

**REVOLUTIONIZING FRACTURED DRUG
TREATMENT COURTS:
AN ANALYSIS AND CRITIQUE OF LEAD AND CARA**

Jordan B. Charnetsky[†]

CONTENTS

INTRODUCTION	456
I. THE HISTORY OF DRUG TREATMENT COURTS	459
A. <i>Background on the “War on Drugs” and the First Drug Courts</i>	459
B. <i>Purpose of Drug Courts</i>	464
C. <i>Failure of Drug Courts</i>	464
1. <i>Certain Aspects of Drug Courts May Be Unconstitutional</i>	465
2. <i>Drug Courts Are Not Designed to Treat Addicts</i> ..	466
3. <i>Drug Courts Target the Wrong Population</i>	467
4. <i>Sentences For “Failures” Are More Severe</i>	467
5. <i>Participants Are Punished For “Failing,” Resulting in Criminal Records</i>	468
II. FAILING DRUG COURTS CURED BY LAW ENFORCEMENT	
ASSISTED DIVERSION	469
A. <i>New Alternative: Law Enforcement Assisted Diversion</i>	470
B. <i>LEAD’s Impact</i>	471
C. <i>How LEAD Fixes Drug Court’s Failures</i>	473
1. <i>Decrease in Participant Recidivism</i>	473
2. <i>Diverting Prearrest Prevents Arrest and Criminal Records</i>	474
3. <i>Diverting Prearrest Avoids Constitutional Issues</i>	474
4. <i>Police Filter Participants Helping to Ensure Addict Participation</i>	475
III. IMPLICATIONS OF THE COMPREHENSIVE ADDICTION AND	

[†] J.D. Candidate, Syracuse University College of Law, Class of 2018; B.A. Psychology and Economics, State University of New York at Binghamton 2015. I would like to thank my Note Advisor, Professor Lauryn P. Gouldin, for her insights and guidance. I would also like to thank my wonderful fiancée, Heather Connors, for her title suggestions and endless support throughout law school. In addition, thank you to the following members of the *Syracuse Law Review* for their amazing work in preparing this Note for publication: Brianne Szopinski, S. Alexander Berlucchi, Robert P. Carpenter, Steven M. Yurkonis, Emily Keable, Darian Niforatos, and the Editorial Staff members.

RECOVERY ACT ON LEAD PROGRAM CREATION AND PARTICIPATION.....	476
A. <i>Current State Eligibility Requirements</i>	477
B. <i>“Substance Abuse Disorder” Provision</i>	479
C. <i>“Comes Into Contact” Provision</i>	480
IV. WILL CARA AND LEAD PROGRAMS DO ENOUGH?.....	480
CONCLUSION.....	482

INTRODUCTION

Marah “The Rocket” Williams was a born athlete whose childhood was full of privileges: ballet lessons, piano classes, a close-knit family, and an excellent school district.¹ At the age of thirteen, Marah began self-medicating with various legal and illegal drugs.² She began sneaking out of the house and experimenting with alcohol and marijuana.³ As a junior in high school, Marah was caught cooking heroin in a bathroom with her friend.⁴ Marah attended multiple drug rehabilitation programs, after which she stayed clean for a year and a half.⁵ Six months later, Marah’s parents found her dead on their bathroom floor.⁶ She had overdosed on heroin.⁷

Tens of thousands of families each year from all racial and socioeconomic backgrounds suffer the loss of a loved one due to overdose.⁸ Drugs are not biased; they can find their way into the lives of people with a predisposition for addiction or plague the lives of anyone so unfortunate as to fall into their deadly grasp.⁹ Drug addiction is particularly prevalent in communities that have fewer prevention and treatment resources.¹⁰

1. *Frontline: Chasing Heroin* (PBS television broadcast Feb. 23, 2016), <http://www.pbs.org/wgbh/frontline/film/chasing-heroin/>.

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Frontline: Chasing Heroin*, *supra* note 1.

7. *Id.*

8. In 2014, over 47,000 drug overdose deaths occurred in the United States. Rose A. Rudd et al., *Increases in Drug and Opioid Overdose Deaths—United States, 2000–2014*, 64 *MORBIDITY & MORTALITY WKLY. REP.* 1378, 1378, 1380 tbl. (2016), <https://www.cdc.gov/mmwr/preview/mmwrhtml/mm6450a3.htm>.

9. Athena Sher, *Why You Should Care About the Staten Island Drug Epidemic*, *ODYSSEY* (June 13, 2016), <https://www.theodysseyonline.com/why-you-should-care-about-the-staten-island-drug-epidemic>.

10. Many factors affect the likelihood of any one person becoming addicted to drugs, but

2018]

Drug Treatment Courts

457

“Drug offenses constitute the most prevalent ground for arrest and are a major basis of imprisonment in the United States.”¹¹ Many of the people imprisoned on drug charges suffer from substance abuse disorders and need specialized treatment—not simply imprisonment—to be rehabilitated.¹² Without proper treatment, these addicts “frequently cycle through the criminal justice system in what is sometimes referred to as a ‘revolving door.’”¹³ Many times addicts do not have a chance to experience the revolving door as, in 2014, there were over 47,000 drug overdose deaths in the United States alone.¹⁴

In 1989, criminal justice personnel in Miami-Dade County developed a solution to the “revolving door” phenomenon of addiction: drug treatment court.¹⁵ Drug treatment courts quickly became popular across the United States, with the goal of decreasing costs and burdens on the criminal justice system by attempting to keep addicts arrested on low-level drug crimes out of the criminal justice system, while at the same time providing these addicts with revolutionized treatment methods to target their underlying addictions.¹⁶

At first, drug treatment courts appeared to be effective in preventing addict recidivism, but those not convinced of the effectiveness of drug courts discovered these courts were not nearly as effective as their

some of the lack of resource-based factors that may lead to increased addiction rates include annual income, employment status, and homelessness. *Economic Status and Abuse*, DUAL DIAGNOSIS, <http://www.dualdiagnosis.org/drug-addiction/economic-status/> (last visited Nov. 28, 2017).

11. Mary Fan, *Street Diversion and Decarceration*, 50 AM. CRIM. L. REV. 165, 167 (2013); *2015 Crime in the United States*, FBI, tbl.29, <https://ucr.fbi.gov/crime-in-the-u.s/2015/crime-in-the-u.s.-2015/tables/table-29> (last visited Nov. 28, 2017).

12. JUSTICE POLICY INST., *ADDICTED TO COURTS: HOW A GROWING DEPENDENCE ON DRUG COURTS IMPACTS PEOPLE AND COMMUNITIES* 4 (2011), http://www.justicepolicy.org/uploads/justicepolicy/documents/addicted_to_courts_final.pdf. In 2004, over fifty percent of prisoners in the United States had a drug dependence or substance abuse problem. CHRISTOPHER J. MUMOLA & JENNIFER C. KARBERG, *DRUG USE DEPENDENCE, STATE AND FED. PRISONERS*, 2004, at 6 (2006), <https://www.bjs.gov/content/pub/pdf/dudsf04.pdf>.

13. SUSAN E. COLLINS ET AL., *LEAD PROGRAM EVALUATION: RECIDIVISM REPORT 4* (2015), http://static1.1.sqspcdn.com/static/f/1185392/26121870/1428513375150/LEAD_EVALUATION_4-7-15.pdf.

14. Rudd et al., *supra* note 8, at 1380 tbl. Additionally, in the United States in 2014, there were one and a half times more drug overdose deaths than deaths from motor vehicle crashes. *Id.* at 1379. This statistic is the result of a study conducted by the Centers for Disease Control and Prevention and has been cited in support of the Comprehensive Addiction and Recovery Act legislation. *Id.*; 162 Cong. Rec. S1189 (daily ed. Mar. 2, 2016).

15. *Drug Courts: A Pathway to Recovery*, MO. RECOVERY NETWORK, <http://morecovery.org/pdf/DrugCourtFactSheet.pdf> (last visited Nov. 28, 2017).

16. *See What are Drug Courts*, NAT’L ASS’N DRUG CT. PROFS., <http://www.nadcp.org/learn/what-are-drug-courts> (last visited Nov. 28, 2017).

creators claimed.¹⁷ Many drug courts eventually started experimenting with different models and methods of treatment.¹⁸ Finally, a promising new drug treatment program was created in Seattle in 2011 called Law Enforcement Assisted Diversion (LEAD).¹⁹ Thus far, LEAD has proven to be a viable and successful alternative to typical drug treatment courts.²⁰ The fundamentals of LEAD cure the major flaws of drug treatment courts that had previously prevented addicts from obtaining proper treatment.

Recently, the Obama administration enacted the Comprehensive Addiction and Recovery Act of 2016 (CARA or the “Act”), which will provide federal funding for LEAD programs across America.²¹ As passed by the Senate in 2016, CARA included two key provisions, which I will call the “substance abuse disorder” provision and the “comes into contact” provision.²² These provisions were ultimately excluded from the enacted version of CARA.²³

This Note provides a first impression examination of a novel model for drug treatment court and analyzes a recently passed federal statute that provides funding for drug treatment courts across the United States. Part I provides a brief history of drug treatment courts and an analysis of the flaws of drug treatment courts.

Part II suggests a cure to the flawed drug courts by implementing programs modeled after the successful Law Enforcement Assisted Diversion program. A brief explanation is included regarding the founding of LEAD and its program model. An analysis of the methods LEAD uses to address drug addicts is also included in this section.

Part III addresses the Comprehensive Addiction and Recovery Act of 2016, which is a vehicle for the implementation of LEAD programs nationwide. This section includes an analysis of the CARA legislation and an explanation of the impact the CARA legislation could have on eligibility of participants for federally funded LEAD programs if

17. See DRUG POLICY ALL., DRUG COURTS ARE NOT THE ANSWER: TOWARD A HEALTH-CENTERED APPROACH TO DRUG USE 3–4 (2011).

18. See generally Allegra M. McLeod, *Decarceration Courts: Possibilities and Perils of a Shifting Criminal Law*, 100 GEO. L.J. 1587 (2012) (discussing four of the major models of drug treatment courts: a therapeutic jurisprudence model, a judicial monitoring model, an order maintenance model, and a decarceration model).

19. Mary Velan, *What Makes Seattle's LEAD Program so Effective?*, EFFICIENTGOV (Jan. 13, 2016), <http://efficientgov.com/blog/2016/01/13/what-makes-seattles-lead-program-so-effective/>.

20. *Id.*

21. See Comprehensive Addiction and Recovery Act of 2016, Pub. L. No. 114-198, 130 Stat. 695 (codified in scattered sections of 21 and 42 U.S.C. (Supp. IV 2016)).

22. S. 524, 114th Cong. § 201(a)(2)(A)–(B) (2016).

23. See Comprehensive Addiction and Recovery Act of 2016, 130 Stat. 695, 711.

amended to include two key provisions originally included in CARA.

Based upon this discussion and analysis, Part V addresses the ultimate question: will LEAD, funded by CARA, do enough? That is, will LEAD properly cure the failures and flaws of drug treatment courts and better fulfill the ultimate objectives of drug treatment courts.

I. THE HISTORY OF DRUG TREATMENT COURTS

Drug treatment courts have existed in the United States for over twenty-five years.²⁴ They were viewed as the ultimate solution to the “war on drugs” and the opioid epidemic plaguing the United States.²⁵ Recently, studies have suggested that drug treatment courts may not be as effective as originally believed, necessitating novel drug treatment methods to provide more compelling solutions to drug addiction.²⁶

A. Background on the “War on Drugs” and the First Drug Courts

In 1971, President Nixon declared a “War on Drugs” and led the initial battle charge by dramatically increasing the size and presence of federal drug control agencies, while pushing new anti-drug policies through Congress such as mandatory sentencing and no-knock warrants.²⁷ President Reagan and his wife, Nancy, furthered Nixon’s anti-drug initiative by expanding the War on Drugs in the 1980s and 1990s through their highly-publicized “Just Say No” campaign.²⁸ When hysteria over the drug war reached an apex in the late 1980s, a new movement

24. JUSTICE POLICY INST., *supra* note 12, at 2.

25. See generally *The Emergence of Drug Courts in Response to the War on Drugs*, SUNRISE HOUSE, <http://sunrisehouse.com/research/emergence-drug-courts/> (last visited Nov. 28, 2017) (discussing the increase in drug courts as a response to the opioid epidemic plaguing the United States).

26. DRUG COURTS ARE NOT THE ANSWER, *supra* note 17, at 3–4; RYAN S. KING & JILL PASQUARELLA, DRUG COURTS: A REVIEW OF THE EVIDENCE 6 (Sent’g Project 2009), <http://www.sentencingproject.org/wp-content/uploads/2016/01/Drug-Courts-A-Review-of-the-Evidence.pdf>. Shortly after President Nixon’s declaration of the “War on Drugs,” Congress passed the Comprehensive Drug Abuse Prevention and Control Act, which serves as the legal basis for U.S. drug policy today. DAWN PALEY, DRUG WAR CAPITALISM 39 (2014) (citing DAVID COURTWRIGHT, DARK PARADISE: A HISTORY OF OPIATE ADDICTION IN AMERICA 163 (2001)); see GARY L. FISHER, RETHINKING OUR WAR ON DRUGS: CANDID TALK ABOUT CONTROVERSIAL ISSUES 54 (2006).

27. *A Brief History of the Drug War*, DRUG POL’Y ALLIANCE, <http://www.drugpolicy.org/issues/brief-history-drug-war> (last visited Nov. 28, 2017).

28. *Id.*; see MATHEA FALCO, WINNING THE DRUG WAR 23 (1989). Between 1980 and 1997, the number of people incarcerated for nonviolent drug law offenses increased from 50,000 to over 400,000. *A Brief History of the Drug War*, *supra* note 27. In addition to the growing drug-related incarceration rates, the proportion of Americans who saw drug abuse as the number one problem in America increased from around two to six percent in 1985 to sixty percent in 1989. *Id.*

emerged that provided a cutting edge approach to drug policy, led by the Drug Policy Foundation.²⁹

The Drug Policy Foundation, later renamed the Drug Policy Alliance, offered a novel attack route to battle the war on drugs: treatment rather than punishment.³⁰ The Drug Policy Alliance, along with other nongovernmental organizations and eventually the drug treatment courts, sought to help drug abusers—instead of simply incarcerating them—through alternative drug polices which included harm reduction, decriminalization, medicalization, and legalization.³¹ Harm reduction policies help drug users learn to help themselves and lead a safe and healthy lifestyle.³² Decriminalization involves selectively enforcing laws on the books so law enforcement can focus on more major drug offenses.³³ Medicalization policies allow “doctors to prescribe otherwise illegal drugs to patients under certain conditions,” or permits doctors to “maintain an addict.”³⁴ The most extreme policy approach, legalization,

29. *Id.* The Drug Policy Foundation, founded in 1987 by Arnold Trebach and Kevin Zeese, eventually merged with The Lindesmith Center, founded by Princeton professor Ethan Nadelmann in 1994, to create the Drug Policy Alliance in 2000. *Id.*; see Ronald Bayer, *The Great Drug Policy Debate—What Means This Thing Called Criminalization?*, in *DRUG WAR DEADLOCK: THE POLICY BATTLE CONTINUES* 179, 193 (Laura E. Huggins ed., 2005); Kathleen Staudt & Beto O’Rourke, *Challenging Foreign Policy from the Border*, in *A WAR THAT CAN’T BE WON: BINATIONAL PERSPECTIVES ON THE WAR ON DRUGS* 217, 222 (Tony Payan et al. eds., 2013); Sam Staley, *The Decriminalization Alternative*, in *DRUG WAR DEADLOCK: THE POLICY BATTLE CONTINUES* 157, 159 (Laura E. Huggins ed., 2005).

30. See Drug Policy All., *Reducing Harm: Treatment and Beyond*, in *DRUG WAR DEADLOCK: THE POLICY BATTLE CONTINUES* 214, 214–16 (Laura E. Higgins ed., 2005). In addition to the Drug Policy Foundation, another major organization devoted to the harm reduction policy in fighting the opioid epidemic was the Harm Reduction Coalition. FISHER, *supra* note 26, at 56. The Harm Reduction Coalition is “a nonprofit organization committed to improving the health and well-being of drug users and communities affected by drug-related harm.” *Id.* On the other hand, the federal government in the early years of the War on Drugs took a harsher approach, involving mass imprisonment for all levels of drug offense and significant increases in federal funding for law enforcement initiatives aimed at eradicating drugs from the United States. See generally DAN BAUM, *SMOKE AND MIRRORS: THE WAR ON DRUGS AND THE POLITICS OF FAILURE* (1996) (discussing the lengthy history of the federal government’s involvement in the War on Drugs).

31. See Drug Policy Found., *A Guide to the Drug-Legalization Movement*, NAT’L FAMILIES ACTION, <http://www.nationalfamilies.org/legalization/dpf.html> (last visited Nov. 28, 2017). The mission was to help drug users learn to help themselves, selectively enforce drug laws to target major drug offenders, allow doctors to prescribe certain types of illegal drugs to patients under certain conditions, and make certain drugs available to adults in a regulated market. *Id.*

32. *Id.* For example, needle exchange programs were implemented, access to which substantially lowered the risk of spreading deadly diseases like HIV/AIDS. *Id.*

33. *Id.*

34. Drug Policy Found., *supra* note 31. Prescriptions of otherwise illegal drugs, such as methadone, can have extremely positive benefits for opioid addicts. NAT’L INST. ON DRUG ABUSE, RESEARCH REPORT SERIES: HEROIN 6 (2014), <https://www.drugabuse.gov/>

makes the legalized drugs available to adults in a regulated market.³⁵ These policy approaches, along with experimentation on different combinations of policies, led to numerous models of drug treatment.³⁶

While different policy approaches have been advanced to attack substance abuse, the primary goals of the nongovernmental organizations and drug treatment courts were similar throughout.³⁷ The goals were to redirect funding from incarceration of nonviolent drug offenders to create more cost-effective and humane approaches to a harm reduction system of treating addicts and to eliminate or reduce mandatory minimum sentencing laws for drug-related offenses—for example, the “draconian” Rockefeller Drug laws³⁸—among many other goals.³⁹

In response to the growing resistance to harsh drug laws, as well as

publications/research-reports/heroin/what-are-treatments-heroin-addiction. *See generally* JEFFREY A. SINGER, MEDICALIZATION: A “THIRD WAY” TO DRUG POLICY (2001), <https://www.publicsafety.gc.ca/lbrt/archives/cnmcs-plcng/cn32282-eng.pdf> (discussing medicalization as a possible alternative approach to drug policy in the United States). The fight to legalize medicalization for the benefit of addicts has been a lengthy one, stemming from three Supreme Court decisions from 1919 to 1925. MATTHEW B. ROBINSON & RENEE G. SCHERLEN, LIES, DAMNED LIES, AND DRUG WAR STATISTICS: A CRITICAL ANALYSIS OF CLAIMS MADE BY THE OFFICE OF NATIONAL DRUG CONTROL POLICY 23 (2d. ed. 2014). The first decision was *Webb v. United States*, 249 U.S. 96 (1919), where the Supreme Court held that “it was illegal for doctors to dispense prescription drugs to alleviate the symptoms of narcotics withdrawal . . .” *Id.* The second decision was *United States v. Behrman*, 258 U.S. 280 (1922), holding that “a narcotic prescription for an addict was unlawful, even if the drugs were prescribed as part of a cure program.” *Id.* The third decision was *Linder v. United States*, 268 U.S. 5 (1925), where the Supreme Court reversed the previous two decisions by holding that “addicts . . . were entitled to medical care like other patients.” *Id.*

35. Drug Policy Found, *supra* note 31. An example of legalization are the laws in the United States regarding alcohol. *Id.*

36. *See id.*

37. The Drug Policy Alliance’s goal was and is simple yet complex at the same time; it simply wants to end the War on Drugs. ARTHUR BENAVIDE, HOW THE DRUG WAR RUINS AMERICAN LIVES 137 (2016). The Harm Reduction Coalition’s goal was to reduce “negative consequences associated with drug use.” *Principles of Harm Reduction*, HARM REDUCTION COALITION, <http://harmreduction.org/about-us/principles-of-harm-reduction/> (last visited Nov. 28, 2017). Drug courts were committed to reduce drug use, reduce crime, save money, and restore lives. *What Are Drug Courts*, *supra* note 16.

38. DRUG POLICY ALL., BACKGROUND ON NEW YORK’S DRACONIAN ROCKEFELLER DRUG LAWS 1, http://www.drugpolicy.org/sites/default/files/FactSheet_NY_Background%20on%20RDL%20Reforms.pdf (last visited Nov. 28, 2017). Additionally, the Anti-Drug Abuse Act was created by President Reagan that introduced mandatory minimum sentences for drug offenses. PAULA MALLEA, THE WAR ON DRUGS: A FAILED EXPERIMENT 34–35 (2014).

39. BACKGROUND ON NEW YORK’S DRACONIAN ROCKEFELLER DRUG LAWS, *supra* note 38, at 2; FISHER, *supra* note 26, at 56–57. Some of the other goals of the Drug Policy Alliance were to eliminate the criminal prohibition of drug use, create policies to decrease the use of invasive drug testing, expand the availability of methadone treatment options, and to institute state policies to support medical marijuana. Drug Policy Found., *supra* note 31. In 2009 and 2011, Mexico and border issues also entered the Drug Policy Alliance’s biennial program agenda. Staudt & O’Rourke, *supra* note 29, at 222.

the realization that the same individuals were cycling through the criminal justice system due to these laws, a group of criminal justice professionals determined the system was broken and that there had to be some better approach to dealing with drug abusers.⁴⁰ The solution this group developed combined “drug treatment with the structure and authority of a judge,” which they called drug treatment court.⁴¹

The first drug treatment court was started in Miami-Dade County, Florida, in 1989, “as a way to work with people whose criminal justice involvement was likely due to an addiction.”⁴² This original drug treatment court employed an approach aimed at the rehabilitation of addicts through “proactive court monitoring of offenders” during treatment.⁴³

The legislation for the Miami-Dade County drug treatment court allowed for any first offender or person previously convicted of only one previous nonviolent misdemeanor, who was charged with any misdemeanor or third-degree felony, to be eligible for drug court.⁴⁴ The offense was not required to be a drug offense in order for the person to meet the eligibility requirements.⁴⁵

To facilitate treatment, a drug court team was assembled, composed of a judge, prosecutor, defense counsel, treatment specialist, probation officer, and other law enforcement.⁴⁶ This team was active in the supervision of treatment and developed a series of sanctions and incentives to motivate addicts to pass random drug testing and ultimately maintain their sobriety.⁴⁷ The judge closely monitored participants through frequent court appearances with treatment, not punishment, as

40. *History: Justice Professionals Pursue a Vision*, NAT’L ASS’N DRUG CT. PROFS., <http://www.nadcp.org/learn/what-are-drug-courts/drug-court-history> (last visited Nov. 28, 2017).

41. *Id.*

42. JUSTICE POLICY INSTITUTE, *supra* note 12, at 2 (citing NAT’L INST. OF JUSTICE, DRUG COURTS: THE SECOND DECADE 1 (2006), <https://www.ncjrs.gov/pdffiles1/nij/211081.pdf>); MITCHELL B. MACKINEM & PAUL HIGGINS, DRUG COURT: CONSTRUCTING THE MORAL IDENTITY OF DRUG OFFENDERS 16 (2008) (“Other drug courts soon arose in Oakland, California; Broward County, Florida; Portland, Oregon; Maricopa County, Arizona; and Las Vegas, Nevada, among other places.”).

43. SUPREME COURT TASK FORCE ON TREATMENT BASED DRUG COURTS, REPORT ON FLORIDA’S DRUG COURTS 4 (2004), <https://www.flcourts.org/core/fileparse.php/260/urlt/taskforcereport.pdf>.

44. FLA. STAT. § 948.08(2) (2016).

45. *See id.*

46. SUPREME COURT TASK FORCE ON TREATMENT BASED DRUG COURTS, *supra* note 43, at 4.

47. *Id.*

2018]

Drug Treatment Courts

463

the eventual outcome.⁴⁸

When participants completed the program, the judge held the ultimate power in determining their fate.⁴⁹ The judge, with the recommendations of the drug court team, could require the participants to continue treatment, dismiss the charges if the participant had successfully completed treatment, or order that the charges be reverted to the normal channels of prosecution if it was apparent that continued treatment would not help the participant.⁵⁰

By the summer of 2015, there were 3,133 drug courts in operation in every state and territory in the United States, which service more than 120,000 defendants each year.⁵¹ Drug courts rapidly grew in popularity because they were believed to significantly reduce drug abuse and crime⁵² and were viewed as the cheapest method to address addicts in the criminal justice system.⁵³ Additionally, drug courts were increasingly popular with defendants because it was a way to expunge part of their criminal record.⁵⁴

48. *Id.*

49. FLA. STAT. § 948.08(6)(c) (2016).

50. *Id.*

51. *Find a Drug Court*, NAT'L DRUG CT. RESOURCE CTR., <http://ndcrc.org/map/> (last updated June 2017); see Maia Szalavitz, *How America Overdosed on Drug Courts*, PAC. STANDARD (May 18, 2015), <https://psmag.com/how-america-overdosed-on-drug-courts-a813ff745a6e#istkupusm>; *Drug Courts*, NAT'L INST. JUST. (Jan. 10, 2017), <https://www.nij.gov/topics/courts/drug-courts/Pages/welcome.aspx>. The National Association of Drug Court Professionals provides a map of the number and type of drug-related courts in each state in the United States. *U.S. Drug Court Map: Find a Drug Court in Your Community*, NAT'L ASS'N DRUG CT. PROFS. (Dec. 13, 2015), <http://www.nadcp.org/learn/find-drug-court>.

52. West Huddleston, *Drug Courts are the Most Sensible and Proven Alternative to Incarceration*, L.A. DAILY J. (Oct. 22, 2009), <http://www.nadcp.org/Drug%20Courts%20Are%20the%20Most%20Sensible%20and%20Proven%20Alternative%20to%20Incarceration>.

53. *Id.*

54. *See id.* Generally, the expungement of a criminal record occurs only in a few rare cases, including the successful completion of certain drug treatment courts. Paul Bergman, *Expunging or Sealing an Adult Criminal Record*, NOLO, <http://www.nolo.com/legal-encyclopedia/expungement-of-criminal-records-basics-32641.html> (last visited Nov. 28, 2017). In many states, criminal records can be sealed, but this does not provide for the complete deletion of the crime from the criminal record as in the expungement of records post-drug treatment court completion. *See Expungement and Criminal Records: State-Specific Information*, FINDLAW, http://files.findlaw.com/pdf/criminal/criminal.findlaw.com_expungement-and-criminal-records-state-specific-information.pdf (last visited Nov. 28, 2017) (providing a comprehensive list of state statutes on record expungement).

B. Purpose of Drug Courts

Drug treatment courts were designed around two initiatives. One was the health policy initiative, meant to “help participants recover from addiction and prevent future criminal activity.”⁵⁵ The other was the criminal justice initiative, aimed at diverting addicts away from incarceration and “reducing the burden and costs of repeatedly processing low-level, nonviolent offenders through the Nation’s courts, jails, and prisons.”⁵⁶

These initiatives were to be completed by strict adherence to the drug court model, consisting of the following key components: integration of alcohol and drug treatment within the justice system; a nonadversarial approach where both prosecution and defense counsel promote public safety while protecting participants’ inherent rights; early identification and placement of eligible participants; access to a continuum of treatment options; frequent alcohol and drug testing; response strategies to participants’ compliance or noncompliance with drug court rules; ongoing judicial interaction; constant monitoring and evaluation to measure achievement; and continuing education.⁵⁷ The central idea was that if these components were followed, the recidivism rate of low-level drug users would decrease leading to a subsequent decrease of the burden on the criminal justice system.

C. Failure of Drug Courts

Drug courts were a great idea on paper, but unfortunately have not been as effective as predicted. Across the country, “most drug courts have done a poor job of addressing participants’ health needs . . . and have not significantly reduced participants’ chances of incarceration.”⁵⁸ Drug courts have proven to be no more effective than other treatment methods

55. OFFICE OF NAT’L DRUG CONTROL POLICY, DRUG COURTS: A SMART APPROACH TO CRIMINAL JUSTICE (2011), https://obamawhitehouse.archives.gov/sites/default/files/ondcp/Fact_Sheets/drug_courts_fact_sheet_5-31-11.pdf.

56. *Id.* It is still up for debate as to whether drug courts actually save money for the criminal justice system. One study found that the annual cost of sending one person to prison was around \$22,650. JUSTICE POLICY INST., *supra* note 12, at 14. Meanwhile, the average cost per person for a year of drug court was around \$4,300. *Id.*

57. OFFICE OF NAT’L DRUG CONTROL POLICY, *supra* note 55; *see* FLA. STAT. § 397.334(4)(a)–(i) (2016).

58. DRUG COURTS ARE NOT THE ANSWER, *supra* note 17, at 3. *See generally* Josh Bowers, *Contraindicated Drug Courts*, 55 UCLA L. REV. 783 (2008) (discussing how drug courts lead to an increased likelihood of incarceration and longer prison sentences). Some studies show little to no impact from drug court participation. KING & PASQUARELLA, *supra* note 26, at 6. From the studies that do show a positive impact from drug court participation, “it can be difficult to specify which components of the program or the research design may be contributing to these results.” *Id.*

2018]

Drug Treatment Courts

465

and do not show the “best public safety outcomes of all justice-related treatment programs.”⁵⁹ The major shortcomings of drug courts are derived from the key components of the drug court model. The flaws include: drug courts are not properly designed to treat addicts; they target the wrong population; they may be unconstitutional; sentences for failures are more severe; and punishing participants for failure results in criminal records.

1. Certain Aspects of Drug Courts May Be Unconstitutional

The very foundations of drug treatment courts may be unconstitutional. Upon entry into a drug treatment court program, participants are usually required to enter a guilty plea and waive several of their constitutional rights.⁶⁰ Included in these rights are waivers of multiple types of hearings, waiver of the right to appeal, waiver of due process challenge, and waiver of jury trial, among many others.⁶¹ While rulings vary significantly from state to state, many courts have held that some of the waivers required upon entry into drug court are unconstitutional.⁶²

Some courts have determined that drug courts from the onset may be unconstitutional in that the drug court guilty pleas are invalid.⁶³ These courts determined that participants are denied their constitutional right to due process because the trial courts did not properly explain the consequences of having the case transferred to drug court, defense counsel did not know enough about drug court to properly advise the defendant on the particulars of participation, and the pleas were not knowingly, voluntarily, and intelligently made.⁶⁴

Another contested issue is the denial of due process when drug court participants waive their right to appeal upon entry into the program.⁶⁵ Courts have held that, where a defendant is advised of the rights he must

59. JUSTICE POLICY INST., *supra* note 12, at 9. “Sixty-two percent of people referred to treatment by the criminal justice system complete treatment or transfer to further treatment compared to sixty percent of people referred from other sources. People referred to treatment by the criminal justice system were more likely to end up incarcerated than people referred from other sources . . .” *Id.* at 6.

60. Fern L. Kletter, Annotation, *Due Process Afforded in Drug Court Proceedings*, 78 A.L.R. 6th *1, *2 (2016).

61. *See id.* at *2–*3.

62. *See generally id.* (discussing the different holdings of various state courts regarding the constitutionality of certain waivers upon entry into drug treatment court).

63. *See Smith v. State*, 840 So. 2d 404, 406 (Fla. Dist. Ct. App. 2003); *see also State v. Loye*, 670 N.W.2d 141, 148 (Iowa 2003).

64. *Smith*, 840 So. 2d at 406; *Loye*, 670 N.W.2d at 148.

65. *See Kletter, supra* note 60, at *26.

waive upon admission to the program, but the trial court fails to advise the defendant of the explicit rights he is waiving—i.e., the right to appeal, which includes the right to challenge the guilty plea—the defendant’s waiver is not knowingly, intelligently, and voluntarily made and thus violates his right to due process.⁶⁶

2. Drug Courts Are Not Designed to Treat Addicts

A major issue with the current drug treatment court model is that it is not designed to properly treat addicts. The World Health Organization specifies that drug dependence is a “chronic, relapsing condition.”⁶⁷ “Relapse is a normal [and necessary] part of [addicts’] efforts to cease drug use.”⁶⁸ Many times addicts need to undergo treatment more than once or try several different forms of treatment to successfully curb their addictions.⁶⁹ An addict must generally “hit rock bottom” before he or she can get better, thus making punishment for relapse inherently flawed.⁷⁰

Participants who fail treatment may be punished by more frequent drug tests, more frequent court appearances, short periods of incarceration, or dismissal from the program.⁷¹ Judges often impose incarceration as punishment for failing treatment, which negates “any benefit of diversion from prison for the original offense.”⁷² Additionally, the participants who “stand the best chance of succeeding in drug courts are those without a drug problem, while those struggling with compulsive drug use are more likely to end up incarcerated.”⁷³

66. See *Loye*, 670 N.W.2d at 151–53; see also *State v. Bellville*, 705 N.W.2d 506(T) *1, *2 (Iowa Ct. App. 2005) (No. 04-1634).

67. JOANNE CSETE & DENISE TOMASINI-JOSHI, DRUG COURTS: EQUIVOCAL EVIDENCE ON A POPULAR INTERVENTION 9 (Open Soc’y Founds. 2015) [hereinafter CSETE & TOMANSINI-JOSHI, EQUIVOCAL EVIDENCE], <https://www.opensocietyfoundations.org/sites/default/files/drug-courts-equivocal-evidence-popular-intervention-20160928.pdf>.

68. See *id.*

69. Joanne Csete & Denise Tomasini-Joshi, *A Well-Intentioned, Deeply Flawed Approach to Drug Treatment*, OPEN SOC’Y FOUNDS. (May 29, 2015), <https://www.opensocietyfoundations.org/voices/well-intentioned-deeply-flawed-approach-addiction-treatment> [hereinafter Ceste & Tomansini-Joshi, *Drug Treatment*].

70. *Does Mandatory Addiction Treatment Work?*, BEHAV. HEALTH PALM BEACHES INC., <https://www.bhpalmbeach.com/blog/does-mandatory-addiction-treatment-work> (last visited Nov. 28, 2017).

71. CSETE & TOMANSINI-JOSHI, EQUIVOCAL EVIDENCE, *supra* note 67, at 9–10. “[N]ot a single study has shown that incarceration sanctions improve substance use treatment outcomes.” DRUG COURTS ARE NOT THE ANSWER, *supra* note 17, at 11.

72. Csete & Tomansini-Joshi, *Drug Treatment*, *supra* note 69.

73. DRUG COURTS ARE NOT THE ANSWER, *supra* note 17, at 2.

3. Drug Courts Target the Wrong Population

A common complaint of current drug treatment courts is that they target the wrong population of participants.⁷⁴ Drug courts have frequently been accused of targeting people most likely to complete treatment programs, such as offenders arrested on marijuana charges⁷⁵ and drug dealers.⁷⁶ One study concluded that about one-third of participants in drug treatment courts did not meet the criteria for drug dependence upon entry and therefore should have never been admitted to the program in the first place.⁷⁷

Some drug courts also “cherry-pick” defendants to artificially raise their success rates.⁷⁸ The result of cherry-picking and targeting specific participants is that “people who suffer from more serious drug problems are often denied access to drug court[s].”⁷⁹ The proper target population for drug treatment courts—nonviolent drug addicts—are historically the group most likely to fail drug treatment and thus the least likely to succeed in drug treatment courts as they are currently designed.⁸⁰

4. Sentences For “Failures” Are More Severe

As a condition of entering treatment in a drug treatment court, defendants must generally plead guilty to all or some of the charges upon

74. See CSETE & TOMANSINI-JOSHI, *EQUIVOCAL EVIDENCE*, *supra* note 67, at 8.

75. *Id.* Drug courts are aimed at treating drug addicts. *Id.* at 2. While there is much controversy over whether marijuana is an addictive drug, many studies suggest marijuana is only addictive in severe cases. See, e.g., NAT’L INST. ON DRUG ABUSE, MARIJUANA 14–15 (2017), <https://d14rmgtrwzf5a.cloudfront.net/sites/default/files/1380-marijuana.pdf> (“Estimates of the number of people addicted to marijuana are controversial, in part because epidemiological studies of substance use often use dependence as a proxy for addiction even though it is possible to be dependent without being addicted.”).

76. Bowers, *supra* note 58, at 794. An explanation for this trend is that drug courts frequently need to show success to gain access to public funds, so they “cherry pick” clients in order to artificially boost their success rates. CSETE & TOMANSINI-JOSHI, *EQUIVOCAL EVIDENCE*, *supra* note 67, at 8.

77. CSETE & TOMANSINI-JOSHI, *EQUIVOCAL EVIDENCE*, *supra* note 67, at 8–9.

78. DRUG COURTS ARE NOT THE ANSWER, *supra* note 17, at 10. Courts “cherry-pick” for at least two reasons:

First, prosecutors and judges may cherry-pick defendants because of the limited capacity of the drug court combined with the political importance of achieving high success rates. Second, some drug courts may opt to knowingly enroll persons who do not need treatment, but for whom drug court participation is seen as the only way to avoid a criminal record for a petty drug law violation.

Id.

79. *Id.*

80. See Bowers, *supra* note 58, at 786.

which they were arrested.⁸¹ If defendants successfully complete the court-prescribed treatment plan, their sentence may be deferred, modified, or suspended.⁸² In the best-case scenario, their criminal record is expunged.⁸³

The major issue with this approach surfaces when a participant fails out of the program. If a person “fails,” they are likely to be returned to criminal courts, forced to accept the guilty plea to the crimes charged, and many times end up with a harsher sentence than if he or she had hired an attorney to mount a proper defense to the crimes charged in the first place.⁸⁴ Studies conducted by the New York City Drug Courts have “found that sentences for failing participants . . . were typically two-to-five times longer than the sentences for the conventionally adjudicated defendants.”⁸⁵ The more severe sentencing may be partially due to the fact that a judge might view the participants’ prior guilty plea as a relevant sentence-enhancing factor.⁸⁶ The judge is then inclined to sentence the defendant more harshly than if he or she had rejected drug court from the outset and argued a defense.⁸⁷ This type of punishment “for a subjectively judged treatment ‘failure’ violates international standards of care of drug dependence and flies in the face of basic tenets of the right to health.”⁸⁸

5. Participants Are Punished For “Failing,” Resulting in Criminal Records

Another criticism of current drug treatment courts is that punishment for “failing” usually leads to the creation or expansion of a criminal record.⁸⁹ The negative effects of this method of punishment are twofold:

81. CSETE & TOMANSINI-JOSHI, *EQUIVOCAL EVIDENCE*, *supra* note 67, at 2.

82. *Id.*

83. *Id.*

84. JUSTICE POLICY INST., *supra* note 12, at 3; CSETE & TOMANSINI-JOSHI, *EQUIVOCAL EVIDENCE*, *supra* note 67, at 9. Some drug court participants even spend “more days in jail while in drug court than if they had been conventionally sentenced.” *DRUG COURTS ARE NOT THE ANSWER*, *supra* note 17, at 2.

85. Bowers, *supra* note 58, at 792. Another study found that drug court participants “did not spend less time overall incarcerated than non-participants because of the long sentences imposed on people who ‘failed’ the court-dictated treatment plan.” CSETE & TOMANSINI-JOSHI, *EQUIVOCAL EVIDENCE*, *supra* note 67, at 9. Additionally, “[l]ong sentences for low-level, non-violent drug offenses do not promote public safety, deterrence, and rehabilitation.” BENAIE, *supra* note 37, at 138 (quoting Memorandum from Eric H. Holder, Attorney Gen., to the U.S. Attorneys & Assistant Attorney Gen. for the Criminal Div. 1 (Aug. 12, 2013), <http://big.assets.huffingtonpost.com/HolderMandatoryMinimumsMemo.pdf>).

86. Csete & Tomansini-Joshi, *Drug Treatment*, *supra* note 69.

87. *See id.*

88. CSETE & TOMANSINI-JOSHI, *EQUIVOCAL EVIDENCE*, *supra* note 67, at 10.

89. *See* Csete & Tomansini-Joshi, *Drug Treatment*, *supra* note 69.

2018]

Drug Treatment Courts

469

first, the drug addicts are not actually undergoing treatment for their drug dependence while incarcerated,⁹⁰ and second, the participants' failure results in criminal convictions on a permanent record.⁹¹

The second negative effect, the creation or expansion of a criminal record, is the more severe of the two. Collateral consequences of a criminal record are numerous and may include denial of employment or occupational licensing; ineligibility for government contracts; restrictions on family relationships and living arrangements; registration, lifetime supervision, and residency requirements; and “[p]ublication of an individual’s criminal record or mandated notification to the general public.”⁹² Any of these consequences may have a significant negative impact on the future lives of “failed” participants. These consequences may not have been present had the participant decided to take an alternative route in lieu of drug treatment court.

While these collateral consequences may occur regardless of drug court participation, had the defendant decided to bring his or her case to trial, there is the chance the defendant would have been found not guilty. A finding of not guilty in court would avoid the collateral consequences resulting from a conviction.

As discussed, these failures can be severely detrimental to the well-being and success of participants. Many of the flaws of the current drug treatment court system can be corrected by adjusting the guidelines and policy approaches of drug treatment courts, which is exactly what the Law Enforcement Assisted Diversion program has successfully accomplished.

II. FAILING DRUG COURTS CURED BY LAW ENFORCEMENT ASSISTED DIVERSION

As drug court success stories have been on the decline, a new alternative to the common drug treatment court model was necessary for the criminal justice system to properly address addiction.⁹³ Law Enforcement Assisted Diversion is that alternative and has thus far proven to fix many of the flaws of drug treatment courts. As I will discuss later, the Comprehensive Addiction and Recovery Act could be a vehicle

90. *Id.*

91. JUSTICE POLICY INST., *supra* note 12, at 24.

92. Sarah B. Berson, *Beyond the Sentence—Understanding Collateral Consequences*, 272 NAT’L INST. JUST. J. 25, 26 (2013), <https://www.ncjrs.gov/pdffiles1/nij/241924.pdf>; *What Collateral Consequences are in the Database?*, NAT’L INST. JUST., <https://www.nij.gov/journals/272/pages/collateral-consequences-database.aspx> (last visited Nov. 28, 2017).

93. *See generally* DRUG COURTS ARE NOT THE ANSWER, *supra* note 17 (discussing how drug courts are no longer successful and a new approach to drug treatment is necessary).

for the implementation of LEAD programs nationwide.

A. New Alternative: Law Enforcement Assisted Diversion

The United Nations was years ahead of the United States' drug treatment policy when, in the Declaration on Drug Remand Reduction in 1999, the following provision was included:

In order to promote the social reintegration of drug-abusing offenders . . . governments should consider providing, either as an alternative to conviction or punishment or in addition to punishment, that *abusers of drugs should undergo treatment, education, aftercare, rehabilitation and social reintegration.*⁹⁴

The design of drug courts in the United States is outdated, as many do not provide for “treatment, education, aftercare, rehabilitation, and social reintegration.”⁹⁵ The drug courts should be modified to reflect the need of increased treatment—rather than increased punishment—for low-level, nonviolent drug offenders.

Finally, in 2011, government organizations provided funding for a Law Enforcement Assisted Diversion program in Seattle.⁹⁶ LEAD was “inspired in part by arrest referral programs, such as those in the United Kingdom where people may be detained briefly (but not formally arrested) to assess whether social or health programs might [provide better treatment] than criminal justice interventions.”⁹⁷ LEAD was designed around a “decarceration” approach where the ultimate aim is to “isolate those crimes for which conventional criminal law administration may be most fitting, contributing gradually to the de facto decriminalization of certain categories of conduct and enabling

94. G.A. Res. S-20/4 A., Declaration on the Guiding Principles of Drug Demand Reduction (June 10, 1998). For a more in-depth review of international drug policy, *see* DRUG WAR, AMERICAN STYLE: THE INTERNATIONALIZATION OF FAILED POLICY AND ITS ALTERNATIVES (Jurg Gerber & Eric L. Jensen eds., 2001).

95. G.A. Res. S-20/3 A ¶ 14.

96. Velan, *supra* note 19. The organizations involved in the original LEAD program were the Seattle Office of the Mayor, King County Prosecuting Attorney's Office, Washington Department of Corrections, and the Defender Association, among many others. *About LEAD, LEAD KING CTY.*, <http://leadkingcounty.org/about/> (last visited Nov. 28, 2017). In 2014, Santa Fe became the second city in the United States to implement a LEAD program. Velan, *supra* note 19. Additionally, Washington D.C., Baltimore, Atlanta, Buffalo, Houston, Ithaca, Los Angeles, New York City, Philadelphia, Portland (ME), and San Francisco are also interested in adopting a LEAD-based drug treatment program. *America's Growing Heroin Epidemic: Hearing Before the Subcomm. on Crime, Terrorism, Homeland Security, and Investigations of the H. Comm. on the Judiciary*, 114th Cong. 76, 84 (2015) [hereinafter *America's Growing Heroin Epidemic*] (testimony of Angela R. Pacheco, First Judicial District Attorney).

97. CSETE & TOMANSINI-JOSHI, *EQUIVOCAL EVIDENCE*, *supra* note 67, at 14.

2018]

Drug Treatment Courts

471

alternative non-carceral regulatory approaches to a range of social ills where criminalization remains appropriate.”⁹⁸ The decarceration model basically aims to select which crimes are better addressed outside the criminal justice system in programs such as LEAD. The basic premise of the decarceration model is that “overcriminalization and overincarceration are in part structural problems, which specialized criminal courts,” such as LEAD, “may begin to address.”⁹⁹

B. LEAD’s Impact

The three purposes of LEAD are to save money by decreasing incarceration rates of low-level drug offenders, save time by diverting low-level drug offenders away from the criminal justice system, and most importantly, to save the lives of addicts.¹⁰⁰ “LEAD is about empowering the person and giving them hope.”¹⁰¹ “LEAD is a pre-booking diversion program that allows officers to redirect low-level offenders engaged in drug . . . activity to community-based services instead of jail and prosecution.”¹⁰² LEAD functions by “divert[ing] low-level drug . . . offenders into community-based treatment and supportive services—including housing, healthcare, job training, treatment and mental health support—instead of processing them through traditional criminal justice system avenues,” such as drug treatment courts.¹⁰³

LEAD is different from traditional drug treatment courts in many significant ways. First, while participants in drug treatment courts are generally required to enter a guilty plea before participation in the program, LEAD is a “pre-booking diversion program, meaning that participants never enter the criminal justice system” and are instead diverted to treatment at the point of arrest, without an arrest record being generated.¹⁰⁴

Next, the programs differ in their approach to abstinence and medication assisted treatment. “Drug court participants are expected to remain abstinent from drugs” and alcohol while enrolled in a drug

98. McLeod, *supra* note 18, at 1631.

99. *Id.*

100. *America’s Growing Heroin Epidemic*, *supra* note 96, at 76, 77 (testimony of Angela R. Pacheco, First Judicial District Attorney).

101. *Id.*

102. *About LEAD*, *supra* note 96.

103. *Id.*

104. Tessie Castillo, *Drug Court v. LEAD: What is the Difference?*, HUFFINGTON POST, http://www.huffingtonpost.com/tessie-castillo/drug-court-v-lead-what-is_b_10993830.html (last updated July 15, 2017).

treatment court program and may be subject to random drug tests.¹⁰⁵ LEAD, on the other hand, follows a “harm reduction philosophy,” as discussed above, where “participants are not required to be abstinent from all drugs, but they are expected to work toward lessening their drug use or negative behaviors associated with [drug use].”¹⁰⁶

Additionally, only around half of drug courts offer the option of medication assisted treatment, while “LEAD emphasizes medication assisted treatment” for those participants addicted to opioids.¹⁰⁷ Medication assisted treatment provides addicts with a plethora of benefits, including allowing the addict to regain a normal state of mind, freeing the addict from constantly thinking about drugs, and reducing the problems associated with withdrawal and drug cravings.¹⁰⁸

The punishment and graduation structures also vary significantly between typical drug treatment courts and LEAD. Drug treatment courts impose sanctions on participants for noncompliance, ranging from loss of certain privileges to jail time.¹⁰⁹ Participants in drug courts can graduate after one to two years of successful participation in the program, while LEAD participants never officially graduate.¹¹⁰ LEAD participants are “eligible to receive continued services from the program indefinitely unless they commit a violent crime and are removed from the program.”¹¹¹

LEAD programs are currently thriving in the Seattle and Santa Fe communities and have proven to have many beneficial impacts on addicts including increasing safety and order of the communities by decreasing

105. *Id.* These requirements have generally stayed consistent over time in drug treatment courts. Many drug treatment courts, such as those in New York, still require complete detoxification and abstinence to occur in phase one of the treatment program, and require participants to submit to random drug screenings throughout the entire program. N.Y. STATE UNIFIED COURT SYS., NEW YORK STATE ADULT DRUG TREATMENT COURTS: RECOMMENDED PRACTICES 38–39 (2008), http://www.courtinnovation.org/sites/default/files/Recommended_Practices_10.pdf; MICH. SUPREME COURT ADMIN. OFFICE, DEVELOPING AND IMPLEMENTING A DRUG TREATMENT COURT IN MICHIGAN 10, 17 (2012), <http://courts.mi.gov/Administration/SCAO/Resources/Documents/Publications/Manuals/Specialty/DC-PlanningImplementation.pdf>; *Collaborative Courts*, SUPERIOR CT. ORANGE CTY., <http://www.occourts.org/directory/collaborative-courts/> (last visited Nov. 28, 2017).

106. Castillo, *supra* note 104.

107. *Id.*

108. U.S. DEP'T OF HEALTH & HUMAN SERVS., MEDICATION-ASSISTED TREATMENT FOR OPIOID ADDICTION 5 (2011), <https://store.samhsa.gov/shin/content/SMA09-4443/SMA09-4443.pdf>.

109. Castillo, *supra* note 104. “[N]ot a single study has shown that incarceration sanctions improve substance use treatment outcomes.” DRUG COURTS ARE NOT THE ANSWER, *supra* note 17, at 11.

110. Castillo, *supra* note 104.

111. *Id.*

future criminal behavior, reducing the burden on the criminal justice system, redirecting resources to prevention of serious and violent crimes, reducing opiate overdoses and recidivism rates, and improving individual outcomes and quality of life.¹¹² These beneficial impacts are imperative in LEAD curing the short-comings of drug treatment courts.

C. How LEAD Fixes Drug Court's Failures

In contrast to more popular drug court models, “programmes that offer alternatives to prison and combine both law enforcement and individual recovery components have proved to be effective both in treating health conditions associated with drug abuse and in reducing crime.”¹¹³ After the first few years, LEAD has proven to be a successful venture into exploring alternatives to traditional drug treatment courts.¹¹⁴

1. Decrease in Participant Recidivism

One of the biggest positive effects of LEAD is a decrease in participant recidivism. A study conducted by the University of Washington suggested that LEAD participants have significantly lower chances, both in the short- and long-term, of re-arrest once beginning the program.¹¹⁵ “Compared to the control group, the LEAD group had 60% lower [chance] of arrest during the six months subsequent to evaluation entry.”¹¹⁶ Additionally, in the long-term, “the LEAD group had 58% lower odds of at least one arrest subsequent to evaluation entry.”¹¹⁷

The decreased rate of recidivism for LEAD participants is likely due to the radically different approach LEAD takes as compared to common drug courts. LEAD participants all receive hands-on case management, which leads to “housing stability, job attainment, and enrollment in drug and alcohol treatment” which many participants in other drug treatment courts do not receive.¹¹⁸

112. *America's Growing Heroin Epidemic*, *supra* note 96, at 82 (testimony of Angela R. Pacheco, First Judicial District Attorney).

113. CSETE & TOMANSINI-JOSHI, *EQUIVOCAL EVIDENCE*, *supra* note 67, at 5. These programs also may prevent young drug abusers from coming into contact with the criminal culture in prisons, thus preventing their integration into such a culture. *Id.* Most of the early drug courts are designed around one of three models: the therapeutic jurisprudence model, the judicial monitoring model, or the order maintenance model. *See* McLeod, *supra* note 18, at 1611. Now, more drug courts are beginning to adopt the decarceration model, which is the model around which LEAD is designed. *See id.* at 1631.

114. *See* COLLINS ET AL., *supra* note 13, at 4.

115. *Id.* at 2.

116. *Id.*

117. *Id.* at 3.

118. *Id.* at 20.

2. *Diverting Prearrest Prevents Arrest and Criminal Records*

Another benefit of LEAD's prearrest diversion is keeping low-level drug abusers out of the criminal justice system altogether. This allows addicts to get the help they need, while at the same time allowing the government to allocate more time and resources toward fighting more serious crime.¹¹⁹ Participants who are selected for the program avoid an official arrest record, which can have crucial effects on their future lives.¹²⁰

The information explosion in the current technology era has made arrest records exceptionally accessible to the public.¹²¹ Arrest records are routinely checked online by "employers, banks, college admission officers and landlords."¹²² The flaw in arrest records is that they rarely mention what occurred subsequent to the arrest.¹²³ Arrest records do not provide whether the person was officially charged or any information regarding the ensuing criminal proceedings.¹²⁴

Additionally, prearrest diversion prevents participants from having to enter a guilty plea as a condition to entering the program. If the participant ultimately fails, unlike in normal drug court models, the participant does not face a conviction or a jail sentence because they were never arrested from the outset and thus were not officially charged with a crime.

3. *Diverting Prearrest Avoids Constitutional Issues*

Another major distinction between prearrest diversion programs, such as LEAD, and post-plea drug court programs is that the LEAD-type programs avoid constitutional issues that are inherent in other drug treatment court models.

119. See CSETE & TOMANSINI-JOSHI, *EQUIVOCAL EVIDENCE*, *supra* note 67, at 11.

120. One study found that ninety-two percent of employers run criminal background checks, and people with criminal records were nine to seventeen percent (depending on race) less likely to receive a callback after a job interview than people without a criminal record. Kai Wright, *Boxed In: How a Criminal Record Keeps You Unemployed for Life*, *NATION* (Nov. 6, 2013), <https://www.thenation.com/article/boxed-how-criminal-record-keeps-you-unemployed-life/>.

121. Gary Fields & John R. Emshwiller, *As Arrest Records Rise, Americans Find Consequences Can Last a Lifetime*, *WALL ST. J.*, Apr. 18, 2014, <http://www.wsj.com/articles/as-arrest-records-rise-americans-find-consequences-can-last-a-lifetime-1408415402>.

122. *Id.*

123. *Id.* "Even in cases of mistaken arrest, the damaging documents [are not] automatically removed. In other instances, arrest information is forwarded to the FBI but not necessarily updated there when a case is thrown out locally." *Id.*

124. *Id.*

Constitutional issues surrounding drug courts typically stem from the waiver of rights upon entering drug court.¹²⁵ The important distinction between LEAD and typical drug courts that allows LEAD participants to avoid these constitutional issues is that LEAD participants are never entered into the criminal justice system upon participation in the program and are not forced to waive any rights upon entering LEAD.¹²⁶

4. Police Filter Participants Helping to Ensure Addict Participation

Police involvement in LEAD varies by jurisdiction, but they are generally involved in the initial prearrest diversion.¹²⁷ LEAD programs use police officers as sorters who decide, based upon their specialized substance abuse disorder training, whether a person might benefit from participation in LEAD.¹²⁸ These officers make a series of decisions about the individuals with whom they come into contact.¹²⁹

Ultimately, the officers are afforded broad discretion in determining whether any one individual is appropriate to participate in a LEAD program.¹³⁰ Police officers may also consult with mental health professionals to make this determination.¹³¹ Officers in areas with a LEAD program additionally receive forty to eighty hours of training on how to assess persons with mental illness and how to help them find treatment resources.¹³²

A major reason that police officer prearrest diversion has been successful is because of the revolving door of addiction. Since addicts may become involved with the criminal justice system numerous times due to their addictions, the police officers are able to observe and identify

125. See Kletter, *supra* note 60, at *2.

126. See Katherine Beckett, *The Uses and Abuses of Police Discretion: Toward Harm Reduction Policing*, 10 HARV. L. & POL'Y REV. 77, 90 (2016).

127. Fan, *supra* note 11, at 184. Police involvement usually follows one of three primary models: "(1) using trained police officers as responders; (2) using police-mental health provider partnerships as responders; or (3) using mental health providers offering direct care." *Id.*

128. JEREMY KAPLAN-LYMAN, FIVE POLICE DEPARTMENTS BUILDING TRUST AND COLLABORATION: INNOVATIONS IN POLICING CLINIC, YALE LAW SCHOOL 8 (2013), <http://bjaexecutivesessiononpoliceleadership.org/pdfs/006.5bFivePDCCaseStudiesSWAShort.pdf>; Fan, *supra* note 11, at 185.

129. SEATTLE LAW ENF'T ASSISTED DIVERSION, REFERRAL AND DIVERSION PROTOCOL 1 (2015), <http://static1.1.sqspcdn.com/static/f/1185392/26595193/1444410613677/June-2015-Seattle-LEAD-Referral-and-Diversion+Protocol.pdf?token=1Yzsbte29AaB1XDY3Q5YsDaS1r0%3D>.

130. Fan, *supra* note 11, at 184.

131. *Id.* at 185.

132. *Id.* at 187.

which individuals are constantly being arrested on drug related charges and refer them to LEAD.¹³³

While LEAD programs have proven to fix many of the flaws of drug treatment courts, the solution to increasing the popularity of LEAD programs nationwide is not as simple as it seems. While the cost for drug court participants is significantly lower than the “business-as-usual” approach—i.e., incarceration—drug treatment courts are still costly and require funding.¹³⁴ On a federal level, the Comprehensive Addiction and Recovery Act of 2016 could be an effective source of funding for LEAD programs across the United States.¹³⁵

III. IMPLICATIONS OF THE COMPREHENSIVE ADDICTION AND RECOVERY ACT ON LEAD PROGRAM CREATION AND PARTICIPATION

The Comprehensive Addiction and Recovery Act (CARA) provides funding for drug treatment programs across the United States, including LEAD programs.¹³⁶ CARA, as signed by President Obama in 2016, is aimed at addressing the ever-growing opioid epidemic in the United States.¹³⁷ CARA promotes, among other drug related initiatives, “many

133. See Beckett, *supra* note 126, at 89.

134. SHANNON CAREY & MICHAEL FINIGAN, A DETAILED COST ANALYSIS IN A MATURE DRUG COURT SETTING: A COST-BENEFIT EVALUATION OF THE MULTNOMAH COUNTY DRUG COURT 42 (2003). This study found that the investment cost per drug court participant was \$5,927.80, while the investment cost per the “business-as-usual” approach was \$7,369.32. *Id.* at 42, tbl.7.

135. See Comprehensive Addiction and Recovery Act of 2016, Pub. L. No. 114-198, § 548, 130 Stat. 695, 732.

136. *Id.*

137. Press Release, Office of the Press Sec’y, Statement by the President on the Comprehensive Addiction and Recovery Act of 2016 (July 22, 2016), <https://obamawhitehouse.archives.gov/the-press-office/2016/07/22/statement-president-comprehensive-addiction-and-recovery-act-2016>; *Congress Approves \$181 Million for Addiction and Recovery Response*, OPEN SOC’Y INST.-BALT. (July 14, 2016), <https://www.osibaltimore.org/2016/07/congress-approves-181-million-for-addiction-and-recovery-response/> [hereinafter *Congress Approves \$181 Million*]; S. 524 (114th): *Comprehensive Addiction and Recovery Act of 2016*, GOVTRACK, <https://www.govtrack.us/congress/bills/114/s524> (last updated Feb. 14, 2016). The Comprehensive Addiction and Recovery Act of 2016 will survive the new administration, as President Trump also “praised the passage of [CARA] saying that ‘this legislation is an important step in the right direction.’” Braeden Kelly, *Trump Addresses Opioid Epidemic; Expresses Support for CARA*, ADDICTION POL’Y F. (Oct. 19, 2016), <http://www.addictionpolicy.org/single-post/2016/10/19/Trump-Addresses-Opioid-Epidemic-Expresses-Support-for-CARA>. President Trump also promised to “expand incentives for states to use drug courts and mandated treatment for those with substance use disorders.” *Id.*; see Damian Garde, *Trump is ‘Doubling Down’ on the Opioid Crisis with Promises of Expanded Treatment*, STAT NEWS (Oct. 15, 2016), <https://www.statnews.com/2016/10/15/trump-opioid-expanded-treatment/>; Dylan Scott, *Drug Addiction is Overwhelming Trump’s America. What’s He Going to Do?*, STAT NEWS (Nov. 14, 2016), <https://www.statnews.com/2016/11/14/donald-trump-drug-addiction/>.

2018]

Drug Treatment Courts

477

evidence-based interventions that have the potential to more effectively address opioid and heroin dependence and save lives.”¹³⁸ The Act authorized \$181 million in funding for a comprehensive response to the opioid epidemic.¹³⁹ CARA further provided the first dedicated federal money to the states for funding of prearrest diversion programs like LEAD.¹⁴⁰

One major purpose of CARA is to support the expansion of diversion programs, such as LEAD. The landmark CARA legislation which “advances evidence-based prevention, treatment and recovery services for substance abuse disorders” included a few key provisions when passed by the Senate in 2016 that would both expand and narrow participant eligibility to the benefit of the participants,¹⁴¹ but these provisions were ultimately omitted from the enacted version of CARA.¹⁴² These provisions, which include a “substance abuse disorder” provision (limiting eligibility to addicts) and a “comes into contact” provision (that would expand eligibility to those who have not been arrested or charged with a crime), are analyzed in the following subsections.

A. Current State Eligibility Requirements

The eligibility requirements for CARA-funded programs would differ significantly from current drug court eligibility requirements and proposed requirements for participation in LEAD programs.¹⁴³ Comparing the proposed CARA provisions to these current and proposed statutes provides a baseline as to the effect CARA would have on the eligibility requirements for participants across the United States.

Section 201 of CARA, as passed by the Senate, defined an eligible participant as someone who “comes into contact with the juvenile justice

138. *Congress Passes Landmark Opioid Bill—The Comprehensive Addiction and Recovery Act (CARA)*, DRUG POL’Y ALL. (July 13, 2016), <http://www.drugpolicy.org/news/2016/07/congress-passes-landmark-opioid-bill-comprehensive-addiction-and-recovery-act-cara>.

139. *Congress Approves \$181 Million*, *supra* note 137.

140. *Id.*

141. S. 524, 114th Cong. § 201(a)(2)(A)–(B) (2016); ERIN BAGALMAN & LISA N. SACCO, THE COMPREHENSIVE ADDICTION AND RECOVERY ACT OF 2016 (S. 524): COMPARISON OF SENATE- AND HOUSE-PASSED VERSIONS 6 (Cong. Res. Servs. 2016), <https://fas.org/sgp/crs/misc/R44493.pdf>; Guy Gambill, *CARA Legislation Funding Drug and Veteran Treatment Courts Goes Forward*, UNIFORMED SERVS. JUST. & ADVOC. GRP. (July 15, 2016), <http://www.usjag.org/cara-legislation-funding-drug-veterans-treatment-courts-goes-forward/>.

142. *See* Comprehensive Addiction and Recovery Act of 2016, Pub. L. No. 114-198, § 201, 130 Stat. 695, 711.

143. S. 524 § 201(a)(2)(A)–(B); S.B.1110, Reg. Sess. (Cal. 2015); N.Y. CRIM. PROC. LAW §§ 216.00, 216.05 (McKinney 2016).

system or criminal justice system or is arrested or charged with an offense that is not . . . a crime of violence or . . . a serious drug offense.”¹⁴⁴ The proposed version of CARA additionally required participants to have a current substance abuse disorder or a co-occurring mental illness and substance abuse disorder.¹⁴⁵ The participant must also have been approved for participation in a program funded under CARA.¹⁴⁶

Eligibility requirements for drug treatment courts vary by state, but the requirements across states are generally similar.¹⁴⁷ In New York, for example, eligible participants for diversion programs must have been charged with a specified offense, including controlled substance offenses and offenses involving marijuana.¹⁴⁸ New York prevents violent offenders from participating in diversion programs by making defendants ineligible for the program if they were convicted of a violent felony

144. S. 524 § 201(a)(2)(A). A “crime of violence” is a crime “as defined under applicable State law or section [16] of title 18, United States Code[.]” *Id.* § 201(a)(2)(A)(i). Under the United States Code, “crime of violence” is defined as

(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

18 U.S.C. § 16 (2012).

A “serious drug offense” is an offense “as defined under section 924(e)(2)(A) of title 18, United States Code[.]” S. 524 § 201(a)(2)(A)(ii). The United States Code defines a “serious drug offense” as

(i) an offense under the Controlled Substances Act . . . the Controlled Substances Import and Export Act . . . or chapter 705 of title 46 for which a maximum term of imprisonment of ten years or more is prescribed by law; or (ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance. . . for which a maximum term of imprisonment of ten years or more is prescribed by law[.]

18 U.S.C. § 924(e)(2)(A) (2012).

145. S. 524 § 201(a)(2)(B).

146. *Id.* § 201(a)(2)(C). Participation may be approved by the relevant law enforcement agency or prosecuting attorney, defense attorney, probation or corrections official, judge, or a representative from the relevant mental health or substance abuse agency. *Id.* § 201(a)(2)(C)(i)–(vi).

147. *See generally* 1 NAT’L ASS’N OF DRUG COURT PROF’LS, ADULT DRUG COURT BEST PRACTICE STANDARDS (2013) (discussing general eligibility requirements for drug treatment courts).

148. The charged offense must be a class B, C, D, or E felony for the participant to be eligible. N.Y. CRIM. PROC. LAW § 216.00(1) (McKinney 2016 & Supp. 2017).

offense,¹⁴⁹ a class A felony,¹⁵⁰ or any other offense for which a merit time allowance is not available.¹⁵¹ Defendants who have previously been deemed a second felony offender or a persistent felony offender are also precluded from participation in New York diversion programs.¹⁵²

A few states, including New Mexico and California, have proposed legislation to implement LEAD programs.¹⁵³ One such bill was proposed in California, but failed to be enacted. Under this bill, an eligible participant for the LEAD pilot program is anyone for whom a police officer has probable cause to arrest for offenses including possession of a controlled substance, being under the influence of a controlled substance, possession for sale or transfer of a controlled substance, or the actual sale or transfer of a controlled substance where circumstances indicate the sale or transfer is intended to provide a subsistence living or to allow the person to afford drugs.¹⁵⁴

B. “Substance Abuse Disorder” Provision

If amended to reflect the March 2, 2016, version of CARA passed by the Senate, CARA would differ from both current and proposed diversion program legislation in a few key ways that would both narrow and expand participation in the LEAD programs funded through CARA.

One major difference would be the substance abuse disorder requirement.¹⁵⁵ CARA’s substance abuse disorder requirement would prevent nonaddicts from participating in a program aimed at treating addicts, curing a major flaw of drug treatment courts and furthering LEAD’s addict-treatment initiative. This requirement is not present in many states’ diversion program requirements or the proposed California LEAD participation requirements, and will thus provide a restriction on participation that the New York and California statutes do not include.¹⁵⁶

The “substance abuse disorder” provision would be crucial in preventing LEAD programs funded by CARA from making the same mistakes as previous drug courts. The provision would further ensure that the people LEAD is designed to assist—true addicts—are the people participating in LEAD programs. This provision would also further

149. “Violent felony offense as defined in New York Penal Law section 70.02.” *Id.* § 216.00(1)(a).

150. This includes only class A felonies from section 220 of the New York Penal Law. *Id.*

151. Pursuant to New York Correction Law § 803(1)(d)(ii). *Id.*

152. *Id.* § 216.00(1)(b).

153. S.B. 1110 Reg. Sess. (Cal. 2015); H.J. Memorial 15, 51st Leg., 2d Sess. (N.M. 2014).

154. Cal. S.B. 1110.

155. S. 524, 114th Cong. § 201(a)(2)(B) (2016).

156. *Id.*; see Cal. S.B. 1110; N.Y. CRIM. PROC. LAW §§ 216.00(2)(a)–(b), 216.05(1).

ensure that LEAD and other drug court programs are specifically designed to treat addicts, as being an addict would be a requirement to enter the program.

C. “Comes Into Contact” Provision

Another key provision included in the March 2, 2016 version of the CARA legislation but excluded from the enacted version is the “comes into contact with the . . . criminal justice system” provision that would expand addict participation.¹⁵⁷

This provision would be an essential difference in the eligibility requirements because it allows participants who have not been officially arrested or charged with a crime to enter LEAD programs. As previously discussed, one of the major benefits of LEAD programs over typical drug treatment courts is that participants enter LEAD through prearrest diversion. This means the participant is never officially arrested and thus does not obtain a criminal record from the act that led them to participate in LEAD. The lack of an arrest record can have a significant impact on the future job prospects of the participants and thus is a major benefit of LEAD as compared to other drug treatment programs.

The “comes into contact” provision would also steer LEAD programs away from the flaws of past drug treatment court models, including the unconstitutionality of certain aspects of drug courts and the severe sentencing for failures. This provision cures these flaws as participants are not required to enter a guilty plea as a requirement to participate in LEAD, as participants are not charged from the onset, fixing the constitutionality issues. Additionally, since participants are not officially charged with a crime, they cannot be punished with jail time.

Without the “comes into contact” provision in CARA, the only eligible participants would be those arrested or charged with any crime besides a crime of violence or a serious drug offense.¹⁵⁸ This would rid LEAD programs funded under CARA of the benefit of prearrest diversion which is one of the biggest differences between LEAD and previous drug treatment programs.

IV. WILL CARA AND LEAD PROGRAMS DO ENOUGH?

If CARA is amended to reflect the March 2, 2016, version as passed by the Senate, CARA and LEAD programs paired together will successfully fix the problems currently associated with drug treatment

157. S. 524 § 201(a)(2)(A).

158. *Id.*

2018]

Drug Treatment Courts

481

courts. CARA provides a vehicle for the funding and creation of LEAD programs, while the LEAD programs themselves cure the ailments of current drug treatment courts.

CARA allows states that wish to create LEAD programs to apply for federal funding. The criteria for eligibility for federal funding closely mirrors the model of a LEAD program in general; thus, if a state wishes to create a LEAD program, by nature, they are likely to meet the criteria for funding through CARA.¹⁵⁹

Amending CARA to provide the provisions discussed above would cure one of the primary shortcomings of drug courts by ensuring that only people who have a substance abuse disorder are allowed to participate in any program funded by CARA.¹⁶⁰ This would categorically exclude anyone without a substance abuse disorder, such as drug dealers who commonly fill spaces in drug treatment courts in lieu of addicts who would actually benefit from drug treatment.¹⁶¹

Further, LEAD programs have already proven, and LEAD programs created through an amended CARA will continue to prove, to be a more effective way for the criminal justice system to address addicts that ultimately keeps addicts out of the criminal justice system altogether. LEAD successfully solves the failures of previous drug treatment court models. LEAD was specifically designed to target, attract, and treat drug addicts, which was not the main goal of many previous drug treatment courts.¹⁶²

LEAD also cures the constitutionality issues surrounding drug treatment courts by neither forcing participants to plead to any crimes nor forcing participants to waive any of their constitutional rights, both of which are required to enter many drug treatment courts.¹⁶³

Additionally, LEAD fixes the negative results for failing treatment

159. See Comprehensive Addiction and Recovery Act of 2016, Pub. L. No. 114-98, § 202, 130 Stat. 695, 715–16 (2016). Criteria for eligibility includes providing evidence of collaboration with State and local government agencies overseeing the program, consultation with different state authorities, demonstration that evidence-based treatment practices will be utilized, and demonstration that evidence-based screening and assessment will be utilized to place participants in the program. *Id.*

160. S. 524 § 201(a)(2)(A)–(B).

161. See generally Bowers, *supra* note 58 (discussing the overabundance of drug dealers in New York City drug courts and the fact that drug dealers are only present in drug treatment courts to decrease their prison time and not to gain drug treatment since they themselves are not necessarily addicts).

162. See generally *Law Enforcement Assisted Diversion (LEAD): Reducing the Role of Criminalization in Local Drug Control*, DRUG POL'Y ALL. (Feb. 9, 2016), <http://www.drugpolicy.org/resource/law-enforcement-assisted-diversion-lead-reducing-role-criminalization-local-drug-control> (describing LEAD's "novel" approach).

163. Kletter, *supra* note 60, at *2.

present in most drug treatment courts, namely, more severe sentencing and creation or expansion of criminal records, by subverting the criminal justice system altogether.¹⁶⁴

CONCLUSION

The LEAD model has successfully cured many of the flaws of other drug treatment court models. LEAD will continue to do so with further research and expansion of LEAD programs through CARA. While LEAD has proven to be more successful than other drug treatment methods, continued research and experimentation could result in even more effective methods and models. Currently, LEAD is the best version of a drug treatment court the criminal justice system has created and participants who utilize LEAD programs will continue to succeed and prosper in their path to an addiction-free life.

164. Ceste & Tomansini-Joshi, *Drug Treatment*, *supra* note 69.