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A MISGUIDED APPROACH TO DRUG DEPENDENCE: THE PROBLEMS WITH DRUG COURTS IN THE UNITED STATES

Submission for the Working Group on Arbitrary Detention (WGAD) Study on Arbitrary Detention Relating to Drug Policies

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Introduction

This submission to the United Nations (UN) Working Group on Arbitrary Detention focuses on drug courts in the United States (U.S.) that claim to serve as an alternative to imprisonment for drug-related offenses, providing an analysis of their shortcomings which lead to rights violations. Specifically, it responds to question 9 of the Working Group questionnaire: *Do drug courts which seek to use treatment as an alternative to imprisonment exist in your State? Please describe their operations, including applicable procedural guarantees for the accused. Does the accused have to plead guilty to the drug-related offence prior to being diverted into treatment? Are only accused persons who are drug dependent on opioids diverted for treatment, or are people who use other drugs that do not cause drug dependence diverted? Can treatment exist for a period that is longer than the period of imprisonment provided for in the offence for which the accused has been charged? Does the accused still have to serve a period of imprisonment if the treatment is not successful? What constitutes successful treatment and does the person in treatment have the right to a hearing before an independent authority and to be represented by legal counsel and present expert medical testimony on the evolution of his or her treatment?*

Drug courts in the U.S. seek to fix a broken system, where people with substance use disorders are criminalized rather than provided with treatment and support. While well-intentioned, they suffer from several fundamental flaws. Drug courts put treatment in the hands of the criminal justice system, which lacks medical expertise, resulting in the denial of evidence-based treatment and punishment for relapses that are a normal part of recovery. Moreover, drug courts function in a context where treatment that is not court-mandated is often inaccessible, monopolizing scarce resources. Additionally, they are not providing treatment to those who need it most. Drug courts compromise the rights to life and to the highest attainable standard of health through these practices. Furthermore, in requiring participants to waive due process protections and doctor-patient confidentiality, they also violate rights to freedom from arbitrary arrest and detention; liberty and security of person; freedom from cruel, inhuman, and degrading treatment; and privacy.

I. Overview: Drug Courts in the U.S.

First established in Miami, Florida in 1989, drug courts spread rapidly in the U.S. and currently number over 3,000 and exist in every state in the country.[1] Since the 1980s, the U.S. has criminalized drug supply and consumption in an effort to reduce them, leading to overflowing dockets and jails.[2] Drug courts, which function as specialized courts in the criminal justice system, attempt to alleviate this pressure by providing court-supervised treatment for drug dependence as

[1] Marianne Møllmann & Christine Mehta, *Neither Justice Nor Treatment: Drug Courts in the United States*, PHYSICIANS FOR HUM. RTS. 1, 6 (2017), https://phr.org/wp-content/uploads/2017/06/phr_drugcourts_report_singlepages.pdf; *Drug Courts*, U.S. DEP'T. OF JUSTICE ("DOJ") 1, 1 (2020), https://www.ncjrs.gov/pdffiles1/nij/238527.pdf.
[2] *Id. See also Drug Courts Are Not the Answer: Toward a Health-Centered Approach to Drug Use*, DRUG POLICY ALL. 1, 5–6, https://www.drugpolicy.org/sites/default/files/Drug%20Courts%20Are%20Not%20the%20Answer_Final2.pdf (discussing the history of drug courts and how they are linked to the "war on drugs" in the 1980s and 90s.).

an alternative to incarceration for drug-related offenses.[3] They seek to rehabilitate and address drug dependence as the underlying cause of these crimes.[4]

Most drug courts operate at the state and local level; however, at least 30 now operate at the federal level as well.[5] While the majority of drug courts target adults,[6] many jurisdictions also provide juvenile drug courts and family drug courts.[7] Additionally, some jurisdictions have drug courts corresponding to certain classes of offenders, such as tribal defendants, veteran defendants, defendants suffering from mental health issues, and defendants arrested for driving while intoxicated.[8] While drug courts vary, they generally share certain common features.

Drug courts target a broad array of drugs, including opioids, marijuana, alcohol, and stimulants, such as methamphetamine or crack/cocaine.[9] A 2011 study conducted by the National Drug Court Institute found marijuana among the most highly used substances by drug court participants prior to arrest— a finding that held true across urban, suburban, and rural drug courts.[10] Furthermore, the prevalence of participants who used marijuana is particularly high within the juvenile drug court system.[11] While the National Institute of Health ("NIH") has found that roughly 30% of those who use marijuana have some degree of dependency, it is unclear how this applies to people diverted into drug courts.[12] Moreover, evidence of effective treatments for marijuana dependence is shaky.[13]

Eligibility for drug courts is typically limited to non-violent offenders who pass a risk assessment. People with current or previous violent offenses are generally excluded from drug courts by either federal funding restrictions or directly under state law.[14] Furthermore, overriding sentencing laws, such as mandatory minimums, may also bar access to drug courts.[15] Eligibility is further assessed using a Risk-Need-Responsivity Model that weighs defendants' risk of recidivism against their

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[3] DRUG POLICY ALL., *supra* note 2, at 3.
https://www.drugpolicy.org/sites/default/files/Drug%20Courts%20Are%20Not%20the%20Answer_Final2.pdf.
[4] Joanne Csete & Denise Tomasini-Joshi, *Drug Courts: Equivocal Evidence on a Popular Intervention*, OPEN SOC'Y FOUND. 1, 2 (2016), *available at* https://www.opensocietyfoundations.org/publications/drug-courts-equivocal-evidence-popular-intervention; DOJ, *supra* note 1, at 1; Møllmann & Mehta, *supra* note 1, at 6.
[5] *In the Spotlight: Drug Courts - Facts and Figures*, NAT'L CRIM. JUST. REFERENCE SERVICE ("NCJRS"), https://www.ncjrs.gov/spotlight/drug_courts/facts.html (last visited June 2, 2020).
[6] Møllmann & Mehta, *supra* note 1, at 6.
[7] DOJ, *supra* note 1, at 1.
[8] *Id*.
[9] West Huddleston & Douglas B. Marlowe, *Painting the Current Picture: a National Report on Drug Courts and Other Problem-solving Court Programs in the United States*, NAT'L DRUG COURT INST. 1, 31 (2011).
[10] *Id*.
[11] *Drug Courts in the Americas*, SOC. SCIENCE RESEARCH COUNCIL 1, 11–12 (2018), https://s3.amazonaws.com/ssrc-cdn1/crmuploads/new_publication_3/DSD_Drug+Courts_English_online+final.pdf.
[12] Is Marijuana Addictive?, NAT'L INST. OF HEALTH, https://www.drugabuse.gov/publications/research-reports/marijuana/marijuana-addictive (last visited June 14, 2020). According to a study by Physicians for Human Rights, "In New York, many individuals landed in drug court programs because of marijuana possession charges, and even more were kept from graduating from drug courts because of marijuana use. A substantial number of these participants did not present indications of marijuana dependence." Møllmann & Mehta, *supra* note 1, at 12.
[13] Møllmann & Mehta, *supra* note 1, at 12.
[14] SOC. SCIENCE RESEARCH COUNCIL, *supra* note 11, at 1; Celinda Franco, *Drug Courts: Background, Effectiveness, and Policy Issues for Congress*, CONG. RESEARCH SERV. 1, 1 (2010), https://fas.org/sgp/crs/misc/R41448.pdf.
[15] SOC. SCIENCE RESEARCH COUNCIL, *supra* note 11, at 1.

needs and likely responsiveness to different treatment models.[16] This model takes into account various factors including the defendant's family/marital relationships, recreational activities, mental and physical health, school or work performance, and self-esteem.[17] However, even if a defendant meets the criteria for eligibility they might be rejected due to capacity limitations.[18]

While diversion to a drug court can happen at various points in the criminal justice system, most jurisdictions employ a post-adjudication model, requiring defendants to plead guilty as a condition for participation. Drug courts are presented as part of the plea bargain, and if participants successfully complete the court-supervised treatment plan, charges will be reduced or dismissed, or their criminal record expunged.[19] Some jurisdictions employ a deferred-prosecution model, where a defendant is given the option of drug court prior to pleading to a criminal charge, [20] and some drug courts admit already convicted participants as a precondition for probation.[21]

While drug court participation is generally supposed to be voluntary, compulsion to enter is high when faced with prison time and a felony record.[22] Physicians for Human Rights reported that participants "felt forced to enter the drug court treatment programs to avoid lengthy legal proceedings, and, in order to do so, were required to plead guilty to charges that have never been investigated."[23] Furthermore, some courts mandate participation if a defendant is eligible.[24]

Drug courts provide a structured treatment program, typically monitored by a court team, including a judge and prosecuting and defense attorneys. The defense and prosecution generally work together to develop an initial treatment plan.[25] Drug court judges are then accorded substantial power to modify and monitor the treatment plan, meting out incentives and punishments based on the participant's success—which is often measured solely by the presence of drug use.[26] This entails intense supervision and mandatory, repeated drug testing. [27] The prosecution will also oversee the treatment plan and determine whether participants are keeping up with it.[28] Defense counsel's role largely consists of advising participants on the process of drug courts, rights

[16] *Seven Program Design Features: Adult Drug Court Principles, Research, and Practice*, NCJRS 1, 2 (2012), https://www.ncjrs.gov/pdffiles1/nij/248701.pdf.
[17] *Id*. at 3.
[18] DRUG POLICY ALL., *supra* note 2, at 5.
[19] Møllmann & Mehta, *supra* note 1, at 6.; Csete & Tomasini-Joshi, *supra* note 4, at 2.
[20] Lisa N. Saco, *Federal Support for Drug Courts: In Brief*, CONG. RESEARCH SERV. 1, 2–3 (2018), https://fas.org/sgp/crs/misc/R44467.pdf.
[21] *Id*. at 3.
[22] SOC. SCIENCE RESEARCH COUNCIL, *supra* note 11, at 13.
[23] Møllmann & Mehta, *supra* note 1, at 4.
[24] Franco, *supra* note 14, at 1. Thirty-eight states in the U.S. additionally allow for involuntary treatment of people with substance use disorders without being charged for a crime on the basis of behavior that has not happened yet. While these are not "drug courts" in the traditional sense, they also involve court-mandated treatment and defendants with drug dependence losing their rights. *See* Møllmann & Mehta, *supra* note 1, at 4, 8.
[25] *Defining Drug Courts: The Key Components*, NAT'L ASS'N OF DRUG COURT PROF'L ("NADCP") 1, 3–4 (1997), https://www.ncjrs.gov/pdffiles1/bja/205621.pdf.
[26] *Id*. at 2; Møllmann & Mehta, *supra* note 1, at 6.
[27] Csete & Tomasini-Joshi, *supra* note 4, at 2.
[28] NADCP, *supra* note 25, 3–4.

relinquished as part of this process, and the benefits of a drug-free life.[29] Rarely do doctors or addiction specialists participate in routine decision-making in drug courts.[30]

Participation in drug courts entails waiver of a number of rights. Drug courts require participants to waive doctor-patient confidentiality and submit to regular drug tests.[31] Additionally, participants' drug use and treatment information are openly discussed in court.[32] Furthermore, as a supposedly voluntary and non-adversarial process, drug courts have great leeway to define the terms of participation. It is common for drug courts to require participants to waive their rights to "appeal, to accede to a stipulated fact trial, provide search waivers or . . . to recuse the judge" with a number of state court cases upholding those waivers as constitutional under federal and state law.[33] Thus, depending on the jurisdiction, participants likely cannot appeal to an independent authority within the drug court and challenge their treatment.

II. Lack of Evidence-Based Treatment

While drug courts recognize the value of treatment, they tie it to a criminal justice system set up to sanction, rather than address health problems. The lack of health expertise leads to denial of evidence-based treatment, including opioid substitution therapy ("OST"), other medications needed for treatment, and psychosocial support, risking both the health and life of people with drug dependence. Additionally, drug courts punish relapses that are a normal part of recovery from drug dependence. Failed treatment can end in imprisonment and sometimes even longer sentences than participants would have received had they gone through the traditional criminal justice system.

Although drug courts are well-intentioned, their mission of helping people who use drugs is fundamentally undermined by placing health decisions in the hands of court personnel lacking medical expertise. Treatment plans are negotiated between defense attorneys and prosecutors on the basis of strategic considerations, rather than therapeutic value.[34] Moreover, drug courts place ultimate authority in judges[35] and subject medical advice to prosecutorial oversight and potential veto.[36] According to research by Physicians for Human Rights, "the same treatment plan was mandated for most participants, regardless of the severity of their addiction level, while in others, non-medical staff recommended treatment plans later deemed unhelpful by medical providers asked to implement them."[37]

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[29] NADCP, *supra* note 25, at 3–4.
[30] DRUG POLICY ALL., *supra* note 2, at 6; Møllmann & Mehta, *supra* note 1, at 11.
[31] Møllmann & Mehta, *supra* note 1, at 16.
[32] *Id*.
[33] William G. Meyer, *Constitutional and Other Legal Issues in Drug Court*, NAT'L DRUG COURT INSTITUTE (Dec. 5, 2015),
https://www.ndci.org/law/#:~:text=Knowing%20and%20intelligent%20waivers%20of,terms%20of%20Drug%20Co Cou%20entry (this resource lists out many of the constitutional issues surrounding drug courts and a number court cases that rule in favor of drug courts on these issues).
[34] Møllmann & Mehta, *supra* note 1, at 11.
[35] Csete & Tomasini-Joshi, *supra* note 4, at 10, 16.
[36] Møllmann & Mehta, *supra* note 1, at 4.
[37] Møllmann & Mehta, *supra* note 1, at 11.

Additionally, many drug courts consider complete abstinence the metric of success,[38] hindering access to needed medications. In fact, the National Association of Drug Court Professionals (NADCP) highlights abstinence as one of the 10 key components of the U.S. drug court model.[39] According to one survey, only 56% of drug courts allowed for maintenance medication, citing court policy and cost as barriers.[40]

This policy is directly at odds with medical best practice for treating opioid dependence, calling for access to OST, including methadone and buprenorphine. Studies show the efficacy of OST in improving physical and mental health, family function, employment, and law-abiding behavior amongst people with opioid dependence.[41] The World Health Organization ("WHO") has placed methadone and buprenorphine on its model list of essential medicines,[42] and the NIH considers the use of these medicines as a best practice for drug treatment.[43] Even the NADCP recognizes the effectiveness of using OST for treating opioid dependency.[44] However, many drug courts do not allow OST use, regarding it as merely swapping one drug for another.[45] Acknowledging this problem, the U.S. federal government issued guidance denying federal funds to drug courts that refuse to allow participants access to OST.[46] Nonetheless, many drug court judges remain skeptical of incorporating OST in treatment.[47]

Additionally, drug courts that do allow for medication to treat opioid dependence generally use only the antagonist vivitrol, rather than better researched OST.[48] These courts do not produce a specialized treatment plan, detailing the appropriateness of this medication, and the preference for vivitrol is not based on evidence, but rather on direct marketing by pharmaceutical companies to judges.[49] In fact, vivitrol seems to carry a high risk of overdoes death.[50]

The skepticism drug court judges have of OST further often extends to other medicines needed by drug court participants. Drug courts have prevented access to prescribed medications for anxiety,

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[38] NADCP, *supra* note 25, at 2.
[39] *Id*. at 11.
[40] Harlan Matusow et. al., *Medication Assisted Treatment in US Drug Courts: Results from a Nationwide Survey of Availability, Barriers and Attitudes*, 44 J. Substance Abuse Treatment 473, 479 (2013).
[41]*Position paper: Substitution maintenance therapy in the management of opioid dependence and HIV/AIDS prevention*, UN OFFICE ON DRUGS AND CRIME ("UNDOC"), WORLD HEALTH ORG. ("WHO"), JOINT UN PROGRAMME ON HIV/AIDS ("UNAIDS") 1,13 (2004), http://www.unodc.org/ documents/hiv-aids/Position%20Paper%20sub.%20 maint.%20therapy.pdf.
[42] *21st WHO Model List of Essential Medicines*, WORLD HEALTH ORG. ("WHO") 1, 49 (2019), https://apps.who.int/iris/bitstream/handle/10665/325771/WHO-MVP-EMP-IAU-2019.06-eng.pdf?ua=1.
[43] Maia Szalavitz, *How America Overdosed on Drug Courts*, PAC. STANDARD (May 3, 2017), https://psmag.com/news/how-america-overdosed-on-drug-courts.
[44] *Id*.
[45] *Id.*; Csete & Tomasini-Joshi, *supra* note 4, at 10; Møllmann & Mehta, *supra* note 1, at 3.
[46] *SAMHSA Treatment Drug Courts*, DEPT. OF HEALTH AND HUMAN SERV. 1, 10 (2015), *available at* https://www.samhsa.gov/sites/default/files/grants/doc/ti-15-002.doc.
[47] Møllmann & Mehta, *supra* note 1, at 12.
[48] Jake Harper, To Grow Market Share, a Drugmaker Pitches Its Product to Judges, NPR, https://www.npr.org/sections/health-shots/2017/08/03/540029500/to-grow-market-share-a-drugmaker-pitches-its-product-to-judges.
[49] *Id.*
[50] Roxanne Saucier et. al, *Review of Case Narratives from Fatal Overdoses Associated with Injectable Naltrexone for Opioid Dependence*, 41 DRUG SAFETY 981, 981 (2018), available at: https://www.ncbi.nlm.nih.gov/pubmed/29560596.

attention deficit disorder, and other chronic health problems,[51] a likely violation of U.S. disability law.[52] Drug courts often require that participants "start clean" and stop using maintenance medications to enter a treatment program.[53] Moreover, many courts condition ending court supervision and probation on terminating use of prescribed medicines, as well as legal drugs such as alcohol.[54]

Additionally, drug courts often fail to provide needed psychosocial support as part of treatment. This includes insufficient counseling and therapy, as well as support for housing, education, and employment, shown critical for recovery in drug court evaluations.[55] In particular, stable housing impacts whether participants are able to complete court-mandated treatment plans.[56]

The lack of evidence-based care leaves participants in a vulnerable position, risking their health and life. Death from overdose for people suffering from substance use disorders is a serious problem in the U.S. causing over 750,000 deaths since 1999, when the Center for Disease Control and Prevention ("CDC") began tracking these numbers.[57] Judges who do not allow for OST or other evidence-based care increase the risk that drug court participants may die from overdose during a relapse.[58] Furthermore, judges are not in a position to supervise treatment and ensure accountability by providers, who, while on the surface may seem reputable, can be ineffective and even harmful, as notably exemplified by a string of deaths that occurred in sham rehabilitation centers in Florida.[59] Finally, the lack of enforceable standards or oversight over drug court judges adds to participants' risks. Drug court judges are rarely investigated for bad behavior, requiring journalists to bring particularly egregious instances to light in order for action to be taken.[60]

Drug courts further punish participants for relapses, a normal part of recovery. Drug court participants who test positive for drug use are commonly punished by more frequent drug tests, additional court appearances, extended time under strict court supervision—which can be longer than the incarceration time for the original crime—essay writing, periods of incarceration, or

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[51] Møllmann & Mehta, *supra* note 1, at 3.
[52] *Legality of Denying Access to Medication Assisted Treatment In the Criminal Justice System*, LEGAL ACTION CTR. 1, 10 (2011), https://www.lac.org/assets/files/MAT_Report_FINAL_12-1-2011.pdf.
[53] Møllmann & Mehta, *supra* note 1, at 13.
[54] *Id*. at 6.
[55] *Id*. at 8.
[56] *Id*. at 17.
[57] *The Drug Overdose Epidemic: Behind the Numbers*, CTR. FOR DISEASE CONTROL AND PREVENTION, https://www.cdc.gov/drugoverdose/data/index.html (last visited Jun. 12, 2020).
[58] Szalavitz, *supra* note 43.
[59] Maia Szalavitz, *The Rehab Industry needs to Clean up its Act. Here's How*, HUFFINGTON POST (Feb. 16, 2016), https://www.huffingtonpost.com/the-influence/the-rehab-industry-needs-clean-up_b_9210542.html.
[60] For example, reporting by the podcast, This American Life, brought to light the story of Lindsey Dills who ended up in a Georgia drug court for over five years, fourteen months of which were behind bars, after she had been arrested for forging checks for $100. During her time behind bars, the judge in this case sentenced Ms. Dills to a term of solitary confinement where she was not able to access her antidepressant medications and attempted suicide. Following the release of this story (and in response to the public pressure it garnered) Georgia's Judicial Qualifications Commission filed charges against the judge in this case. *See* Ira Glass, *Very Tough Love*, THIS AM. LIFE (Mar. 25, 2011), transcript available at: https://www.thisamericanlife.org/430/transcript; *"Very Tough Love" Update – Lindsey Dills*, THIS AM. LIFE (Mar. 5, 2012), https://www.thisamericanlife.org/extras/very-tough-love-update-lindsey-dills.

dismissal from the treatment program.[61] However, punishing relapses is counterproductive to treatment, as relapses are a regular part of the recovery process.[62] The WHO considers drug dependence a "relapsing condition,"[63] and even the NADCP recognizes that relapses should not be punished, but instead receive "a therapeutic adjustment."[64]

"Failing" treatment typically results in a return to prosecution under an adversarial system, facing either sentencing or trial,[65] and ultimately resulting in imprisonment.[66] Moreover, a guilty plea on record is a disadvantage,[67] and participants who fail to graduate may face harsher sentences than they would have received had they gone through the traditional criminal justice system and mounted a defense. In Florida, drug court participants can face larger sentences if they violate court orders and are placed back in the criminal justice system.[68] According to a 2013 meta-analysis using data from 19 studies in the U.S., "drug courts did not significantly reduce the average amount of time offenders spent behind bars, suggesting that any benefits realized from a lower incarceration rate are offset by the long sentences imposed on participants when they fail the program."[69]

III. Lack of Access to Treatment

Operating in a context of scarce treatment resources, drug courts impede access to voluntary treatment and do not service those most in need. Communities serviced by drug courts often lack quality treatment options.[70] The federal Substance Abuse and Mental Health Administration noted this treatment and service gap in drug courts.[71] In particular, there is a shortage of methadone and buprenorphine clinics and certified prescribers.[72] For people seeking voluntary treatment, waiting lists could take months.[73] Moreover, the costs can be prohibitive.[74] By putting mandated participants at the front of the line, drug courts monopolize scarce treatment resources and may be

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[61] Csete & Tomasini-Joshi, *supra* note 4, at 10; Møllmann & Mehta, *supra* note 1, at 8, 16; Franco, *supra* note 14, at 1.
[62] Møllmann & Mehta, *supra* note 1, at 8.
[63] *Principles of Drug Dependence Treatment*, UN OFFICE ON DRUGS AND CRIME ("UNDOC") & WORLD HEALTH ORG. ("WHO") 1,1 (2008), https://www.unodc.org/documents/drug-treatment/UNODC-WHO-Principles-of-Drug-Dependence-Treatment-March08.pdf.
[64] *Adult Drug Court Best Practice Standards*, NADCP 1, 27 (2018), https://www.nadcp.org/wp-content/uploads/2018/12/Adult-Drug-Court-Best-Practice-Standards-Volume-I-Text-Revision-December-2018-1.pdf.
[65] Saco, *supra* note 20, at 4.
[66] *Id*. at 2–3
[67] Csete & Tomasini-Joshi, *supra* note 4, at 9.
[68] *Drug Courts, Not More Jail Time, Can Help Reduce Criminal Recidivism*, FOUND. FOR ECON. EDUC. (Mar. 12, 2019), https://fee.org/articles/drug-courts-not-more-jail-time-can-help-reduce-criminal-recidivism/.
[69] Eric L. Sevigny et. al., *Do Drug Courts Reduce the Use of Incarceration? A Meta-analysis*, 41 J. CRIM. JUS. 416, (2013).
[70] Møllmann & Mehta, *supra* note 1, at 3, 9.
[71] *SAMHSA Treatment Drug Courts*, DEPT. OF HEALTH AND HUMAN SERV. 1, 4 (2015), *available at* https://www.samhsa.gov/sites/default/files/grants/doc/ti-15-002.doc.
[72] Møllmann & Mehta, *supra* note 1, at 9–10 (2017).
[73] *Id.* at 9.
[74] *Id*.

the only viable route to care in some communities.[75] This creates perverse incentives where arrest is the most direct means of accessing treatment.[76]

Additionally, drug courts fail to treat those most in need. The criminalization of drug possession for personal use captures people who do not suffer from a substance use disorder.[77] As discussed above, many participants come to drug courts for marijuana use. Moreover, to establish high success rates, drug courts "cherry-pick" and target people most likely to complete treatment programs, including those who do not need treatment.[78] For instance, a study in Delaware concluded that "more than one third of clients in three misdemeanor drug courts showed little evidence of having a drug use problem on entry into the drug courts."[79] This then fills up limited treatment space with patients who do not need care.[80] High risk and high need patients, on the other hand, encounter both regulatory and financial barriers in accessing treatment.[81]

IV. Human Rights Violations

In many cases, drug courts thus fail to provide evidence-based treatment and, in fact, may impede access to treatment that is voluntary or for those who need it most. Moreover, with the threat of impending criminal sanctions, the voluntary nature of drug courts is dubious. Drug courts further require participants to waive basic due process protections, such as the possibility to appeal and challenge their treatment, and doctor-patient confidentiality. Additionally, drug court participants face imprisonment if they "fail" treatment and sometimes even longer sentences than they would have received if they had gone through the traditional criminal justice system. These practices contradict human rights, enshrined in the Universal Declaration of Human Rights (UDHR),[82] International Covenant on Civil and Political Rights (ICCPR),[83] International Covenant on Economic, Social, and Cultural Rights (ICESCR),[84] Convention Against Torture (CAT)[85], and International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).[86]

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[75] *Id.* at 4.
[76] As noted above, even getting arrested will not necessarily ensure access to state funded drug treatment. *See also* DRUG POLICY ALL., *supra* note 2, at 7 (noting that "[e]ven if drug courts were dramatically expanded to scale to cover all people arrested for drug possession, between 500,000 and 1 million people would still be ejected from a drug court and sentenced conventionally every year.").
[77] Møllmann & Mehta, *supra* note 1, at 4.
[78] DRUG POLICY ALL., *supra* note 2, at 10; Eric L. Sevigny et. al., *Can Drug Courts Help to Reduce Prison and Jail Populations?*, 647 ANN. AM. ACAD. POL. SOC. SCI. 190–210 (2013); Csete & Tomasini-Joshi, *supra* note 4, at 8.
[79] DeMatteo et. al., *Outcome Trajectories in Drug Court: Do All Participants Have Serious Drug Problems?*, 36 CRIM. JUST. AND BEHAV. 354, 366 (2009).
[80] Møllmann & Mehta, *supra* note 1, at 3.
[81] *Id*. at 8.
[82] Universal Declaration of Human Rights ("UDHR"), G.A. Res. 217 (III) A, U.N. Doc. A/810 (Dec. 10, 1948) (foundational document of the international human rights system, which the U.S. played a pivotal role in drafting).
[83] International Covenant on Civil and Political Rights ("ICCPR") *ratified* Jun. 8, 1992, 999 U.N.T.S. 171.
[84] International Covenant on Economic, Social, and Cultural Rights ("ICESCR"), *signed* Oct. 05, 1977, 993 U.N.T.S. 3. While the U.S. has only signed the ICESCR, it has "an obligation to refrain, in good faith from acts that would defeat the object and the purpose of the treaty." RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 304 (AM. L. INST. 2018).
[85] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT"), *ratified* Oct. 21, 1994, 1465 UNTS 85.
[86] International Convention on the Elimination of All Forms of Racial Discrimination ("ICERD"), *ratified* Oct. 21, 1994, 660 UNTS 195.

They not only infringe on the right to the highest attainable standard of health,[87] but also violate the right to life[88] and rights to freedom from arbitrary arrest and detention;[89] liberty and security of person;[90] freedom from cruel, inhuman, and degrading treatment;[91] and privacy.[92]

While the U.S. model of drug courts is flawed from a human rights perspective, even more problematic is its export to other countries. Many countries around the world, particularly throughout Latin America and the Caribbean, have attempted to follow the U.S.'s example by instituting their own drug courts, with the U.S. promoting and funding this expansion as an "alternative" to incarceration.[93] The various shortcomings in the U.S. model may be further amplified in contexts with less economic resources and looser rights protections.[94]

Conclusion

While drug courts purport to recognize a need for treatment rather than punishment, they do not get to the heart of the problem, which is the criminalization of drug use and drug dependence. Attempting to patch a broken system, they rely on the structures of criminal justice to manage what is fundamentally a health problem. Drug courts work through graduated sanctions and continue to treat participants as criminals, denying them basic rights and punishing the symptoms of drug dependence "as if the illness itself were a crime"[95] In fact, treatment without detention or parole would be cheaper, and provision of harm reduction and psychosocial services would better advance health and human rights.[96]

[87]UDHR, *supra* note 82, art. 25(1) ("Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services."); ICERD, *supra* note 86, art. 5 ("States Parties undertake to . . . guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law and notable in the enjoyment of the flowing rights: [. . .] (iv) The right to public health, medical care, social security and social services"); ICESCR, *supra* note 84, art. 12 ("1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health").
[88] UDHR, *supra* note 82, art. 3 ("Everyone has the right to life."); ICCPR, *supra* note 83, art. 6 ("Every human being has the inherent right to life … No one shall be arbitrarily deprived of his life.").
[89] UDHR, *supra* note 82, art. 9 ("No one shall be subjected to arbitrary arrest, detention or exile"); ICCPR, *supra* note 83, art. 9 ("No one shall be subject to arbitrary arrest or detention").
[90] UDHR, *supra* note 82, art. 3 ("Everyone has the right to … liberty and security of person."), ICCPR, *supra* note 83, art. 9(1) ("Everyone has the right to liberty and security of person."); ICERD *supra* note 86, art. 5(b) ("The right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution").
[91] UDHR, *supra* note 82, art. 5 ("No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment"); ICCPR, *supra* note 83, art. 7 ("No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment"); CAT, *supra* note 85, art. 16(1) ("Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment…committed by…a public official or other person acting in an official capacity").
[92] UDHR, *supra* note 82, art. 12 ("No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence"); ICCPR, *supra* note 83, art. 17 ("No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence").
[93] SOC. SCIENCE RESEARCH COUNCIL, *supra* note 11, at 11. *See generally* RETHINKING DRUG COURTS: INTERNATIONAL EXPERIENCES OF A US POLICY EXPORT (John Collins et. al. eds., 1st ed. 2019); *Cortes de Drogas en México: Una Crítica a Partir de las Experiencias de las Mujeres*, EQUIS (2018), https://equis.org.mx/wp-content/uploads/2018/10/Cortes_de_Drogas.pdf.
[94] SOC. SCIENCE RESEARCH COUNCIL, *supra* note 11, at 4–5.
[95] Møllmann & Mehta, *supra* note 1, at 4.
[96] *Id*.