Canadian drug courts, like those in the United States, require participants to enroll in drug treatment programs and subject participants to random drug tests.<sup>102</sup>

## 2. England

In England, the criminal justice system implemented drug courts in 1997.<sup>103</sup> Whereas the United States follows a collaborative model,<sup>104</sup> English drug courts use a top-down structure.<sup>105</sup> As a result, “drug treatment magistrates do not impose short, sharp carceral sentences,” and drug court participants are not required to schedule regular court attendances.<sup>106</sup> Similar to Canada and unlike the United States, England follows a harm-reduction model for heroin users.<sup>107</sup> Perhaps the most striking difference compared to the United States is that medical doctors are actively involved with drug courts in England.<sup>108</sup>

## 3. Australia

Similar to Canada and England, Australia implemented its first drug court in the late 1990s.<sup>109</sup> In place of pre-conviction and post-conviction tracks, Australia uses drug courts and court diversion programs.<sup>110</sup> Drug courts admit more serious offenders, with participants required to submit to longer time frames.<sup>111</sup> On the other hand, “[c]ourt diversion programs tend to deal with less serious offenses, and there is often less or no

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<sup>97</sup> *Id.*

<sup>98</sup> DRUG POL’Y ALL., *supra* note 46, at 4.

<sup>99</sup> Holst, *supra* note 91, at 84.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 85.

<sup>102</sup> *Id.* at 84.

<sup>103</sup> *Id.* at 87.

<sup>104</sup> Gross, *supra* note 2, at 166.

<sup>105</sup> Duggal, *supra* note 42, at 174.

<sup>106</sup> *Id.*

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

<sup>108</sup> *Id.*

<sup>109</sup> Holst, *supra* note 91, at 85.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

involvement by the court in the management of the offender's treatment."<sup>112</sup> Australian drug courts use a harm reduction model, but like the United States, state drug courts rely on federal funding.<sup>113</sup> The harm reduction model in Australia involves several different stages including a withdrawal management program and relapse prevention.<sup>114</sup>

Altogether, Australian drug courts follow a holistic view of treatment that focuses on rehabilitation.<sup>115</sup> In line with harm-reduction, Australian drug courts may take additional preventive measures such as restricted bail, referral to other agencies, temporary housing for up to fifteen months, and income support.<sup>116</sup> The preventive measures Australian drug courts provide for the benefit of drug court participants<sup>117</sup> is a model the United States should adopt as housing and income are obstacles American drug court participants face in successfully completing drug court.<sup>118</sup> However, the biggest issues facing drug courts in the United States are those related to incarceration: namely, jurisdictions that have implemented drug courts see an increased number of drug-related arrests<sup>119</sup> and longer jail sentences than if the drug court participant had been sentenced for the initial charge.<sup>120</sup>

### III. DRUG COURTS – HOW THEY MAY CONTRIBUTE TO INCARCERATION

This Part examines how drug courts may contribute to incarceration, namely that drug courts present the risk of (1) an increased number of drug-related arrests in those jurisdictions that have implemented them<sup>121</sup> and (2) longer jail sentences correlated with the implementation of drug courts as compared to the sentence of the initial charge.<sup>122</sup>

Currently, the United States is experiencing mass incarceration.<sup>123</sup> Not only is “[t]he United States . . . the world’s leader in incarceration,” there is a 500% increase in the United States prison population since 1980.<sup>124</sup> In

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

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

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

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

<sup>117</sup> *Id.*

<sup>118</sup> JUST. POL’Y INST., *supra* note 5, at 3.

<sup>119</sup> Werkmeister, *supra* note 8.

<sup>120</sup> Szalavitz, *supra* note 9.

<sup>121</sup> Werkmeister, *supra* note 8.

<sup>122</sup> Szalavitz, *supra* note 9.

<sup>123</sup> *Criminal Justice Facts*, SENT’G PROJECT, <https://www.sentencingproject.org/criminal-justice-facts/> (last visited Aug. 31, 2023).

<sup>124</sup> *Id.*

1980, federal and state prisons in the United States held 315,974 prisoners, and the prison population totaled 1,380,427 in 2019.<sup>125</sup> The United States incarcerates 639 people per 100,000, with El Salvador being the next highest at 572 people per 100,000.<sup>126</sup> Not only did the War on Drugs contribute to the dramatic growth in incarceration, so too did sentencing policies.<sup>127</sup>

[H]arsh sentencing laws such as mandatory minimums keep many people convicted of drug offenses in prison for longer periods of time: in 1986, people released after serving time for a federal drug offense had spent an average of 22 months in prison. By 2004, people convicted on federal drug offenses were expected to serve almost three times that length: 62 months in prison.<sup>128</sup>

The growth in incarceration had the most notable impact on drug-related offenses, with “the number of Americans incarcerated for drug offenses [rising] from 40,900 in 1980 to 430,926 in 2019.”<sup>129</sup> State prisons incarcerated 19,000 people in 1980 for drug-related offenses, as compared to 176,300 in 2019.<sup>130</sup> In federal prisons, “people incarcerated on a drug conviction make up nearly half the prison population.”<sup>131</sup> Most prisoners incarcerated for drug-related offenses are not drug dealers nor do they have a history of committing violent offenses.<sup>132</sup> Additionally, prison sentences are much longer as compared to years past.<sup>133</sup> In 1984, 34,000 prisoners served life sentences compared with 203,865 in 2020.<sup>134</sup> While the United States first implemented drug courts as a way to alleviate overcrowding and rehabilitate drug users,<sup>135</sup> drug courts present the risk of an increased number of drug-related arrests<sup>136</sup> and long jail sentences<sup>137</sup> rather than act as true diversion.

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<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

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

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> Gross, *supra* note 2, at 165.

<sup>136</sup> Werkmeister, *supra* note 8.

<sup>137</sup> Szalavitz, *supra* note 9.

A. *Drug Courts Present the Risk of an Increased Number of Drug-related Arrests in Those Jurisdictions that Have Implemented Them*

Drug courts are touted as a “facilitator of treatment and alternative to incarceration.”<sup>138</sup> However, researchers suggest that drug courts may contribute to arrests rather than act as diversion programs.<sup>139</sup> David R. Lilley, a Criminal Justice Professor at the University of Toledo, tested this hypothesis by examining the number of arrests in those jurisdictions in the United States that have implemented drug courts versus those jurisdictions that have not.<sup>140</sup> Lilley posited three primary reasons as to why drug courts may present the risk of an increased number of drug-related arrests, specifically that a jurisdiction’s implementation of a drug court: (1) leads law enforcement to pursue arrests because “now there is something that can be done” about drug-related offenses, (2) advocates for therapeutic jurisprudence where law enforcement view drug-related arrests as chivalrous, and (3) becomes viewed “as a mechanism to improve the protection of families, friends, and neighbors of drug users,” thus encouraging arrests.<sup>141</sup>

By 2002, “nearly all cities [in the United States] with populations of 100,000 or more had at least one operational drug court.”<sup>142</sup> After 2002, the number of drug courts continued to increase nationwide, thus making it difficult for researchers to compare jurisdictions with drug courts against those without drug courts.<sup>143</sup> As a result, Lilley’s study focused on more than 8,000 city and county jurisdictions from 1990 through 2002.<sup>144</sup> Lilley found that drug-related arrests were not only higher in jurisdictions with drug courts compared to those without, but also that “[t]hroughout the remainder of the 1990s, arrests among drug court jurisdictions rapidly increased.”<sup>145</sup> Lilley further concluded that:

[D]rug court implementation was associated with a 12 to 15% increase in drug use and possession arrests after controlling for changes in police force size, enforcement of minor nondrug offenses and other nationwide trends. During the decade of the 1990s, a typical jurisdiction of

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<sup>138</sup> David R. Lilley, *Did Drug Courts Lead to Increased Arrest and Punishment on Minor Drug Offenses?*, 34 JUST. Q. 674, 675 (2017).

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

<sup>140</sup> *Id.* at 674–75.

<sup>141</sup> *Id.* at 676–77.

<sup>142</sup> *Id.* at 680.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* at 681.

<sup>145</sup> *Id.* at 684.

size 100,000 experienced an average increase of 46 misdemeanor drug arrests (an annual increase from 290 to 336) during each year that the drug court was active.<sup>146</sup>

This phenomena is also known as net-widening.<sup>147</sup> “Net-widening refers to ‘an expansion in the number of offenders arrested and charged after the implementation of [a drug court] because well-meaning police and prosecutors now believe there to be something worthwhile that can happen to offenders once they are in the system.’”<sup>148</sup> The increase in drug court participants corroborates that drug courts present the risk of an increased number of arrests for drug-related offenses.<sup>149</sup> Between 1996 and 2008, the number of drug court participants nationwide rose from 26,485 to 116,300.<sup>150</sup> However, net-widening is more pronounced in certain jurisdictions.<sup>151</sup>

### 1. Texas and Denver

There are specific jurisdictions that experienced an increased number of drug-related arrests after implementing drug courts.<sup>152</sup> For example, in Texas, drug arrests increased by more than 50% in the five years after the state’s largest counties implemented drug courts.<sup>153</sup> The increase in arrests is most pronounced in Denver.<sup>154</sup> Following the implementation of drug courts, the criminal justice system in Denver, Colorado experienced “a massive influx of drug offenders.”<sup>155</sup> Denver courts sentenced 265 defendants for drug-related offenses in the year before Denver implemented drug courts.<sup>156</sup> “In the first year after Denver began its drug court program, 434 offenders received prison sentences.”<sup>157</sup> Two years later, Denver courts sentenced 625 offenders, an almost 200 person increase.<sup>158</sup>

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<sup>146</sup> *Id.* at 691.

<sup>147</sup> *Drug Courts Can Lead to ‘Net-Widening’ and Increased Arrests*, DRUG POL’Y FACTS, <https://www.drugpolicyfacts.org/node/1964>.

<sup>148</sup> *Id.*

<sup>149</sup> Duggal, *supra* note 42, at 155.

<sup>150</sup> *Id.*

<sup>151</sup> Werkmeister, *supra* note 8; Gross, *supra* note 2, at 167–68.

<sup>152</sup> Werkmeister, *supra* note 8; Gross, *supra* note 2, at 167–68.

<sup>153</sup> Werkmeister, *supra* note 8.

<sup>154</sup> Gross, *supra* note 2, at 167–68.

<sup>155</sup> *Id.* at 167.

<sup>156</sup> *Id.* at 168.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*



However, drug courts affected the number of drug filings in Denver as well.<sup>159</sup> As Judge Morris B. Hoffman explained, “[t]here were 1047 drug cases filed in the Denver District Court in 1993, the last full year before implementation of the drug court. In 1995, the first full year of the drug court, that number jumped to 2,661. The following year, drug filings increased to 3,017.”<sup>160</sup> In 1993, the year before Denver implemented drug courts, “drug filings represented 28.6% of all criminal filings. In 1995, the first full year after the drug court, that percentage skyrocketed to 51.5% and has remained at that high level.”<sup>161</sup> Furthermore, the increase in offenders and filings translates to a strain on courts.<sup>162</sup> In Denver, drug courts process an average of 91 defendants daily, compared to less than 15 defendants in felony courtrooms.<sup>163</sup> As a result, there is a high overturn of drug court judges in Denver, to the extent that no drug court judge has served a term of longer than a year.<sup>164</sup> However, drug courts may affect incarceration more than a potential increased number of drug-related arrests.<sup>165</sup> Drug courts also present the risk of longer jail sentences as compared to the sentence of the initial charge.<sup>166</sup>

*B. Drug Courts Present the Risk of Participants Serving Longer Sentences Than Originally Faced for the Initial Charge*

Drug court judges are entitled to issue sanctions to drug court participants for noncompliance with drug court standards.<sup>167</sup> Generally, judges issue a verbal reprimand as a first sanction, but with repeated violations, many judges resort to jail time.<sup>168</sup> The jail stays imposed for noncompliance “typically range from a few days to a couple of weeks, increasing with the severity of the violation.”<sup>169</sup> For example, in Dade County, Florida, drug court judges often sentence drug court participants to jail stays of up to two weeks for noncompliance.<sup>170</sup> Furthermore, a national survey conducted in 1997 of 97 drug courts found that over 50%

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<sup>159</sup> Hoffman, *supra* note 85, at 1502.

<sup>160</sup> *Id.* (footnotes omitted).

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

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> *Id.* at 1504.

<sup>165</sup> Werkmeister, *supra* note 8.

<sup>166</sup> Szalavitz, *supra* note 9.

<sup>167</sup> JUST. POL’Y INST., *supra* note 5, at 3.

<sup>168</sup> REGINALD FLUELLEN & JENNIFER TRONE, DO DRUG COURTS SAVE JAIL AND PRISON BEDS? 5 (2000), <https://biblioteca.cejamericas.org/bitstream/handle/2015/1799/IIB%2BDrug%2Bcourts.pdf?sequence=1&isAllowed=y>.

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

<sup>170</sup> *Id.*

of judges “punish relapse and other violations by ordering time in jail.”<sup>171</sup> In Oakland, California, the drug court sanctions participants with a jail stay of at least one week before reinstatement.<sup>172</sup>

Because drug court participants enter drug court for low-level offenses, sanctions may cause participants to “spend more time in jail than they would have if they’d received a traditional sentence.”<sup>173</sup> In one drug court in Santa Clara, California, participants spend an average of 51 days in jail, similar to an average of 55 days spent in jail served by participants in Baltimore, Maryland.<sup>174</sup> However, long jail sentences are not only tied to sanctions, but are also tied to a failure to “graduate” from drug court.<sup>175</sup> “Studies have found that people who ‘fail’ drug court programs receive sentences up to two to five times longer than conventionally sentenced defendants facing the same charges.”<sup>176</sup> At the extreme end of the spectrum, drug court participants “spent up to 10 years under drug court supervision, with years of that in prison . . . on charges that would otherwise have resulted in a few months in jail.”<sup>177</sup> Long jail sentences more heavily affect African American drug court participants.<sup>178</sup> Because “[African American drug court] participants have a significantly higher ‘failure’ rate in drug courts . . . [they] can face harsher sentences than if they had not participated in the drug court in the first place.”<sup>179</sup>

To compound on the problems with jail sanctions, drug court judges impose cookie-cutter sentences because they do not have the time to issue individualized sentences.<sup>180</sup> In this regard, Judge Hoffman, a district judge in the Second Judicial District of Colorado, compares drug court with traffic court:

In traffic court, we are forced by volume to look at easily measurable things like the defendant’s driving record and how fast he was going. In drug court, we are forced by volume to look at easily measurable things like the number of prior felonies and the quantity and type of drugs used. In both kinds of courts, we then mete out sentences generally based only on those few variables and generally falling into only a few categories and ranges.

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<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> JUST. POL’Y INST., *supra* note 5, at 16.

<sup>174</sup> *Id.* at 16–17.

<sup>175</sup> FAIR & JUST PROSECUTION, *supra* note 77, at 11.

<sup>176</sup> *Id.*

<sup>177</sup> Szalavitz, *supra* note 9.

<sup>178</sup> FAIR & JUST PROSECUTION, *supra* note 77, at 7.

<sup>179</sup> *Id.*

<sup>180</sup> Hoffman, *supra* note 85, at 1513–14.

The difference, of course, is that a defendant in traffic court faces modest penalties; a defendant in drug court faces a felony conviction and substantial incarceration.<sup>181</sup>

Drug courts are failing because they punish defendants for their inability to comply with standards enforced by judges lacking medical expertise, not for the underlying crimes.<sup>182</sup> Perhaps most alarming is the fact that drug courts have been using jail stays as sanctions for the past 15 years, but no studies have correlated jail sanctions with improved treatment outcomes.<sup>183</sup> In fact, incarceration interrupts treatment and translates to “a higher likelihood of re-arrest and a lower probability of program completion.”<sup>184</sup> While a drug court participant may face longer incarceration by failing drug court, failure also amounts to a conviction, which can have severe consequences.<sup>185</sup>

### 1. The Consequences of a Conviction

A drug-related conviction has lasting consequences.<sup>186</sup> Those offenders with a conviction are often discriminated against both in the workplace and in their ability to obtain housing.<sup>187</sup> Perhaps most importantly, a felony- or drug-related conviction adversely affects receipt of public benefits.<sup>188</sup> Under the Welfare Reform Act of 1996, a felony- or drug-related conviction results in a lifetime ban on welfare benefits.<sup>189</sup> A single drug-related conviction results in a temporary ban on federal student aid and three convictions result in a lifetime ban.<sup>190</sup>

Based on federal and state regulations, state housing authorities may exclude those with a drug history from public housing.<sup>191</sup> Most states restrict voting rights for convicted felons, including drug felons, with Florida being the most restrictive in imposing a lifetime voting ban on convicted felons.<sup>192</sup> Drug possession even affects drivers’ licenses.<sup>193</sup> “Fourteen states, including Florida and New York, automatically suspend

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<sup>181</sup> *Id.* at 1514.

<sup>182</sup> JUST. POL’Y INST., *supra* note 5, at 17.

<sup>183</sup> *Id.*

<sup>184</sup> DRUG POL’Y ALL., *supra* note 46, at 12.

<sup>185</sup> *Id.* at 19.

<sup>186</sup> JUST. POL’Y INST., *supra* note 5, at 24.

<sup>187</sup> *Id.*

<sup>188</sup> MØLLMANN, *supra* note 62, at 18.

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

drivers' licenses for at least six months for drug possession. Florida requires a mandatory suspension of one year."<sup>194</sup>

## 2. Due Process Concerns

Drug courts also implicate due process concerns for drug court participants.<sup>195</sup> In order to enroll in a post-conviction track drug court, some courts require participants to waive rights such as the right to a speedy trial or preliminary hearing.<sup>196</sup> The role of defense counsel is weakened because there is often insufficient grounds on which to challenge the validity of drug court sanctions.<sup>197</sup> This is further exacerbated by the collaborative nature of drug courts where "the team approach adopted by all players in [drug court] impairs a lawyer's ability to be a vigorous advocate for her client."<sup>198</sup> Defense counsel may be forced to abandon an adversarial approach.<sup>199</sup>

In a non-adversarial specialty court, the professional role and duties of a defense attorney are diminished or even extinguished. Clients and observers may not even understand why the defense attorney is present, as he does not appear to have a functional representational role. Attorney-client confidentiality may be breached by the interactions with third parties. The retreat from adversarialism may also affect the attorney's duties with respect to conflicts of interest, competence and preparation, and communication with the defendant.<sup>200</sup>

One critic argued that defense counsel may act unethically if he or she focuses solely on conflict resolution while ignoring the underlying facts of a drug court participant's case.<sup>201</sup> There is further conflict with the judge in a post-conviction track drug court.<sup>202</sup> In the criminal context, judges have a duty "to ensure the [defendant's] plea is a voluntary and informed choice."<sup>203</sup> In focusing solely on treatment, such an obligation may be

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<sup>194</sup> *Id.*

<sup>195</sup> Duggal, *supra* note 42, at 149–54.

<sup>196</sup> *Id.* at 149.

<sup>197</sup> *Id.* at 150.

<sup>198</sup> *Id.* at 151.

<sup>199</sup> *Id.*

<sup>200</sup> Tamar M. Meekins, *Risky Business: Criminal Specialty Courts and the Ethical Obligations of the Zealous Criminal Defender*, 12 BERKELEY J. CRIM. L. 76, 92 (2007).

<sup>201</sup> Duggal, *supra* note 42, at 152.

<sup>202</sup> *Id.* at 152–53.

<sup>203</sup> *Id.* at 152.

ignored in drug court, resulting in “miscarriages of justice.”<sup>204</sup> Ultimately, drug courts present the risk of an increased number of drug-related arrests<sup>205</sup> and long jail sentences,<sup>206</sup> which shows that reform is needed to bring drug courts in line with their original purpose: true diversion.

#### IV. PROPOSED SOLUTIONS TO REMEDY THE RISK OF AN INCREASED NUMBER OF DRUG-RELATED ARRESTS AND LONG JAIL SENTENCES

This Part will propose four solutions to combat the risk of an increased number of drug-related arrests<sup>207</sup> and long jail sentences<sup>208</sup> resulting from drug court implementation, namely (1) the decriminalization of drug offenses, (2) providing greater funding to outside treatment programs, (3) removing incarceration as a sanction, and (4) permitting violent offenders to enter drug court programs.

##### A. *The Decriminalization of Drug Offenses*

One solution to the prevalence of drug courts<sup>209</sup> and the risk of an increased number of drug-related arrests<sup>210</sup> and long jail sentences<sup>211</sup> is the decriminalization of drug offenses, most notably possession of a controlled substance (marijuana). The recreational use of marijuana is legalized in only 18 states.<sup>212</sup> At the federal level, possession of marijuana is still a crime.<sup>213</sup> The increase in drug arrests during the 1990s resulted primarily from marijuana possession, with marijuana possession responsible for 79% of the growth.<sup>214</sup>

Decriminalizing marijuana is also important because drug courts have the most impact on young offenders.<sup>215</sup> Young marijuana arrestees are introduced to harder drugs through jail or drug court treatment.<sup>216</sup> In fact, a New York study showed that “drug court increased the risk of re-arrest

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<sup>204</sup> *Id.* at 153.

<sup>205</sup> Werkmeister, *supra* note 8.

<sup>206</sup> Szalavitz, *supra* note 9.

<sup>207</sup> Werkmeister, *supra* note 8.

<sup>208</sup> Szalavitz, *supra* note 9.

<sup>209</sup> Davies, *supra* note 6.

<sup>210</sup> Werkmeister, *supra* note 8.

<sup>211</sup> Szalavitz, *supra* note 9.

<sup>212</sup> Sarah Rense, *Here Are All the States that Have Legalized Weed in the U.S.*, ESQUIRE (July 2, 2021), <https://www.esquire.com/lifestyle/a21719186/all-states-that-legalized-weed-in-us/>.

<sup>213</sup> *Id.*

<sup>214</sup> DRUG POL’Y ALL., *supra* note 46, at 6.

<sup>215</sup> Szalavitz, *supra* note 9.

<sup>216</sup> *Id.*

by 10 percent for those without any prior arrest history.”<sup>217</sup> The decriminalization of drug offenses will result in fewer drug-related charges and arrests overall and reduce the public need for drug courts. However, in lieu of decriminalization, states may also reduce the penalties associated with drug-related offenses.<sup>218</sup> “In 2010, Colorado reduced penalties for some low-level possession offenses . . . [and] Indiana’s Criminal Code Evaluation Commission advised the state to shorten sentences for drug possession and some low-level sales offenses.”<sup>219</sup> Additionally, the federal government “reduced disproportionate sentencing for crack cocaine, and repealed a mandatory minimum drug sentence for the first time since the 1970s.”<sup>220</sup>

### B. *Provide Greater Funding to Outside Treatment Programs*

Another solution is greater funding for treatment programs outside of drug courts. Currently, most jurisdictions have long waitlists for drug treatment programs.<sup>221</sup> Drug court participants are often pushed to the front of these waitlists,<sup>222</sup> thus incentivizing those in need of treatment to commit crimes. In the United States, there is not enough treatment capacity to serve the many people who need treatment.<sup>223</sup> From 1997 through 2007, overall treatment capacity “fell from 65.1 percent . . . to 62.5 percent.”<sup>224</sup>

Outside of long wait times, 37% of people who need treatment cannot afford it, while 15% do not know how to access funding.<sup>225</sup> Greater funding in outside treatment programs will enable the outside programs to enroll a greater number of people. Such programs include “reduction service providers for training in safer use practices.”<sup>226</sup> As one report recommends, “[p]roviding treatment in the community before a person becomes involved in the criminal justice system can be an effective way to defeat a person before it starts. Community-based treatment is truly an investment in public safety, one that will reduce incarceration and its economic and social costs.”<sup>227</sup>

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<sup>217</sup> *Id.*

<sup>218</sup> DRUG POL’Y ALL., *supra* note 46, at 19.

<sup>219</sup> *Id.*

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

<sup>221</sup> Kerry Nenn, *Treatment Waiting Lists Can Be a Death Sentence*, REHABS (Dec. 28, 2021), <https://rehabs.com/blog/treatment-waiting-lists-can-be-a-death-sentence/>.

<sup>222</sup> MØLLMANN, *supra* note 62, at 15.

<sup>223</sup> DRUG POL’Y ALL., *supra* note 46, at 6.

<sup>224</sup> *Id.*

<sup>225</sup> *Id.* at 7.

<sup>226</sup> FAIR & JUST PROSECUTION, *supra* note 77, at 12.

<sup>227</sup> JUST. POL’Y INST., *supra* note 5, at 26.

### C. *Remove Incarceration as a Drug Court Sanction*

Removing incarceration as a drug court sanction is a solution to improve drug courts. Other countries, such as Canada, do not impose incarceration as a drug court sanction,<sup>228</sup> and the United States should follow suit. Research shows that drug court sanctions tied to incarceration have no effect on program retention and completion.<sup>229</sup> A study that focused on two drug courts in Maricopa County, Arizona examined drug court participants enrolled in a post-conviction track where they received a suspended 120-day jail sentence compared with participants enrolled in a track where they received probation with no threat of incarceration for noncompliance.<sup>230</sup> The study found that:

[T]he threat of jail on program retention and completion found no support for the widely held view that the threat of incarceration is needed to motivate offenders to participate in the drug court program. There was no observed difference . . . in (a) the average length of time between program entry and program termination, (b) the proportion of entering probationers who remained in the program for 90 days or for 180 days, or (c) the proportion of entering probationers who successfully completed the program.<sup>231</sup>

Jail sanctions can also affect defendant well-being in that a defendant's motivation "can be undermined if they feel they are sanctioned unfairly."<sup>232</sup> Drug court jail stays are "associated with a higher likelihood of re-arrest and a lower probability of program completion."<sup>233</sup> With no tangible benefit to jail sanctions, it makes sense little sense for United States drug courts to continue using them moving forward.

### D. *Eliminate Federal Funding*

Eliminating federal funding is another solution to curb the risk of an increased number of drug-related arrests<sup>234</sup> and long jail sentences<sup>235</sup>

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<sup>228</sup> Holst, *supra* note 91, at 84.

<sup>229</sup> John R. Hepburn & Angela N. Harvey, *The Effect of the Threat of Legal Sanction on Program Retention and Completion: Is That Why They Stay in Drug Court?*, 53 CRIME & DELINQ. 255, 271 (2007).

<sup>230</sup> *Id.* at 260.

<sup>231</sup> *Id.* at 271.

<sup>232</sup> DRUG POL'Y ALL., *supra* note 46, at 12.

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

<sup>234</sup> Werkmeister, *supra* note 8.

<sup>235</sup> Szalavitz, *supra* note 9.

resulting from drug court implementation. Federal funding requires that those defendants admitted to drug court be nonviolent offenders.<sup>236</sup> One study showed that “one third of participants in three misdemeanor drug court programs might have had relatively minimal drug use problems,”<sup>237</sup> implying that violent offenders are often the individuals most in need of drug treatment.

If drug courts focus on those defendants who otherwise would have gone to prison, drug courts can act as true diversion programs. Robert Russell, founder of the drug court in Buffalo, NY, “believes . . . that drug courts can work effectively with ‘high-risk’ populations, and that practitioners will realize that if drug courts accept clients who have a longer criminal history and greater addiction problems, it will provide the best ‘bang for your buck.’”<sup>238</sup> As Judge Hoffman explained, eliminating federal funding will also help states maintain separation and administer drug courts as they see fit, without the intrusion of the federal government.<sup>239</sup>

## V. CONCLUSION

In theory, drug courts serve as an alternative to incarceration, but drug court implementation presents the risk of an increased number of drug-related arrests<sup>240</sup> and longer jail sentences for repeated violations.<sup>241</sup> Several solutions are available to combat these problems including (1) the decriminalization of drug offenses, (2) providing greater funding to outside treatment programs, (3) removing incarceration as a sanction, and (4) permitting violent offenders to enter drug court programs. Drug courts should be reassessed at both the state and federal level, and the proposed solutions provide meaningful ways to address the risk of an increased number of drug-related arrests<sup>242</sup> and long jail sentences<sup>243</sup> resulting from drug court implementation.

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<sup>236</sup> JUST. POL’Y INST., *supra* note 5, at 21.

<sup>237</sup> David DeMatteo et al., *Outcomes Trajectories in Drug Court: Do All Participants Have Drug Problems?*, 36 CRIM. JUST. & BEHAV. 354, 363 (2009).

<sup>238</sup> Gross, *supra* note 2, at 171–72.

<sup>239</sup> Hoffman, *supra* note 85, at 1440.

<sup>240</sup> Werkmeister, *supra* note 8.

<sup>241</sup> Szalavitz, *supra* note 9.

<sup>242</sup> Werkmeister, *supra* note 8.

<sup>243</sup> Szalavitz, *supra* note 9.