

5-2017

# Revealing What Recidivism Hides: Punishment, Surveillance, and Bias in Evaluating Adult Drug Court in Maine

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Revealing What Recidivism Hides: Punishment, Surveillance, and Bias in Evaluating Adult  
Drug Court in Maine

An Honors Thesis

Presented to

The Faculty of the Department of Politics

Bates College

In partial fulfillment of the requirements for the

Degree of Bachelor of Arts

By

Claire Brown

Lewiston, Maine

May 4, 2017

## ***Abstract***

This thesis evaluates Adult Drug Court in Maine through Foucauldian and carceral state perspectives. The expansion of the U.S. penal system through key political events including the 1960s War on Crime and the 1980s War on Drugs fueled the rise of the “carceral state.” This punitive turn in American governance has created serious problems of mass incarceration, bias in criminal justice, and societal and political marginalization of ex-offenders, especially in connection with drug crime. Adult Drug Court was first adopted in the United States in 1989 as an alternative to incarceration for drug-addicted offenders and has since spread to every state and territory. It is a drug treatment program led by a team of legal and treatment professionals and has been reported as a success largely in terms of reducing recidivism. Determining whether drug court is an alternative to traditional incarceration, however, requires evaluating its relationship to the carceral state and whether it reproduces or counteracts core problems of punishment, surveillance, and bias. This thesis gauges the relationship of Adult Drug Court to the carceral state in Maine through interviews with drug court and traditional criminal justice professionals as well as direct observations of the program. I conclude that drug court in Maine is an improvement upon carceral state conceptions of punishment and surveillance as well as success and effectiveness. However, it is another vehicle of carceral state development in that it relies on the threat of punishment and does not fully address important structural obstacles to reintegration.

## ***Acknowledgements***

I would like to graciously thank my brilliant thesis advisor, Professor Stephen Engel, for providing me with his guidance, knowledge, and thorough feedback throughout the process of writing this thesis. I would also like to thank Professor Michael Rocque for directing me to valuable resources in the study of criminology and teaching me about the various theories of crime. Thank you to the members of the Lewiston District Court, particularly Judge John B. Beliveau, for fostering my enduring interest in the law over the course of my four-year internship which inspired this thesis by first introducing me to drug court. Thank you to all of the interviewees who provided me with firsthand knowledge and insight into the Adult Drug Court process and their experiences. Thank you to my wonderful friends and suitemates for your constant love, support, enthusiasm, and engaging feminist and political discussions. I would also like to thank my fellow Community-Engaged Research Fellows as well as Darby Ray and Sam Boss of the Harward Center for Community Partnerships at Bates College for supporting my work, sharing your fascinating thesis ideas with me, and teaching me how to conduct community-based research. Finally, a tremendous thank you to my parents and my sister for your constant love, motivation, and support.

## **Table of Contents**

Introduction.....	1
Chapter 1: Drug Court and Treating the U.S. Prison Addiction .....	8
Chapter 2: Methodology.....	39
Chapter 3: Punishment: .....	61
Chapter 4: Surveillance.....	85
Chapter 5: Access and Bias.....	114
Conclusion .....	139
Bibliography .....	143

## **Introduction**

“Do what they tell you!”<sup>1</sup> said the defense attorney when I asked him how he advises clients in drug court. Rather than being incarcerated, drug court participants are handed down to a team of treatment and legal professionals, and the consequence of failure in the program is the fearful prospect of going to prison. The defense attorney urges his clients, “Just do it. There’s no negotiation. Negotiation’s over. You’re turning yourself over to this treatment team.”<sup>2</sup>

In his *Discipline and Punishment*, Michel Foucault explained how carceral mechanisms of punishment and surveillance have become normalized within ordinary society.<sup>3</sup> He identified the completion of “the carceral” with the opening of Mettray prison colony in 1840.<sup>4</sup> At Mettray, the chiefs and deputies “were technicians of behavior” with the duty of transforming people into compliant and capable beings.<sup>5</sup> Upon entering Mettray, children underwent an “interrogation” of their backgrounds, including information about their family and their criminal histories.<sup>6</sup> The “modelling of the boy” produced a “knowledge of the individual” that was instrumental for compelling obedience and fostering the acquisition of new skills.<sup>7</sup> In other words, submissive subjects were produced using the vast amount of information known about them. Foucault depicted Mettray as involving a type of carceral supervision in which knowledge of the individual was used as power over those who violated disciplinary norms.<sup>8</sup> According to him, “the carceral” extends beyond the prison into normal society through the legal vehicle of justice and the extra-legal vehicle of discipline.<sup>9</sup> Even with rehabilitative institutions, the prison is reproduced through society’s continued use of disciplinary mechanisms.<sup>10</sup>

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<sup>1</sup> Defense Attorney X (non-drug court), interview by Claire Brown, November 14, 2016.

<sup>2</sup> Ibid.

<sup>3</sup> Michel Foucault, *Discipline and Punish: The Birth of the Prison*, vol. 2nd Vintage Books (New York: Vintage Books, 1995).

<sup>4</sup> Ibid., 293.

<sup>5</sup> Ibid., 294.

<sup>6</sup> Ibid.

<sup>7</sup> Ibid., 294-95.

<sup>8</sup> Ibid., 296.

<sup>9</sup> Ibid., 301.

<sup>10</sup> Ibid., 302-03.

Upon entering drug court, the participant moves from incarceration and the courts back into the community but, in a potentially Foucauldian fashion, is under another form of disciplinary control. From the cravings of drug dependency, from the prosecutor who offers a nonnegotiable plea deal, from the judge who imposes a conviction and a sentence, and from the constant watch of the prison guard, to the control of the drug court team, the sources of power over the individual are evident from multiple perspectives. Drug court uses a great deal of knowledge about people to reshape them into sober, law-abiding citizens. The drug court team knows nearly everything about the participants from where they live, to their daily routines, to their relationships. The knowledge extends beyond their criminal histories and is far more than a judge would know about a typical defendant. Having deep knowledge of the participants is considered critical for being able to rehabilitate them from drug abuse and crime as well as reintegrate them into normal society.

I became interested in the connection between drugs and the justice system over the course of my four undergraduate years as an intern at the Lewiston District Court. Whether the case was criminal, protective custody, family matters, etc., I noticed that a great deal of strife in the parties' lives was often caused by drug abuse. Even when people were incarcerated multiple times and had their children taken away, they were addicted to drugs and could not seem to change. And upon leaving court or being released from jail or prison, they were never actually free because they still wanted drugs and I would see them in court soon after. What I knew about them was based on their testimony and what I had read in their case files. Hearing attorneys question them about their histories of drug abuse and seeing the extensive lists of counts on police reports, I was shocked and frustrated. I wanted to take these people aside, shake them and say, "Get treated and make your own life." But I didn't really know what their lives were like.

One of the judges would hold Family Treatment Drug Court hearings on Fridays in Courtroom 5. I vaguely knew that the drug court docket consisted of drug-addicted parents involved in child abuse and neglect cases. Usually I would be assigned to record in another courtroom, so it was a while before I learned what was actually happening in Courtroom 5. Eventually I had the opportunity to sit in on one of

the hearings. My fellow intern told me, “It’s not real law, but it’s interesting.” And in a way both of these characterizations proved true once I entered the courtroom. What I saw was not two attorneys leering at each other from separate tables and battling it out with premade questions. I saw twelve mothers seated around a semi-circle table talking directly with the judge and with each other. Talking informally about how they were doing, how their treatment was going, about their lives. I felt I was getting to know them.

Then there were criminal arraignments in Courtroom 2, where I truly observed the cycling of people in and out of the criminal court system. Among the same orange and tan jumpsuits were also the faces that would appear again and again on new charges. A lot of these charges were drug-related and many of the alleged offenders were likely users themselves. I knew there were other types of drug courts besides Family Treatment Drug Court and that Adult Drug Court dealt with criminal cases. One day during dispositional conferences the judge introduced me to an Adult Drug Court prosecutor and then I was scheduled to observe drug court the following week. As in Family Treatment Drug Court, what I observed was a completely different interaction of a group of people talking directly with the judge and the other team members and with each other about their lives.

Foucault also said the carceral “naturalizes” the legal power to punish as it “legalizes” the technical power to discipline.<sup>11</sup> The power to punish in part defines the carceral state, as knowledge of individuals’ criminal histories is used to exclude them from key aspects of public life and citizenship while they are also placed under high surveillance. Worse is that people can be disproportionately subject to punishment and surveillance based on their race, immigration status, or socioeconomic status. Essentially, knowledge of individuals’ criminal histories and ethnic and socioeconomic backgrounds, absent knowledge of who they are as people, becomes a justified means for subjecting them to carceral control.

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<sup>11</sup> Ibid., 303.

The success of drug court in reducing crime is largely attributed to how it addresses the underlying cause of the crime, drug addiction. The drug court team intensely monitors and gets to know the participants on a personal level beyond what their criminal histories suggest. Program success and effectiveness have been principally measured against the goals of reducing recidivism and substance abuse, and lowering costs in the justice system. And yet, as Foucault's analysis of punishment, discipline, and surveillance suggests, we might evaluate this program from a perspective other than policy outcomes.<sup>12</sup> In other words, to gauge whether drug court is an alternative to the carceral state, we must examine whether its operative mechanisms are characterized by qualities distinct from Foucault's assessment of "the carceral." Or does drug court, even as it is a programmatic alternative to traditional incarceration, reproduce the problematic aspects of punishment, surveillance, and bias even if by other means. In other words, is drug court simply another form of carceral state development that uses its great knowledge of the person to discipline and thereby retains problems in the areas of punishment, surveillance, and bias, or is it an alternative approach to rehabilitating offenders addicted to drugs? In utilizing a Foucauldian and carceral state theoretical framework to evaluate drug court's relationship to the carceral state, this thesis uncovers what is hidden by a focus on recidivism.

The thesis specifically focuses on drug court in Maine through a case study of two drug courts in County X and County Y. The locations of the courts are not disclosed in order to maintain confidentiality. I answer my research question using interviews with members of the two drug court teams to learn how they view the program in relation to the themes of punishment, surveillance, and access and bias. I also gauge the interviewees' impressions of drug court as an alternative to incarceration and probation and how they view their roles in comparison with those in a traditional criminal court. I also use interviews with traditional criminal law professionals in County X to obtain a purely traditional criminal justice perspective on the program. In addition to interviews, I draw on my observations of drug court in County X to understand how drug court is implemented in Maine.

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<sup>12</sup> Ibid.

Chapter 1 is the literature review. Part I reviews the literature on the carceral state and suggests that critiques of the American criminal justice system are best conceptualized within the term “the carceral state,” which looks beyond prison growth to the impact of “tough-on-crime” policies and authoritative decisions on the treatment of ex-offenders and suspected criminals. The chapter outlines scholars’ perspectives on the origins of the carceral state and the development of its three defining features of punishment, surveillance, and bias, including the impact of turning points such as the War on Drugs. Part II on Adult Drug Court discusses the history and key components of the program. The section also reviews recent evaluations that indicate drug court is primarily evaluated in terms of reducing recidivism. The chapter frames my research question by emphasizing how existing evaluations on the subject of recidivism and other end goals do not sufficiently capture the program’s relationship to the carceral state. In this thesis I seek to understand whether drug court is in fact an alternative to the carceral state or if it merely reproduces core problems of punishment, surveillance, and bias.

Chapter 2 outlines my methodology for answering my research question. The chapter first frames my case study of drug court in Maine within a national evaluation of the program and its performance. The study portrays drug court as a success in terms of reducing recidivism and illicit drug use, as well as being cost-effective, and thus justifies my research into its relationship to the carceral state. The study also contains demographic data in terms of admission and success rates, which serves as a base from which I evaluate access and bias in Maine’s drug courts. The chapter then introduces the two drug courts that I study in County X and County Y. Next I describe my research methods beginning with the thirteen semi-structured interviews with drug court team members and traditional criminal justice professionals. I utilize the literature on qualitative semi-structured interviewing to explain my methods of questioning. The final section describes my approach to observing drug court in County X while utilizing the literature on participant observation.

Chapter 3 examines drug court’s relationship to the carceral state in terms of punishment. It shows that drug court is an improvement upon the carceral state in its focus on drug treatment as opposed to monitoring and punishment, and in how it conceptualizes punishment within a fairer system of

graduated sanctions. I nonetheless conclude that drug court can never be a true alternative to the carceral state given its reliance on the threat of punishment in order to motivate compliance. Furthermore, I find that the power to punish is expanded by the drug court team's ability to subjectively define which violations are deserving of more severe and punitive sanctions.

Chapter 4 examines drug court's relationship to the carceral state in terms of surveillance. It shows that the unique type of surveillance in drug court that rests on mutual accountability between the team and the participants and the participants and each other is more humanizing than in probation, incarceration, and traditional criminal court. The team becomes familiar with the participants as people and not just criminals and these personalized interactions foster mutual trust between the team and the participants. However, it ultimately suggests that the intense surveillance can create problems for people living in disadvantaged and drug-involved communities as they leave drug court and are not able to resist temptations to relapse and recidivate. Therefore, even though the type of surveillance in drug court is more humanizing, it is not an alternative to carceral state surveillance because it does not sufficiently respond to larger structural problems surrounding reintegration.

Chapter 5 examines bias in access to drug court at the stages of applying, admissions, and participants' success in the program. The chapter suggests there is bias in access to drug court at multiple levels, including the threat of punishment as a barrier to access, exclusions of certain types of persons, as well as some bias in favor people with the "right attitude" and structural advantages. It also finds that the drug court team members have various and more substantial definitions of success and effectiveness other than the traditional definition of reducing recidivism. Nonetheless, the presence of certain types of bias in drug court shows it is an extension of carceral state development in this respect.

Chapter 6 is the conclusion. The chapter answers my research question by revisiting Foucault's characterizations of punishment and "the carceral" as well as arguments from the literature on the carceral state. The chapter concludes that while drug court is an improvement in its conceptions of surveillance, punishment and success and effectiveness, it is nonetheless another vehicle of carceral state development

in that it relies on the threat of punishment as a source of control and does not adequately respond to structural obstacles surrounding reintegration.

## **Chapter 1: Drug Court and Treating the U.S. Prison Addiction**

“Mass incarceration” tends to be the buzzword used in critiques of the American criminal justice system. However, the problems extend far beyond prison and jail and are better encapsulated by the term “the carceral state.” This chapter conceptualizes the carceral state broadly, defining it not only in terms of prison construction and material capacity, but also to include the set of laws, policies and authoritative decisions whereby criminals and suspected criminals are disadvantaged in policing, prosecution, parole and probation, and upon reentry. Part I reviews the literature on critiques of the American criminal justice system and the carceral state. Part II introduces Adult Drug Court as a possible alternative to traditional incarceration. Part III assesses how we might evaluate drug court beyond a focus on recidivism and considers whether the program challenges or paradoxically reinforces the qualities of punishment, surveillance, and bias that are at the foundation of the carceral state.<sup>13</sup>

Part I begins by defining the magnitude of mass incarceration and traces the rise of the carceral state through the intensification of law enforcement and criminal law policy from the War on Crime to the War on Drugs. The literature on the carceral state reveals its three main qualities to be: 1) an emphasis on punishment rather than rehabilitation, 2) surveillance in a way that undermines human dignity, and 3) systemic bias, particularly racial bias, in the application of punishment and surveillance. The section shows how carceral state policies have historically had the effect of relegating large numbers of citizens to a socially and politically marginalized criminal status. Part I concludes with Marie Gottschalk’s criticism of the traditional ways of evaluating carceral state solutions based on reentry, recidivism, and justice reinvestment. She suggests these metrics do not sufficiently address carceral state development in their tendency to ignore problems of punishment, surveillance, and bias. These disturbing effects of carceral state development need to be addressed by any attempt at reducing mass incarceration, the visible manifestation of these underlying problems.

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<sup>13</sup> Ibid.

Part II begins by describing the contemporary shift in American criminal law policy from incarceration of drug-addicted offenders to treatment. It reviews the literature on drug court in general and then focuses on Adult Drug Court, a widely-used program alternative to incarceration for drug-addicted offenders that emphasizes treatment and rehabilitation. The section provides an overview of Adult Drug Court, describes how it differs from traditional criminal court, and gives an historical account of the program and its expansion across the United States. The chapter also summarizes key components and best practices of drug court, as well as the criteria used for its evaluation. It is in part meant to alert readers to parallels between the carceral state and drug court in terms of their structure and evaluation.

Having given an overview of the carceral state and Adult Drug Court as a programmatic alternative, the chapter grounds my research question: *Does Adult Drug Court in Maine present an alternative to the carceral state, thereby inhibiting its growth, or can it be viewed as simply another vehicle of carceral state development?* Part III asserts that the main ways in which Adult Drug Court has been evaluated - rates of recidivism and drug abuse as well as cost-effectiveness - do not sufficiently account for its impact on carceral state development. I seek to assess the relationship between drug court and the carceral state both empirically – how drug court’s design, operation and societal impact compare with the carceral state, and critically – the extent to which any similarities or deviations from the carceral state model are justified responses to crime and drug addiction.

My case study of drug courts in Maine is necessitated by two factors. First, as I am limited to writing a year-long thesis, I do not have the time or the financial resources to accomplish a systematic comparative study of the program throughout the United States. Second, the case study of Maine is normatively important since, as I will show, Maine has been severely impacted by the opioid and heroin abuse crisis.

## ***I. Sentenced to Life under the Carceral State***

The United States incarcerates more people than any other country, with 2.2 million people in the nation's prisons and jails in 2014. This marks a 500% increase in the incarcerated population over the previous forty years (see Figure 1-1). Changes in sentencing laws and policies, not crime rates, explain most of the increase.<sup>14</sup> The trends have resulted in prison overcrowding and fiscal burdens on states to accommodate rapid penal expansion (see Figure 1-2 for a representation of the rapid increase in corrections expenditures from 1985-2013).<sup>15</sup> Despite growing evidence that it does not effectively deter crime and ensure public safety, the U.S. continues to incarcerate unprecedented numbers of people.<sup>16</sup>

**Figure 1-1**



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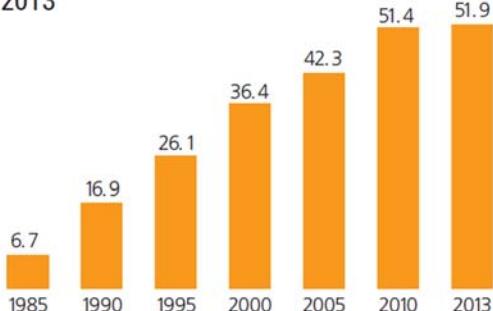
<sup>14</sup> "Fact Sheet: Trends in U.S. Corrections," The Sentencing Project, accessed November 4, 2016, <http://www.sentencingproject.org/criminal-justice-facts/>.

<sup>15</sup> Ibid.

<sup>16</sup> Ibid.

<sup>17</sup> Bureau of Justice Statistics Prisoners Series, "U.S State and Federal Prison Population, 1925-2014," (The Sentencing Project, 2014).

**Figure 1-2**  
State Expenditures on Corrections in Billions, 1985-2013



Source: National Association of State Budget Officers (1985-2013). *State Expenditure Report Series*. Washington, DC: National Association of State Budget Officers.

18

Mass incarceration is particularly pronounced in drug offending. The number of Americans incarcerated for drug offenses rose from 41,000 in 1980 to nearly half a million in 2014. This increase was largely due to harsh sentencing laws such as mandatory minimums that have continued to keep many people convicted of drug offenses in prison for longer periods.<sup>19</sup>

“Mass incarceration” is often the term used in critiquing the U.S. criminal justice system. The literature in political science and sociology however indicates that the problem is not merely the number of people in jail and prison. The persistence of tough-on-crime policies that have led to rising incarceration rates and infiltrated conceptions of U.S. governance and citizenship are better encapsulated by the term “the carceral state.” Scholars have not settled upon a singular definition of the carceral state but most view it as a collection of punitive institutions and policies employed in U.S. governance. David Garland’s conception of the “penal state” focuses on the authorities, e.g., the state legislature, executive, and judiciary, and agencies, e.g., police commissioners, chief prosecutors, judicial elites, justice department chiefs, correctional commissioners, etc. which enact and enforce penal rules.<sup>20</sup> He clarifies that “the penal state” is a more neutral term than “the carceral state” in that all states possess leadership

<sup>18</sup> National Association of State Budget Officers, "State Expenditures on Corrections in Billions, 1985-2013," (The Sentencing Project, 2013).

<sup>19</sup> "Fact Sheet: Trends in U.S. Corrections", 3.

<sup>20</sup> David Garland, "Penality and the Penal State," *Criminology* 51, no. 3 (2013): 494, 96.

for managing their penal policies.<sup>21</sup> Given that I am studying Adult Drug Court in light of critiques of the American criminal justice system, I comparatively analyze the institution against the more critical term of “the carceral state.” Following the practice in the extant multi-disciplinary literature on mass incarceration, I define the carceral state in terms of the policies and mechanisms as well as the authoritative decisions whereby criminals and suspected criminals are systemically disadvantaged in policing, prosecution, probation, parole and upon reentry.

Having read across different interpretations of the carceral state, I have identified three primary characteristics that define its policies and practices: 1) an emphasis on punishment rather than rehabilitation, 2) a system of surveillance that undermines human dignity, and 3) bias in the application of punishment and surveillance. The following section outlines a historical account of how punishment, surveillance, and bias came to be the defining features of the carceral state.

#### I.a. An Account of Carceral State Development

Elizabeth Hinton identifies the origin of the carceral state with President Lyndon B. Johnson’s conflicting efforts to combat poverty and crime. While federal policymakers and officials suggested problems of unemployment and inadequate urban schooling contributed to poverty and crime, incidents of collective violence during the 1960s turned them away from structural solutions.<sup>22</sup> As part of the Safe Streets Act of 1968, which invested \$400 million in the War on Crime, Johnson created the Law Enforcement Assistance Act (LEAA) to fund the enhancement of state criminal justice systems.<sup>23</sup> The President and Congress passed the LEAA in order to expand supervision and control over low-income urban communities.<sup>24</sup> While the law was written in race-neutral terms, it in part stemmed from policymakers’ perceptions of black urban youths as possessing individual and cultural deficiencies that

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<sup>21</sup> Ibid., 494.

<sup>22</sup> Elizabeth Kai Hinton, "Introduction: Origins of Mass Incarceration," in *From the War on Poverty to the War on Crime: The Making of Mass Incarceration in America* (Cambridge, Massachusetts: Harvard University Press, 2016), 12.

<sup>23</sup>Ibid., 1.

<sup>24</sup>Ibid., 3.

impeded their performance in society.<sup>25</sup> Policymakers, federal administrations, law enforcement officials, and journalists portrayed black urban youths as criminals and law enforcement began to target them.<sup>26</sup>

Others highlight the seemingly race-neutral “law and order” rhetoric of Barry Goldwater’s 1964 presidential campaign that was used again in Richard Nixon’s 1968 campaign.<sup>27</sup> They highlight Nixon’s association of crime with citizen protest movements, including the Civil Rights Movement, the Antiwar Movement, and the movement for women’s rights.<sup>28</sup> At the same time that these movements were being denounced as threats to law and order, the FBI reported significant increases in the national crime rate. While plausible explanations for the rise in crime were population growth with the baby boom generation or improvements in crime reporting, Nixon blamed citizen activism.<sup>29</sup> Michelle Alexander describes Nixon’s implication of the Civil Rights Movement as key to his electoral strategy of pitting poor and working class whites against blacks in order to recruit them into the Republican Party and secure their votes.<sup>30</sup> Once in office, Nixon introduced harsh sentencing reforms, supported targeted stationing of undercover police, and incentivized prison building.<sup>31</sup>

Drugs became the focus of the War on Crime during Nixon’s presidency. The Controlled Substances Act of 1970 created the ‘scheduling’ table that assigned prohibitive weight to substances based on their medical value, harmful effects on human health, and addictiveness.<sup>32</sup> Drug scheduling led to the rapid expansion of federal drug law enforcement.<sup>33</sup> In 1973, Nixon assembled the Drug Enforcement Administration (DEA). DEA agents were trained by the FBI to fight organized crime and the DEA built a large intelligence division that included former CIA personnel to fight the drug war.<sup>34</sup>

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<sup>25</sup> Ibid.

<sup>26</sup>Ibid., 12.

<sup>27</sup>Ibid., 7.

<sup>28</sup>Ava DuVernay, "13th," (Netflix, 2016).

<sup>29</sup>Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (New York, N.Y: New Press, 2012), 41.

<sup>30</sup>DuVernay, "13th."

<sup>31</sup>Hinton, "Introduction: Origins of Mass Incarceration," 4.

<sup>32</sup>Mona Lynch, "Theorizing the Role of the ‘War on Drugs’ in US Punishment," *Theoretical Criminology* 16, no. 2 (2012): 178.

<sup>33</sup> Ibid., 179.

<sup>34</sup> Ibid., 187.

The War on Drugs intensified during Ronald Reagan's presidency and onward. From 1980 to 1984, FBI antidrug funding increased from \$8 million to \$95 million, and Drug Enforcement Administration antidrug spending grew from \$86 million to \$1,026 million.<sup>35</sup> The economic recession of the 1980s presented limited employment opportunities for many inner-city residents who resorted to selling drugs.<sup>36</sup> The Reagan administration publicized the crack epidemic to build support for the drug war. Crack dealing was more common among blacks, Hispanics, and Latinos, and the media reinforced these racial stereotypes by disproportionately featuring black "crack whores," "crack babies," and "gangbangers."<sup>37</sup> Reagan also signed the Anti-Drug Abuse Act of 1986, which established mandatory minimum sentences for distribution of cocaine that were far more severe for crack than powder cocaine.<sup>38</sup> (The sentence was the same for possession of 1 ounce of crack and 100 ounces of cocaine powder).<sup>39</sup>

Mona Lynch notes that the federal government addresses only a small proportion of drug offenses whereas most drug law enforcement occurs at the state and local levels.<sup>40</sup> In fact, state and local law enforcement were at first reluctant to wage the drug war since it meant diverting resources from more serious crimes.<sup>41</sup> They nonetheless agreed to participate after President Reagan offered huge cash grants to law enforcement agencies that would prioritize drug-law enforcement.<sup>42</sup> As part of the Anti-Drug Abuse Act of 1988,<sup>43</sup> the Byrne program provided federal aid to law enforcement agencies to fight the drug war.<sup>44</sup> The program funded special drug enforcement units, anti-gang efforts and expanded narcotics task forces.<sup>45</sup> The DEA offered free training, intelligence, and technical support to state highway patrol agencies to conduct highway drug interdiction, and the Pentagon provided military intelligence and large

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<sup>35</sup> Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*, 43.

<sup>36</sup> Ibid., 51.

<sup>37</sup> Ibid., 52.

<sup>38</sup> Ibid.

<sup>39</sup> DuVernay, "13th."

<sup>40</sup> Lynch, "Theorizing the Role of the 'War on Drugs' in US Punishment," 181.

<sup>41</sup> Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*, 72.

<sup>42</sup> Ibid., 73.

<sup>43</sup> Marie Gottschalk, *Caught: The Prison State and the Lockdown of American Politics* (Princeton: Princeton University Press, 2015), 33.

<sup>44</sup> Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*, 73.

<sup>45</sup> Gottschalk, *Caught: The Prison State and the Lockdown of American Politics*, 33. Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*, 73.

funds to state and local agencies for mounting military drug war responses.<sup>46</sup> By the late 1990s, an overwhelming majority of state and local police forces in the country had boosted their military drug war operations.<sup>47</sup> Another way in which the Reagan administration incentivized state and local law enforcement to wage the drug war was through drug forfeiture laws, which allowed them to keep most of the cash and possessions that they seized.<sup>48</sup> Police departments could inflate their budgets by seizing the belongings and homes of people based on mere suspicion of illegal drug activity and without notice or hearing as long as they showed probable cause that the property had been “involved” in a crime.<sup>49</sup>

The electoral defeats of 1980, 1984, and 1988 communicated to Democratic presidential candidates that they could not appear soft on crime.<sup>50</sup> In 1994, President Bill Clinton signed a \$30 billion federal crime bill that created many new federal capital crimes, mandated life sentences for some three-time offenders (three strikes laws) and allocated over \$16 billion for state prison grants and the enhancement of state and local police forces.<sup>51</sup> Clinton also made it easier for federal assisted public housing projects to exclude people with criminal histories, which disproportionately affected racial and ethnic minorities.<sup>52</sup>

Common among the criminal justice policies of the different presidents were the enhancement of surveillance and policing, the creation of more stringent punishment policies, and the disproportionate impact of these policy decisions on poor and minority communities. These defining features have since persisted in the development of the modern carceral state. The following subsections discuss how these three features of punishment, surveillance, and bias presently operate within a variety of criminal justice and extra-carceral settings, including plea bargaining, monitoring by police and probation and parole

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<sup>46</sup> *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*, 73.

<sup>47</sup> Ibid., 74.

<sup>48</sup> Ibid., 78.

<sup>49</sup> Ibid., 79.

<sup>50</sup> DuVernay, "13th."

<sup>51</sup> Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*, 56.

<sup>52</sup> Ibid., 57.

officers, and ex-offender discrimination. The discussion is followed by an analysis of the implications of carceral state policies for American political development.

#### I.b.i. Punishment

As a result of the punitive turn in American governance, prosecutors now wield extreme power through plea-bargaining, in which a defendant pleads guilty in exchange for a lighter sentence.<sup>53</sup> Fearing a longer sentence if they lose in court, defendants may feel compelled to accept plea deals even when they are in fact innocent. The pressure to plead guilty has increased exponentially with the War on Drugs, especially the Anti-Drug Abuse Act's establishment of mandatory minimum prison sentences for low-level drug dealing and possession of crack.<sup>54</sup> In exchange for monetary rewards, states willingly adopted get tough policies such as harsh drug laws and three strikes laws.<sup>55</sup> Additionally, whereas in other nations and earlier in American history, probation and parole are intended for rehabilitation, in the United States today they prioritize policing and risk management.<sup>56</sup>

Beyond direct involvement in the criminal justice system, the status of “ex-offender” can come to define one’s place in society. As Michelle Alexander suggests, felons may be relegated to second-class citizenship through social and political discrimination reminiscent of the Jim Crow era.<sup>57</sup> Gottschalk similarly says many ex-felons and some former misdemeanants suffer a “civil death” of exclusion from public life and citizenship.<sup>58</sup> Both authors stress that former criminals, especially drug offenders, are highly restricted in employment, housing, education, public benefits, voting, and jury service, many of which are critical for leading productive, law-abiding lives.<sup>59</sup>

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<sup>53</sup> Ibid., 87.

<sup>54</sup> Ibid.

<sup>55</sup> Ibid., 97.

<sup>56</sup> Garland, "Penality and the Penal State," 478.

<sup>57</sup> Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*, 58.

<sup>58</sup> Gottschalk, *Caught: The Prison State and the Lockdown of American Politics*, 96.

<sup>59</sup> Ibid., 46; Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*, 141.

Joshua Kaiser argues that a major problem with these extra-carceral punishments is that they are “hidden sentences” - “punishment[s] imposed by law as a direct result but not as part of a formally recognized, judge-issued sentence.”<sup>60</sup> For example, the federal housing code bars drug offenders from public housing and two other areas of federal law bar them from receiving food stamps or education loans.<sup>61</sup> To illustrate the scope and multiplicity of hidden sentences, Kaiser presents the National Inventory of the Collateral Consequences of Conviction (NICCC), a dataset consisting of all codified, post-release hidden sentences across 53 U.S. jurisdictions compiled by The American Bar Association’s Criminal Justice Section and the National Institute of Justice in July, 2014.<sup>62</sup> More than 35,000 U.S. laws impose over 42,000 deprivations or harms based on a conviction or other criminal status.<sup>63</sup> An average of 2,100 laws per jurisdiction are punishments and severely impact offenders’ rights and opportunities.<sup>64</sup>

Kaiser indicates a number of inaccuracies and consequences that result from these sentences being hidden. First, they may be seen as of secondary in importance to “real” punishments.<sup>65</sup> Yet hidden sentences basically impact the totality of ex-offenders’ lives.<sup>66</sup> “Whole communities face political disempowerment, extreme poverty, damaged collective efficacy, and severe cynicism about government and law enforcement, yielding a cycle of community disadvantage and escalating violence.”<sup>67</sup> Secondly, hidden sentences are often masked as unintended “collateral consequences.”<sup>68</sup> Kaiser argues that the legislators, administrative agencies, and (non-convicting) judges who created them did so intentionally and directly based on criminal status.<sup>69</sup> Lastly, “collateral consequences” misconstrues hidden sentences

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<sup>60</sup> Joshua Kaiser, "Revealing the Hidden Sentence: How to Add Transparency, Legitimacy, and Purpose to “Collateral” Punishment Policy," *Harvard Law & Policy Review* 10 (2016): 127.

<sup>61</sup> Ibid., 157.

<sup>62</sup> Ibid., 128.

<sup>63</sup> Ibid., 178-79.

<sup>64</sup> Ibid., 126.

<sup>65</sup> Ibid., 144.

<sup>66</sup> Ibid., 145.

<sup>67</sup> Ibid., 149.

<sup>68</sup> Ibid., 150.

<sup>69</sup> Ibid., 149.

as byproducts of punishment rather than actual punishments.<sup>70</sup> And in the case of a hidden sentence, the punishment need not follow from actual wrongdoing, but merely an authority's perception of wrongdoing.<sup>71</sup> According to Kaiser, fundamental to addressing this problem is revealing hidden sentences for what they are, real, intended punishments.<sup>72</sup>

In conclusion, the expansion of law enforcement and penal policies during the 1980s and 1990s fostered a larger practice of what Gottschalk calls “governing through crime.”<sup>73</sup> The criminal justice system has tended towards punitive solutions to reducing crime that have allowed for the continuation of punishment upon reentry.

### I.b.ii. Surveillance

Apart from the constant supervision endured in prison and jail, the state continues to watch and place restrictions on former offenders and will swiftly punish them when they falter. Every day over 7 million people – 1 in every 32 adults – are incarcerated or on probation or parole or under some form of community supervision.<sup>74</sup> Those on probation or parole may be under constant police surveillance and stopped and searched (with or without consent) arbitrarily.<sup>75</sup> They also face restrictions on travel and behavior (e.g. engaging with other felons), frequent and unannounced drug tests, and various conditions such as paying fines and meeting with probation officers.<sup>76</sup> Violation of these conditions or failed drug tests can lead to re-incarceration. Extensive surveillance in policing has fostered distrust in the criminal justice system. Men on parole or probation with outstanding warrants avoid the police and the courts in fear of being sent back to prison or jail. This is true even for those who incur violent attacks and other serious crimes.<sup>77</sup> People also refrain from visits to local hospitals and steady employment for fear of

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<sup>70</sup> Ibid., 151.

<sup>71</sup> Ibid., 155.

<sup>72</sup> Ibid.

<sup>73</sup> Marie Gottschalk, "Chapter 10: The Carceral State and the Politics of Punishment," in *The Sage Handbook of Punishment and Society*, ed. Richard Sparks Jonathan Simon ( SAGE Publications, 2013), 207.

<sup>74</sup> Garland, "Penality and the Penal State," 478.

<sup>75</sup> Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*, 94.

<sup>76</sup> Ibid., 95; Gottschalk, *Caught: The Prison State and the Lockdown of American Politics*, 248.

<sup>77</sup> "Chapter 10: The Carceral State and the Politics of Punishment," 221.

being located by the police.<sup>78</sup> The surveillance also extends to institutions outside of the criminal justice system. Schools may employ school-based law enforcement, drug searches, uniforms, metal detectors, zero-tolerance rules and employers may use drug testing and other intrusive ways of monitoring their workers.<sup>79</sup> Welfare agencies and law enforcement have access to each other's databases, allowing the police to use the welfare system to locate people with outstanding warrants.<sup>80</sup> For many former offenders, receiving benefits is largely contingent on drug testing, finger printing, home searches and welfare hearings, which, when unsuccessful, can lead to criminal prosecution and incarceration.<sup>81</sup>

Carceral state surveillance has also expanded through blurred distinctions of civil, administrative, and criminal law.<sup>82</sup> In order to combat disorder, many cities have adopted expansive and legally complex social control mechanisms, including civil gang injunctions, no-contact orders, and exclusion laws that ban individuals seen as disorderly from urban spaces.<sup>83</sup> The state can thereby deem violations of civil or administrative orders to be criminal and follow up with criminal punishment.<sup>84</sup> The shift to a lighter burden of proof than the criminal statute further enhances the power to punish through civil sanctions and the creation of new crimes.<sup>85</sup>

The growing reach and various forms of penal supervision demonstrate an intent to "catch em' in the act" and punish rather than facilitate reentry. The carceral state has developed creative ways of finding ex-offenders in violation and thereby prohibiting them from entering certain spaces and accessing needed resources. The high level of surveillance also indirectly prevents reentry by conditioning abnormal behaviors of disengagement from public life for fear of being sent back to jail or prison.

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<sup>78</sup> *Caught: The Prison State and the Lockdown of American Politics*, 248.

<sup>79</sup> "Hiding in Plain Sight: American Politics and the Carceral State" (2008), 247.

<sup>80</sup> Vesla M. Weaver Amy E. Lerman, "The Carceral State and American Political Development" *"The Oxford Handbook of American Political Development* (2014): 7.

<sup>81</sup> *Ibid.*, 8.

<sup>82</sup> Katherine Beckett and Naomi Murakawa, "Mapping the Shadow Carceral State: Toward an Institutionally Capacious Approach to Punishment," *Theoretical Criminology* 16, no. 2 (2012): 222.

<sup>83</sup> *Ibid.*, 231.

<sup>84</sup> *Ibid.*

<sup>85</sup> *Ibid.*, 222.

### I.b.iii. Bias

Even with the end of slavery, the American criminal justice system has continued to disproportionately target certain racial groups, particularly African Americans, through convict leasing, segregation, racialized law and order rhetoric and polices, and now mass incarceration.<sup>86</sup> People of color make up 37% of the United States population but 67% of the prison population (see Figure 1-3). Black men are nearly 6 times as likely to be incarcerated as white men and Hispanic men are 2.3 times as likely.<sup>87</sup> People of color are more likely to be stopped, searched, arrested, convicted, harshly sentenced and have lifelong criminal records.<sup>88</sup> Trends of racial bias have been particularly pronounced in drug offending. Although rates of drug use and sales are similar among whites and people of color, blacks and Latinos are far more likely to be criminalized for drug offenses than whites. Blacks comprise 13% of the U.S. population but make up 31% of those arrested for drug law violations. Latinos comprise 17% of the US population but make up 20% of people incarcerated in state prisons for drug offenses and 37% of people incarcerated in federal prisons for drug offenses.<sup>89</sup>

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<sup>86</sup> Michelle Alexander discusses how during the Reconstruction Era states arrested large numbers of African Americans for minor offenses such as vagrancy and loitering (30-31). Also, convict leasing (by which prisoners were contracted out as laborers) created the nation's first prison boom, of which the population was mostly black (31-32). With the end of convict leasing, states enacted segregation laws aimed at disrupting interracial political alliances against the white elite (34). Eventually overt racism became unacceptable with the growth of the Civil Rights Movement, which advocated for equality in addressing the needs of the black and white poor (39). Conservative whites determined to restore the racial order knew it would have to happen in race-neutral terms and made subtle racial appeals in calling for law and order that blamed the Civil Rights Movement for rising crime rates (40). (Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*.)

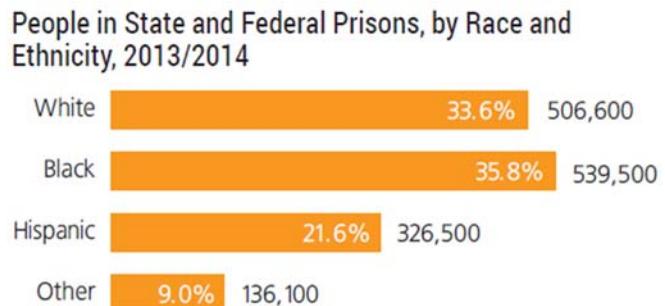
Naomi Murakawa rather argues that racialized "law and order" rhetoric was first employed about two decades earlier in direct defense of segregation (236). At the same time that many whites began condemning racism as contrary to American democracy, many also voiced public safety concerns about racial integration (236). "Southern Democrats in Congress, as well as many whites in the South and the urban North, defended Jim Crow by suggesting that segregation maintains law and order while integration breeds crime [...]" (237). In Murakawa's view, the law and order rhetoric used to defend segregation set the stage for race-based explanations of the 135% spike in crime rates between 1964 and 1968 (244). (Murakawa, "Chapter 10: The Origins of the Carceral Crisis: Racial Order as "Law and Order" in Postwar American politics," *Race and American Political Development*.)

<sup>87</sup> "Fact Sheet: Trends in U.S. Corrections", 5.

<sup>88</sup> "The Drug War, Mass Incarceration and Race," (Drug Policy Alliance, 2016), 1.

<sup>89</sup> Ibid.

**Figure 1-3**



Source: Carson, E.A. (2015). *Prisoners in 2014*. Washington, DC: Bureau of Justice Statistics.

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Bias is also evident in the criminalization of immigrants. According to Jonathon Simon, since the 1980s immigrants have been primary targets of the American criminal justice system, beginning with the sanctioning of employers who hired undocumented workers and in the 1990s with harsh "criminal alien" laws that mandated the deportation (and detention until deportation) of aliens with convictions for a number of state crimes.<sup>91</sup> In recent years, federal and local authorities have been detaining an increasing number of immigrants, both documented and undocumented in jails, prisons, and detention facilities.<sup>92</sup> Over the past few decades, a new system to capture, detain, and punish immigrants, including legal residents with green cards, has operated through the Immigrations and Customs Enforcement (ICE) and U.S. Marshals Service (USMS).<sup>93</sup> The system was built by incorporating many of the theories and practices of law enforcement into immigration enforcement, as well as the racialized law-and-order rhetoric.<sup>94</sup> The consequences of combining criminal justice with immigration enforcement have been severe for many immigrants. Arrests for minor infractions have been used to deport people who are not entitled to defense counsel and other legal protections.<sup>95</sup> Many deportees face discriminatory, inhumane, and sometimes life-threatening conditions upon returning "home."<sup>96</sup> The criminalization of

<sup>90</sup> Bureau of Justice Statistics, "People in State and Federal Prison, by Race and Ethnicity, 2013/2014," (The Sentencing Project, 2015).

<sup>91</sup> Jonathan Simon, "Rise of the Carceral State," *Social Research* 74, no. 2 (2007): 501.

<sup>92</sup> Gottschalk, *Caught: The Prison State and the Lockdown of American Politics*, 215.

<sup>93</sup> Ibid., 217.

<sup>94</sup> Ibid.

<sup>95</sup> Ibid., 216.

<sup>96</sup> Ibid., 220.

immigrants has also fostered the common misconception that they are responsible for a disproportionate number of serious crimes when in fact research indicates that immigration decreases crime rates.<sup>97</sup>

In addition to there being clear racial bias, the carceral state targets people of lower socioeconomic status. According to Steven Maynard-Moody, American sentencing laws that have been essential to fueling mass incarceration disproportionately impact the lives of the poor, especially poor minorities.<sup>98</sup> Jail, prison, probation, parole, warrants, and car and pedestrian stops have become regular occurrences within these communities.<sup>99</sup> Gottschalk argues that the carceral state has launched a “war on the poor.”<sup>100</sup> Budget cuts in corrections have burdened offenders with more fees and other financial obligations as well as not being able to afford even minimum bail costs.<sup>101</sup> Criminal law and policy have also led to high eviction rates in inner-city minority communities, which inhibit the poor from acquiring wealth and impede their ability to pay their criminal costs.<sup>102</sup>

The literature indicates that the intense surveillance and punishment of the carceral state disproportionately affect people of color, immigrants, and the poor. Any alternative to the carceral state should seek to undermine racial and class discrimination in the criminal justice system.

#### *I.c. Barred from Democratic Participation*

Punishment, surveillance and bias within the carceral state have important implications for American political development. The United States disenfranchises most of its prisoners and is the only democracy that disenfranchises large numbers of non-incarcerated offenders and ex-offenders.<sup>103</sup> Amy Lerman and Vesla Weaver also show that criminal justice interactions negatively affect people’s

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<sup>97</sup> Ibid., 216, 18.

<sup>98</sup> Steven Maynard-Moody, "Punishing the Poor," *Social Service Review* 90, no. 4 (2016): 713.

<sup>99</sup> Ibid., 710.

<sup>100</sup> Gottschalk, *Caught: The Prison State and the Lockdown of American Politics*, 46.

<sup>101</sup> Ibid.

<sup>102</sup> Maynard-Moody, "Punishing the Poor," 710.

<sup>103</sup> Gottschalk, "Chapter 10: The Carceral State and the Politics of Punishment," 219.

conceptions of democracy and their political positions within it.<sup>104</sup> And those belonging to historically targeted groups may come to view their groups and themselves as of lower political status.<sup>105</sup>

In November of 2010, Lerman and Weaver published an empirical study examining how criminal justice encounters affected individuals' perceptions of the government and civic participation. The study showed declining participation at every level of contact with the criminal justice system. Even a minor police encounter that did not result in an arrest was linked to reduced likelihood to vote in an election.<sup>106</sup> Additionally, "those who experience punitive interventions – from police questioning to incarceration – are much less likely to seek out civic society and participate in cultural, social, or political groups."<sup>107</sup> These people were much less likely to believe in the importance of voting, serving on a jury, performing community service, or serving in the military. The findings suggest that exposure to "the supervisory, punitive side of the state" renders one less likely to be engaged in civic society and to have less trust in the government and the democratic process.<sup>108</sup>

Also relevant to the political implications of the carceral state, Joshua Kaiser claims that "hidden sentences" are adverse to democracy and rule of law.<sup>109</sup> In a representative democracy, public participation in voting relies on at least some informed discussion of policy, and elected officials need be held accountable. The hiddenness also contradicts rule of law, "consistent and predictable laws of the land ought to supersede arbitrary action by government officials," and which must be made transparent to the public and to the officials themselves.<sup>110</sup> To the extent that freedom and equality are central to democracy, how can 42,000 punishments that permanently subordinate an enormous portion of the population ever be democratic, whether hidden or not?<sup>111</sup>

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<sup>104</sup> Amy E. Lerman and Vesla M. Weaver, *Arresting Citizenship: The Democratic Consequences of American Crime Control* (Chicago;London;: The University of Chicago Press, 2014), 9.

<sup>105</sup> Ibid.

<sup>106</sup> Vesla M. Weaver and Amy E. Lerman, "Political Consequences of the Carceral State," *American Political Science Review* 104, no. 4 (2010): 824.

<sup>107</sup> Ibid.

<sup>108</sup> Ibid.

<sup>109</sup> Kaiser, "Revealing the Hidden Sentence: How to Add Transparency, Legitimacy, and Purpose to "Collateral" Punishment Policy," 177.

<sup>110</sup> Ibid.

<sup>111</sup> Ibid., 178.

Underlying carceral state development and its political implications is the problem of unfairness. The carceral state not only locks away massive numbers of people, but it tells ex-offenders that their periods of doing time are never over. In a nation built on the principle of equal opportunity, it is unfair that such a large portion of citizens are forever restricted from pursuing the American dream. Rather they live in a perpetual nightmare in fear of being sent back to jail or prison and they withdraw from key aspects of civilian life and democratic participation. The unfairness of the situation is compounded by the disparate impact of punishment and surveillance, in which those relegated to this status of incomplete citizenship are largely, poor, African American, Hispanic, or immigrants.

#### I.d. Evaluating the Carceral State: “The Three R’s”

Marie Gottschalk indicates that carceral state solutions have chiefly been evaluated through the three R’s – reentry, recidivism, and justice reinvestment.<sup>112</sup> She contends that the approach problematically stresses repairing the individual while ignoring structural obstacles to reintegration.<sup>113</sup>

Reentry programs are aimed at cultivating personal traits of employability that are said to reduce recidivism, including social skills, personal appearance, and attitude.<sup>114</sup> The top reentry programs, however, have been shown to have little impact on reducing unemployment and recidivism among former offenders.<sup>115</sup> Prison-based GED, basic education, life skills, cognitive skills, and secondary and post-secondary education programs result in only short-lived boosts in earnings and employment and much of the literature suggests many programs have no impact on recidivism.<sup>116</sup>

Gottschalk argues that rather than personal traits, social and economic conditions are largely the predictors of successful reintegration.<sup>117</sup> Finding a job is often a parole condition even though most of the difficulties in seeking employment are out of the control of former offenders, such as the refusal to hire

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<sup>112</sup> Gottschalk, *Caught: The Prison State and the Lockdown of American Politics*, 79.

<sup>113</sup> Ibid., 80.

<sup>114</sup> Ibid., 82.

<sup>115</sup> Ibid., 83.

<sup>116</sup> Ibid., 83-84.

<sup>117</sup> Ibid., 84.

felons. Ex-offenders returning to economically disadvantaged neighborhoods have more difficulty finding employment and are more likely to recidivate. “African American men released to areas with higher unemployment rates for blacks are also more prone to violent recidivism.”<sup>118</sup> Limited low-skill urban labor, racial discrimination, and punitive attitudes of voters and lawmakers are all critical barriers to reintegration that are largely ignored by reentry programs aimed at reducing recidivism.<sup>119</sup>

Recidivism rates are seen as essential for judging the value of investments in corrections by states, municipalities, and taxpayers. “Recidivism” is nonetheless an ambiguous term and can mean rearrest, reconviction, or reincarceration.<sup>120</sup> In fact, most offenders are reimprisoned for minor crimes or technical parole violations. Depending on how it is defined, a focus on recidivism can mean little for improving public safety. Lower recidivism also does not necessarily indicate better policy.<sup>121</sup> States that incarcerate more low-level offenders rather than place them on probation or other alternatives tend to have lower recidivism rates, although they incur high incarceration costs. By contrast, states that sentence large numbers of released prisoners to parole generally have higher recidivism rates since parole officers will detect more violations.<sup>122</sup> Recidivism rates also do not necessarily explain crime rates. Arrest rates are as much dependent on policing and policy choices as the level of criminal activity.<sup>123</sup> Those targeted by police surveillance, including young minority men, residents of high crime areas, and people with prior criminal records, tend to be arrested more often.<sup>124</sup>

Justice reinvestment was initially based on the idea that local communities would lead the effort in solving their problems by redirecting money and resources from the criminal justice system to schools, healthcare services and areas of economic development.<sup>125</sup> Nowadays power and resources tend to remain within law enforcement and the penal system and are primarily aimed at avoiding prison costs.<sup>126</sup>

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<sup>118</sup> Ibid.

<sup>119</sup> Ibid.

<sup>120</sup> Ibid., 101.

<sup>121</sup> Ibid., 103.

<sup>122</sup> Ibid.

<sup>123</sup> Ibid., 104.

<sup>124</sup> Ibid.

<sup>125</sup> Ibid., 98.

<sup>126</sup> Ibid.

Yet the states leading in justice reinvestment have not seen significant reductions in prison populations nor major shifts in resource allocation from corrections to local communities. Much of the money saved has been allocated to community corrections and law enforcement agencies.<sup>127</sup>

Reentry and reintegration overlook the general disregard of law enforcement for offender rehabilitation. Many parole officers have adapted the rehabilitative rhetoric of reentry to their punitive techniques of surveillance, sanctions, and utilizing (or threatening) reimprisonment.<sup>128</sup> Gottschalk warns that so long as recidivism remains the principle measure of correctional effectiveness and is so vague as to include anything from rearrest for a minor technical violation to conviction for a serious crime, the punitive tendencies of law enforcement will continue to go unchecked.<sup>129</sup> The focus will be on enabling parole and probation officers to detect more violations and impose swifter sanctions while structural obstacles that prevent ex-offenders from meeting their conditions of release will be ignored.<sup>130</sup>

Essentially, Gottschalk criticizes that the current framework for curbing crime and mass incarceration ignores the core problems of carceral state development. The 3-R approach fails to acknowledge that individuals who develop beneficial qualities through reentry programs may still be barred from using them to their advantage. Rather than recognize the potential to move on from past wrongdoings, the carceral state tends to focus on catching people in error to justify continued use of punishment outside of prison and jail. Moreover, the punishment and surveillance target specific groups, namely African Americans, Hispanics or Latinos, immigrants, and the poor. A viable alternative to incarceration must therefore address the three problematic features of punishment, surveillance, and bias.

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<sup>127</sup> Ibid., 99.

<sup>128</sup> Ibid., 94.

<sup>129</sup> Ibid.

<sup>130</sup> Ibid.

## **II. Drug Court**

The Office of the National Drug Control Policy of the White House during President Barack Obama's term acknowledged that states bore large financial costs from mass incarceration and that too many people continued to abuse drugs and commit crimes upon reentry.<sup>131</sup> In its National Drug Control Strategy, the White House asserted that too often people with substance use disorders have been incarcerated when drug treatment – or alternatives such as drug courts – can achieve better outcomes at lower costs.<sup>132</sup> The administration supported the use of drug courts and other problem-solving courts to assist offenders with substance abuse disorders.<sup>133</sup>

Drug court is the most prominent problem-solving court in the United States. A problem-solving court consists of a judge working with a community team to develop a case plan and monitor defendants' compliance.<sup>134</sup> Drug court provides eligible drug-addicted offenders with an alternative to traditional incarceration through intensive, judicially-monitored drug treatment.<sup>135</sup> It differs from the traditional criminal justice system in important ways: the judge interacts directly with the defendant rather than through an attorney, the ultimate goal is to rehabilitate the individual from a life of crime and drug addiction, and instead of the defense and prosecution distinctly representing the defendant and the state respectively, they work together as part of a team.<sup>136</sup> The multidisciplinary team may consist of judges, prosecutors, defense attorneys, community corrections, social workers, and treatment service professionals.<sup>137</sup>

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<sup>131</sup> "Criminal Justice Reform: Breaking the Cycle of Drug Use and Crime," accessed 2016, <https://www.whitehouse.gov/ondcp/criminal-justice-reform>. (This content has been removed from the website by the current administration of President Donald Trump).

<sup>132</sup> "National Drug Control Strategy," ed. Executive Office of the President of the United States (2014), 25.

<sup>133</sup> Ibid., 27.

<sup>134</sup> "Problem-Solving Courts: Resource Guide," accessed September 16, 2016,

<sup>135</sup> "Types of Drug Courts," accessed <http://www.nadcp.org/learn/what-are-drug-courts/models>. Other types of drug courts include Veterans Treatment Court (the newest type), DWI Court, Family Dependency Treatment Court, and Juvenile Drug Court.

<sup>136</sup> "Adult Drug Treatment Court: Traditional Court Vs Drug Court," accessed September 16, 2016, ; "Adult Drug Court Best Practice Standards, Volume II," (National Association of Drug Court Professionals (NADCP). , 2015).

<sup>137</sup>"Drug Courts," accessed August 20, 2016, <https://www.ncjrs.gov/topics/courts/drug-courts/Pages/welcome.aspx>.

## II.a. The Origin of Drug Court

The first drug court opened in 1989 in Dade County, Florida's Eleventh Judicial Circuit in response to an increased caseload during the 1980s and the suspected connection between illicit drugs and public safety. It was founded on the idea that court-monitored drug treatment could reduce demand for illicit drugs as well as crime and re-involvement in the court system by substance abusers.<sup>138</sup> In the ten years after the first drug court was founded, 492 drug courts were opened in the United States. In December of 2014, it was estimated that over 3,000 drug courts were operating throughout the country, 1,540 of which were Adult Drug courts.<sup>139</sup>

Adult Drug Court is generally aimed at reducing recidivism and substance abuse among nonviolent substance abusing offenders and facilitating their reintegration. Other types of drug courts include Juvenile Drug Court, Driving While Impaired (DWI) Court, Veterans Treatment Court, etc.<sup>140</sup> Drug courts usually process cases in one of two ways: 1) "Deferred prosecution, or diversion" is when defendants enroll in drug court before entering a plea, "and those that complete the program are not prosecuted further or may have their charges dismissed."<sup>141</sup> Failure to complete the program results in prosecution for the original offense.<sup>142</sup> 2) In "Post-adjudication" drug court "participants are required to plead guilty to the charge or charges against them, and their sentences are suspended or deferred if they agree to participate in the program. If participants successfully complete the program, their sentences are waived."<sup>143</sup>

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<sup>138</sup> John Goldkamp, Weiland, Doris, "Assessing the Impact of Dade County's Felony Drug Court." National Institute of Justice," (National Institute of Justice 1993), 2.

<sup>139</sup> Ibid.

<sup>140</sup> "Types of Drug Courts".

<sup>141</sup> Celinda Franco, "Drug Courts: Background, Effectiveness and Policy Issues for Congress." " Congressional Research Service (2013): 10.

<sup>142</sup> Ibid.

<sup>143</sup> Ibid.

## II.b. Key Components of Drug Court

Drug courts generally operate according to the guidelines of the 1997 document, *Defining Drug Courts: The Key Components*, produced by the coordinated efforts of drug court practitioners and other experts that were convened by the National Association of Drug Court Professionals (NADCP). The committee included representatives from courts, prosecution, public defense, treatment, pretrial services, case management, probation, court administration, academia and others involved in drug court.<sup>144</sup> *Defining Drug Courts* outlines the basic elements of drug court - explaining the purpose of each and listing several performance benchmarks. To convey the overall design and purpose of drug court, I summarize the main points below.

Drug court operates through the coordinated efforts of a team, consisting of judges, prosecutors, defense counsel, probation officers and other corrections personnel, law enforcement, pretrial services, treatment providers, evaluators, local service providers, and the greater community.<sup>145</sup> Judges and other legal professionals can educate treatment professionals on criminal justice and court procedure, while treatment professionals can provide insight into the nature of substance abuse and effective treatment.<sup>146</sup>

Drug court typically occurs through a multi-phased treatment process that entails more intense supervision in the early phases. Supervision may be increased or reduced based on the participant's demonstrated compliance and progress.<sup>147</sup> The team uses various incentives and sanctions to encourage good behavior and discourage or sanction noncompliance.<sup>148</sup> Incentives can be praise from the judge, ceremonies and tokens of progress, reduced supervision, and fewer court appearances.<sup>149</sup> Sanctions can

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<sup>144</sup> "Defining Drug Courts: The Key Components," in *The National Association of Drug Court Professionals, Drug Court Standards Committee* (1997), 3.

<sup>145</sup> Ibid., 7.

<sup>146</sup> Ibid., 35.

<sup>147</sup> Ibid., 9.

<sup>148</sup> Ibid., 27.

<sup>149</sup> Ibid., 24.

be warning or reprimand by the judge, demotion to earlier phases, more frequent drug testing and court appearances, jail sentences, and up to termination from drug court.<sup>150</sup>

While ending drug addiction is the ultimate goal, drug courts should also acknowledge incremental progress, e.g. attending all status hearings, punctuality, and commitment to treatment.<sup>151</sup> Additionally, “treatment” should not be limited to drug treatment but should also include primary health and mental health care, as well as social and other support services.<sup>152</sup> Drug courts should work to partner with each other as well as with public agencies and community-based organizations to expand the types of services available to participants and to educate the community about drug court.<sup>153</sup>

To monitor its effectiveness, existing policy indicates that drug courts should measure fulfillment of their operational and administrative goals – e.g. implementation of treatment, as well as long-term goals – e.g. lowering recidivism.<sup>154</sup> Additionally, drug courts should evaluate whether they are cost-effective by calculating reductions in costs for the court, law enforcement and corrections, health care, as well as increased economic productivity.<sup>155</sup>

### II.c. Evaluations of Adult Drug Court

According to the NADCP, scientific evidence confirms that Adult Drug Court reduces drug abuse and crime and at far less of a cost than other judicial strategies. The NADCP’s *Adult Drug Court Best Practice Standards Vol. I* (2013) and *Vol. II* (2015) highlight which aspects of Adult Drug Court are most important for success. The volumes find that good performance depends on adhering to the *Key Components* and they highlight best practices in ten general areas of the program’s administration.<sup>156</sup>

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<sup>150</sup> Ibid., 24-25.

<sup>151</sup> Ibid., 23.

<sup>152</sup> Ibid., 15.

<sup>153</sup> Ibid., 37.

<sup>154</sup> Ibid., 29.

<sup>155</sup> Ibid., 33.

<sup>156</sup> "Adult Drug Court Best Practice Standards, Volume I," (National Association of Drug Court Professionals (NADCP), 2013), 1.

## Volume I

*Volume I* identifies best practices concerning target populations, historically disadvantaged groups, roles and duties of judges, incentives, sanctions, and therapeutic adjustments, and substance abuse treatment.<sup>157</sup> Eligibility and exclusion criteria for admission to drug court should be objective, and not reflect subjective impressions of motivation for change or readiness for treatment. Eligibility should rather be determined by predicting recidivism and failure in community supervision, and identifying substance dependency or addiction.<sup>158</sup> Additionally, drug courts should ensure that people who have historically been discriminated against or have had fewer opportunities because of their ethnicity, gender, sexual orientation, sexual identity, physical or mental disability, religion, or socioeconomic status have equal opportunity as everyone else to participate and succeed in drug court.<sup>159</sup>

Participants should appear before the same judge over the course of the program and be required to attend drug court hearings more often in earlier phases.<sup>160</sup> The frequency of status hearings may be reduced following consistent demonstration of restraint from substance use as well as engagement in treatment.<sup>161</sup> Participants also meet individually with a treatment provider or clinical caseworker at least once per week during the first phase. Fewer meetings may be required later on if unlikely to cause behavioral problems or relapses.<sup>162</sup> In the final phase, participants develop continuing-care plans with the help of their counselors to ensure continued engagement in prosocial activities and peer support groups upon graduation.<sup>163</sup> For at least the first 90 days after graduation, treatment providers or clinical case managers should attempt to contact former participants periodically to check on them, offer advice and encouragement, and provide referrals for additional treatment services if needed.<sup>164</sup>

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<sup>157</sup>Ibid.

<sup>158</sup>Ibid., 5.

<sup>159</sup>Ibid., 11.

<sup>160</sup>Ibid., 20.

<sup>161</sup>Ibid., 21.

<sup>162</sup>Ibid., 39.

<sup>163</sup>Ibid., 40.

<sup>164</sup>Ibid.

## Volume II

Volume II identifies best practices in complementary treatment and social services, drug and alcohol testing, the multidisciplinary team, census and caseloads, monitoring and evaluation.<sup>165</sup> Participants receive complementary treatment and social services apart from substance abuse treatment for conditions that may interfere with their participation, lead to criminal recidivism, or inhibit their progress.<sup>166</sup> Frequent drug and alcohol testing provides an accurate, timely, and comprehensive assessment of unauthorized substance use and helps ensure proper implementation of incentives or sanctions and adjustments to treatment and supervision.<sup>167</sup> Testing is random and unpredictable, meaning the likelihood of being tested on weekends and holidays is the same as for normal week days.<sup>168</sup>

Adult Drug Court is run by a multidisciplinary team of professionals. Team members review the participants' progress in pre-court staff meetings and in-court status hearings, provide observations and recommendations within their fields of expertise, and conduct or oversee the administration of legal, treatment and supervision services.<sup>169</sup> The judge considers the input of all team members before making decisions and explains his or her decisions before the team and the participant.<sup>170</sup>

*Volume II* also offers guidance on determining the appropriate caseloads for drug courts, probation and other community supervision agencies, and clinicians. Each should seek to serve as many eligible individuals as possible without compromising adherence to best practices.<sup>171</sup>

*Volume II* concludes by providing guidelines for monitoring and evaluating drug court. It emphasizes evaluating its adherence to best practices, in-program outcomes, and criminal recidivism.<sup>172</sup> In-program evaluations look at attendance at meetings, drug and alcohol test results, graduation rates, retention, technical violations, and new arrests during participation. Evaluations of criminal recidivism

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<sup>165</sup> "Adult Drug Court Best Practice Standards, Volume II."

<sup>166</sup> Ibid., 5.

<sup>167</sup> Ibid., 28.

<sup>168</sup> Ibid., 29.

<sup>169</sup> Ibid., 38-39.

<sup>170</sup> Ibid., 38.

<sup>171</sup> Ibid., 51.

<sup>172</sup> Ibid., 59.

monitor new arrests, new convictions, and new incarcerations for at least three years following the participant's enrollment in drug court.<sup>173</sup> Drug court should also monitor admissions rates, services received, and outcomes for members of historically disadvantaged groups.<sup>174</sup>

#### A Note on the Commentaries

In both volumes, the commentaries on the research confirming the effectiveness of each practice give insight into the ways in which the effectiveness of Adult Drug Court has been traditionally measured. Firstly, effectiveness is measured by successful outcomes for participants, such as remaining in treatment and complying with program requirements, improved access to services, and increased graduation rates.

Common across the commentaries were more general evaluations of reduced substance abuse, reduced criminal recidivism, and cost-effectiveness. At least one of these three criteria were mentioned in each commentary. For example, in discussing drug and alcohol testing, *Volume II* cites a study of around 70 drug courts that reported significantly greater reductions in criminal recidivism and significantly greater cost benefits when the teams received drug and alcohol test results within 48 hours of collecting samples. Drug courts that received test results within 48 hours were 73% more effective at reducing crime and 68% more cost-effective than drug courts receiving test results after more than 48 hours.<sup>175</sup>

#### II.d. Research Question

The literature on the carceral state and drug court emphasizes measuring effectiveness through rates of recidivism. And yet, political scientist and development scholar Marie Gottschalk warns that recidivism is not always a reliable measure of policy effectiveness.<sup>176</sup> Furthermore, Foucault's analysis of power and punishment suggests that we might do well to consider whether and how this programmatic alternative to traditional incarceration comports with or challenges the dimensions of "the carceral" that

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<sup>173</sup> Ibid.

<sup>174</sup> Ibid., 60.

<sup>175</sup> Ibid., 33.

<sup>176</sup> Gottschalk, *Caught: The Prison State and the Lockdown of American Politics*, 103.

he described. Indeed, evaluations based on recidivism might suggest that drug court is a success, but they can also mask the punitive nature of policies and thus how the program is reinforcing rather than challenging these dimensions. Additionally, a focus on recidivism does not address the structural obstacles, whether they be the stigma of the criminal label or racial discrimination that can bar people from reintegration. It is not clear that the remaining criteria for evaluating drug court, rates of substance abuse and cost-effectiveness, place an obligation on drug courts to assess how they compare with the carceral state.

Given the rapid growth of this institution and its being lauded as an alternative to traditional incarceration, a complete assessment of drug court must inquire into its impact on the carceral state. In other words, to conceptualize whether drug court is an alternative to the carceral state, we have to assess whether or not it reproduces the core problems of punishment, surveillance, and bias. I seek to understand whether drug court's unique structure and goal of rehabilitation help retain the human dignity and citizenship of the offender that would otherwise be diminished under the punitive governance and surveillance of the carceral state. In other words, does drug court treat the participants in ways that are truly rehabilitative or is it simply creating punishment and surveillance by other means? The literature on drug court indicates that surveillance techniques such as frequent drug and alcohol testing as well as sanctions for noncompliance are key components of the program. The question is whether the ways in which drug court utilizes surveillance and punishment or not is less dehumanizing. I also assess whether there is any kind of bias such that certain types of persons (by race, class, gender, etc.) have more or less access or are more likely to succeed in this program. I use these examinations to evaluate whether drug court is an alternative to the carceral state.

Some of drug court's best practices, e.g. drug testing and sanctions, appear as though they may mimic carceral state mechanisms of punishment and surveillance. Through a comparative analysis of the structure and implementation of drug court with that of traditional incarceration, I will answer the crucial question of whether drug court is an alternative to incarceration, or is it merely an extension of the carceral state. It is vital to examine how punishment and surveillance in the carceral state compare with

drug court because they have been shown to impede reintegration, confidence in the democratic process, as well as trust in the government and motivations for civic engagement.

Secondly, the literature shows that high levels of discretion have made prosecutors and law enforcement more powerful and punitive and less accountable to the public. Since prosecutors and law enforcement serve on the drug court team, it is important to assess whether the design of drug court, namely multiple entities working on a team, counteracts problematic features of the carceral state. In other words, does the design of the program improve the dynamic between the citizen (drug offender) and the justice system or is it merely a new version of expanded and intrusive carceral state surveillance?

In fact, Mona Lynch argues that drug courts and other treatment alternatives have intensified punishment and surveillance. “Research indicates that the presence of a drug court increases the number of offenders arrested in a given jurisdiction.”<sup>177</sup> Police are more likely to arrest in low-level drug cases in believing that drug courts will provide the necessary positive intervention. Drug courts in turn augment the concentration of law enforcement in areas already under high surveillance, further deepening the racial and socioeconomic discrimination in criminal justice interactions.<sup>178</sup>

As seen in the White House’s National Control Strategy, drug treatment and drug court as a strategy are central to how we now consider drug crime to be both a public health and public safety issue.<sup>179</sup> When considering drug court in light of the literature on the carceral state, it is important to note that “drug treatment” like “law and order” is a race-neutral term. Yet racial discrimination has consistently reemerged in American politics even when the dominant discourse has been race-neutral. It is important to assess whether drug court effectively counteracts biases within the carceral state or marks another phase in the long history of decreasingly race-neutral rhetoric with consistently racist implications.

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<sup>177</sup> Lynch, "Theorizing the Role of the ‘War on Drugs’ in US Punishment," 185.

<sup>178</sup> Ibid.

<sup>179</sup> "National Drug Control Strategy," 25.

Mona Lynch criticizes that drug courts essentially “sort” which drug offenders are brought into the criminal justice system, due to their strict eligibility criteria.<sup>180</sup> Structural inequalities beyond the courts ensure that more indigent defendants and those of color are barred from drug court, while white and more affluent defendants are welcome to participate. Poor participants who are mostly of color are less able to succeed due to lack of resources – transportation, money, time, and social support resources needed for successful participation.<sup>181</sup> She claims women are also at a disadvantage in drug court. Drug courts often do not distinguish between male and female participant needs and women, especially mothers, are less likely than men to have the supports they need. The consequences of failing out of drug court can be worse than if one had not participated at all.<sup>182</sup> For example, research on New York drug courts suggested that those who ‘failed’ in drug court were much more likely to be incarcerated and for much longer periods than those who were eligible but did not participate.<sup>183</sup>

#### II.e. Case Study of Maine Adult Drug Courts

I have chosen to study Adult Drug Court in Maine not only because it is convenient for me in terms of location, but also Maine is one of the states that has been most affected by the opioid and heroin abuse crisis. Drug overdose deaths in Maine this year are on track to exceed last year’s record by almost 40%. Addiction to opioids, including heroin, fentanyl, and prescription painkillers caused most of the deaths.<sup>184</sup> About 25,000 to 30,000 Mainers have been unsuccessful in accessing drug treatment programs, according to the Substance Abuse and Mental Health Services Administration.<sup>185</sup> As a prevention measure, Maine recently adopted some the nation’s strictest rules for regulating opioid prescriptions, requiring doctors to use the state’s prescription monitoring program and capping the dosage for opioids.<sup>186</sup>

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<sup>180</sup> "Theorizing the Role of the ‘War on Drugs’ in US Punishment," 185.

<sup>181</sup> Ibid.

<sup>182</sup> Ibid.

<sup>183</sup> Ibid., 185-86.

<sup>184</sup> Joe Lawlor, "Fueled by Opioid Crisis, Drug Overdose Deaths on Record Pace in Maine," *Portland Press Herald* 2016.

<sup>185</sup> Ibid.

<sup>186</sup> Ibid.

In May of 2016, the Maine Opiate Collaborative published a set of recommendations for addressing the heroin/opiate epidemic. The Collaborative consisted of professionals and experts in law enforcement, education/prevention/harm reduction, and treatment to discuss issues of supply, demand and addiction.<sup>187</sup> Law enforcement stressed approaching the crisis as both a public safety and public health problem. The public health aspects (e.g. low-level users) should be addressed through health services such as drug court and diversion.<sup>188</sup> Law enforcement recommended expanding access to problem-solving courts, such as drug courts. It also suggested creating a system to track recidivism rates to determine the effectiveness of problem-solving courts and to guide treatment options.<sup>189</sup>

The opioid crisis creates an important role and presents unique challenges for Adult Drug Courts in Maine. It will be interesting to try and understand the impact the opioid crisis has had on the effectiveness of Maine's drug courts.

### **III. Conclusion**

Alternatives to traditional incarceration cannot simply feed into carceral state development. Criminal justice institutions can forever constrain the lives of many who are labeled criminal, branding them as second-class citizens and setting them up for reimprisonment rather than reintegration. Punishment, surveillance, and bias extend beyond prison and jail, from policing, prosecution, and probation to housing and employment, to civic engagement. Whether they be "hidden sentences"<sup>190</sup> or "race-neutral" calls for law and order,<sup>191</sup> the overall reach of the carceral state is less apparent than mass incarceration, but it cannot be ignored.

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<sup>187</sup> Janet T. Mills Thomas E. Delahanty II, John E. Morris, "Recommendations of the Maine Opiate Collaborative," ed. Maine Opiate Collaborative (2016), 1.

<sup>188</sup> Ibid., 53.

<sup>189</sup> Ibid., 58.

<sup>190</sup> Kaiser, "Revealing the Hidden Sentence: How to Add Transparency, Legitimacy, and Purpose to "Collateral" Punishment Policy."

<sup>191</sup> Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*, 40.

Adult Drug Court is becoming a widely-used alternative to incarceration for substance abusing offenders as the nation comes to view illegal drug use primarily as a problem of addiction rather than criminality. The program has been hailed as a success by many for lowering rates of recidivism and substance abuse and saving money. As with mass incarceration, however, these evaluations do not sufficiently examine the extent to which the underlying problems of the carceral state are reproduced.

Given that the carceral state has come to affect various areas of social and political life beyond prison and jail, we need to assess the extent to which drug court is an alternative or a mere extension of the carceral state. This thesis will answer the question, *Does Adult Drug Court in Maine present an alternative to the carceral state, thereby inhibiting its growth, or can it be viewed as simply another vehicle of carceral state development?* I assess the ways in which drug court deviates from or utilizes comparable mechanisms of punishment and surveillance and whether there is bias in access and success comparable with biases found in the carceral state. I narrow my focus to drug courts in Maine, which is an important case study given that Maine currently faces a heroin and opioid abuse crisis. A thorough examination of Maine's Adult Drug Courts enables me to determine the extent to which the problematic pathologies of the carceral state are either continued or resolved within the program.

As greater numbers of people are being swept into prison and jail, the carceral state becomes more a part of American political development by relegating an enormous portion of the population to the margins of society. We must assess how the extensive reach of incarceration is affected by the institution of alternative programs like drug court. As more people are diverted from traditional incarceration to drug court, does this intentionally rehabilitative program present an alternative to the carceral state?

## **Chapter 2: Methodology**

This chapter explains the methods of data collection and analysis I use to assess the relationship of Adult Drug Court (henceforth also known as drug court) to the carceral state in Maine. Part I presents the first data set, The National Drug Court Institute’s most recent “Painting the Current Picture” survey on the effectiveness of the program nationally. The survey indicates that drug court is successful at reducing recidivism, reducing drug illicit use, and saving money. It also portrays the demographic distribution of participation in the program and suggests evidence of racial disparities in access and graduation rates.<sup>192</sup> This national data provide a comparative base for framing my case study of Maine’s drug courts. As explained in Parts II and III, most of my data comes from qualitative interviews and observations of two drug courts in Maine in County X and County Y. I use a combination of one-on-one interviews with members of the drug court teams and criminal law professionals who are unaffiliated with drug court, as well as direct observations of drug court. The qualitative data provide explanations for Maine’s drug court operation and performance. Gauging these possible explanations enables me to assess whether the performance is based on continuing or deviating from carceral state practices of punishment, surveillance, and bias.

### **I. “Painting the Current Picture” of National Drug Court Performance:**

The June 2016 survey, “Painting the Current Picture: A National Report on Drug Courts and Other Problem-Solving Courts in the United States” provides the most recent analysis of drug courts and other problem-solving courts in every U.S. state and territory. The National Drug Court Institute (NDCI) has been conducting the PCP Survey twice a year since 2004.<sup>193</sup> The survey evaluates the effectiveness

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<sup>192</sup> Douglas B. Marlowe, Carolyn D. Hardin, and Carson L. Fox, "Painting the Current Picture: A National Report on Drug Courts and Other Problem-Solving Courts in the United States," (Alexandria, Virginia: National Drug Court Institute (NDCI), 2016).

<sup>193</sup> Ibid., 10.

of drug courts, identifies which individuals are most likely to succeed, and highlights practices that lead to better outcomes for participants and for society.<sup>194</sup>

#### I.a. Recidivism and Cost-effectiveness

The survey indicates Adult Drug Courts work. At least 9 meta-analyses, systematic reviews, and multisite studies conducted by leading scientific organizations have shown that they significantly reduce criminal recidivism – typically measured by rearrest rates over at least two years – by an average of approximately 8 to 14% (see Figure 2-1).<sup>195</sup> The most effective drug courts have been found to reduce recidivism by 35 to 80%.<sup>196</sup> Two randomized experiments and one meta-analysis determined that the effects of Adult Drug Courts lasted for at least three years after participants had left the program.<sup>197</sup> Additionally, a national study of 23 Adult Drug Courts – Multisite Adult Drug Court Evaluation (MADCE) – found that participation significantly reduced illicit drug and alcohol use, improved family relationships, reduced family conflicts, and increased access to needed financial and social services.<sup>198</sup> The survey also highlights that the program is cost-effective. Several meta-analyses and the MADCE concluded that these drug courts yielded an average return on investment of approximately \$2 to \$4 for every \$1 invested, amounting to a 200 to 400% return on investment.<sup>199</sup> These calculations convey a net economic savings for local communities of approximately \$3,000 to \$22,000 per participant.<sup>200</sup>

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<sup>194</sup> Ibid.

<sup>195</sup> Ibid., 15.

<sup>196</sup> Ibid.

<sup>197</sup> Ibid.

<sup>198</sup> Ibid.

<sup>199</sup> Ibid.

<sup>200</sup> Ibid.

**Figure 2-1**

**Table 1. Drug Court Effectiveness Studies**

Study	Method	Number of Drug Courts	Average Reduction in Recidivism
Mitchell et al. (2012)	Meta-analysis	92	12%
Carey et al. (2012b)	Multisite study	69	32%
Rossmann et al. (2011)	Multisite study	23	13%
U.S. Government Accountability Office (2011)	Systematic review	32	6%–26%
Shaffer (2010)	Meta-analysis	76	9%
Aos et al. (2006)	Meta-analysis	57	8%
Latimer et al. (2006)	Meta-analysis	66	9%
Wilson et al. (2006)	Meta-analysis	55	14%
Lowenkamp et al. (2005)	Meta-analysis	22	8%

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### I.b. Race and Ethnicity

The NDCI has expressed concern that African-American and Hispanic or Latino persons appear to be underrepresented in some drug courts relative to jail and prison populations, and are graduating at rates substantially below those of non-Hispanic Caucasians.<sup>202</sup> The NDCI has emphasized that drug courts must determine whether access or outcomes differ for some racial or ethnic groups and, if so, they must work to undermine these disparities.<sup>203</sup>

A 2014 study concluded that, on average, Caucasians represented 2/3 (67%) of drug court participants and African Americans represented 17% of drug court participants.<sup>204</sup> There was a small increase in Caucasian representation since 2008 (from 62% in 2008 to 67% in 2014) and a small decrease in African-American representation (from 21% to 17%) (see Figure 2-2).<sup>205</sup>

Caucasian representation in drug courts was roughly equal to that of the general and arrestee populations, but was considerably higher than probation, parole, and incarcerated populations.<sup>206</sup>

<sup>201</sup> Painting the Current Picture: A National Report on Drug Courts and Other Problem-Solving Courts in the United States, "Table 1. Drug Court Effectiveness Studies," (2016).

<sup>202</sup> Marlowe, "Painting the Current Picture: A National Report on Drug Courts and Other Problem-Solving Courts in the United States," 10.

<sup>203</sup> Ibid., 46.

<sup>204</sup> Ibid.

<sup>205</sup> Ibid.

<sup>206</sup> Ibid.

African-Americans were slightly overrepresented in drug courts compared to the general population, but were underrepresented relative to all other criminal justice populations. Hispanic and Latino participants were underrepresented by a small-to-moderate margin in drug courts compared to both the general population and other criminal justice populations.<sup>207</sup>

**Figure 2-2**

**Table 6. Drug Court Population by Race and Ethnicity**

Race or Ethnicity	Mean (SD)	Range
White or Caucasian	67% (25%)	0%–98%
<i>non-Hispanic</i>	62% (26%)	0%–97%
<i>Hispanic</i>	4% (10%)	0%–52%
Black or African-American	17% (19%)	0%–98%
<i>non-Hispanic</i>	17% (19%)	0%–98%
<i>Hispanic</i>	1% (2%)	0%–15%
Hispanic, Latino, or Spanish (any race)	10% (19%)	0%–100%
American Indian or Alaskan Native	5% (9%)	0%–36%
Guamanian or Chamorro	2% (10%)	0%–65%
Pacific Islander	1% (4%)	0%–20%
SD: standard deviation		208

Twenty-two respondents (41% of states and territories) provided data on graduation rates for African-American participants, and 19 respondents (35%) provided data on graduation rates for Hispanic and Latino participants.<sup>209</sup> These graduation rates were compared to the overall graduation rates for those areas. The average graduation rate for African-American participants was 39% compared to an overall graduation rate for the same states or territories of 58%.<sup>210</sup> The average graduation rate for Hispanic and Latino participants was 32% compared to an overall graduation rate for the same states or territories of

<sup>207</sup> Ibid.

<sup>208</sup> Painting the Current Picture: A National Report on Drug Courts and Other Problem-Solving Courts in the United States, "Table 6. Drug Court Population by Race and Ethnicity," (2016).

<sup>209</sup> Marlowe, "Painting the Current Picture: A National Report on Drug Courts and Other Problem-Solving Courts in the United States," 48.

<sup>210</sup> Ibid.

57%.<sup>211</sup> The data suggest that African-American and Hispanic participants are graduating from some drug courts at rates significantly below those of other drug court participants.<sup>212</sup>

A Note on the PCP Data:

Consistent with the criteria for measuring effectiveness used in the *Adult Drug Court Best Practice Standards*, the NDCI has suggested that drug courts work based on successful outcomes for participants, reductions in illicit drug use, reductions in criminal recidivism, and cost-effectiveness. However, there is evidence of potential racial and ethnic bias in terms of who has access to drug court and who succeeds in the program. The most notable disparities and underrepresentation were for African-American and Hispanic or Latino persons. For evaluating the success of drug court as an alternative to incarceration, this data is alarming since these are the populations that have historically been targeted by the American criminal justice system. While the survey acknowledges that drug courts have an obligation to investigate these disparities, there is no indication yet of an explanation.

**II. Overview of the Data**

**II.a. Explanation of Drug Court in County X and County Y**

My study focuses on one drug court in County X with another drug court in County Y as a shadow, or less-developed but still informative, case study. I do not disclose the locations of the courts in order to maintain the confidentiality of the interviewees. Ideally I would have been able to conduct a comparative study of all of the Adult Drug Courts in Maine and interview all members of the team as well as the participants. However, such a large-N study was not possible given the financial costs involved and year-long time constraint. I ultimately conducted thirteen interviews and observed drug court in County X four times.

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<sup>211</sup> Ibid.

<sup>212</sup> Ibid.

One enters Adult Drug Treatment Court in County X after pleading guilty to having committed a crime.<sup>213</sup> There must be a clear connection between the applicant's substance abuse disorder and the alleged criminal behavior.<sup>214</sup> The person then forms an agreement with the District Attorney's office that outlines what the underlying incarcerated sentence will be if he or she fails to complete drug court. An individual who successfully graduates from drug court receives a "good sentence," which acknowledges completion of the program and then generally he or she is placed on probation. The original jail or prison sentence is suspended meaning the individual is not subject to any period of incarceration.<sup>215</sup> However, if the individual violates the conditions of probation, they can be required to serve their original sentence. Alternatively, an individual who ends up being terminated from the program receives a "bad sentence," meaning the traditional sentence that was decided prior to his or her enrollment in drug court gets imposed. In addition, jail time as a sanction while in drug court counts against the individual's underlying sentence.<sup>216</sup>

The County Y Adult Drug Treatment Court is different in that it is probation-only. This means that the participants have already been convicted of an underlying charge and have been sentenced in the traditional criminal justice system.<sup>217</sup> The original sentence imposed was either a suspended sentence or a split sentence. A suspended sentence means the court imposes no jail time and the person is placed on probation with a number of conditions meant to induce rehabilitation. A split sentence means the court imposes an incarcerated sentence that is only partially completed with the remaining time suspended. After the initial unsuspended time is served, the person is placed on probation.<sup>218</sup> Participants can come into drug court in County Y when they violate their conditions of probation and the violation appears to be due to substance abuse.<sup>219</sup> In most cases, participants admit to the allegations made in the Motion to

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<sup>213</sup> Judge X (drug court), interview by Claire Brown, December 12, 2016.

<sup>214</sup> "County X' Adult Drug Treatment Court: Purpose, Goals, Eligibility Guidelines and Procedures," 2.

<sup>215</sup> Prosecutor X2 (drug court), interview by Claire Brown, November 14, 2016.

<sup>216</sup> Judge X (drug court), "Interview, December 12, 2016."

<sup>217</sup> Defense Attorney Liaison Y (drug court), interview by Claire Brown, December 19, 2016. Although I was unable to conduct a full interview with Defense Attorney Liaison Y (drug court), she provided information on the operation of drug court in County Y.

<sup>218</sup> Judge Y (drug court), interview by Claire Brown, March 16, 2017.

<sup>219</sup> Defense Attorney Liaison Y (drug court), "Interview, December 19, 2016."

Revoke Probation when they enter drug court.<sup>220</sup> The program also accepts participants who have already had access to treatment during their probation and who appear to need the additional support of drug court.<sup>221</sup> There are a number of drug court specific conditions that are added to the individual's conditions of probation. One who gets terminated from drug court faces the imposition of any or all of the remaining suspended jail time.<sup>222</sup>

### II.b. Interviews

Most of my data were obtained through qualitative interviews with drug court and traditional criminal law professionals. I interviewed judges, prosecutors, defense attorneys, and law enforcement since these roles overlap between drug court and the traditional criminal justice system. The interviewees from County X included, from drug court: the judge, two prosecutors, defense attorney liaison, and probation officer; from traditional court: a judge, prosecutor, defense attorney, and detective. The interviewees from County Y included, from drug court, the former judge, former prosecutor, current probation officer, and case manager. Unfortunately I was not able to interview as many individuals from County Y due to location and communication issues.

County X and County Y Adult Drug Court Interviewees and Roles	
Interviewee	Role Description
<b>County X</b>	
Judge X (drug court)	Makes the final decision on whether someone is admitted into drug court. Monitors and speaks with the participants and imposes sanctions if needed. Oversees the participants "commencement" (graduation) from drug court. <sup>223</sup>
Prosecutor X1 (drug court)	Represents the state's interest and prosecutes the case through drug court. Splits this role with Prosecutor X2 (drug court). <sup>224</sup>
Prosecutor X2 (drug court)	Determines the public safety issues with a candidate participating in drug court before he or she applies for drug court. Makes all the charging decisions and then if the drug court team decides to admit the candidate, negotiates the underlying sentence or drug court plea agreement. <sup>225</sup>

<sup>220</sup> Judge Y (drug court), "Interview, March 16, 2017."

<sup>221</sup> Defense Attorney Liaison Y (drug court), "Interview, December 19, 2016."

<sup>222</sup> Judge Y (drug court), "Interview, March 16, 2017."

<sup>223</sup> Judge X (drug court), "Interview, December 12, 2016," 1.

<sup>224</sup> Prosecutor X1 (drug court), interview by Claire Brown, November 11, 2016.

<sup>225</sup> Prosecutor X2 (drug court), "Interview, November 14, 2016."

Defense Attorney Liaison X (drug court)	Represents and advocates for the participants' interests. Makes sure that the drug court process is fair and predictable. Advocates for policies that will be fair and allow participants in County X to benefit from drug court. <sup>226</sup>
Probation Officer X (drug court)	Brings forth any history a drug court referral has with probation or incarceration through the Maine Department of Corrections. Relays information on the individuals' risk level, violations and the circumstances surrounding those violations. Also brings forth any concerns expressed by victims and the community. For drug court participants not on probation, facilitates house checks and brings forth any information on them to the team and assists with community interventions such as with bail checks. For those on probation, she supervises them weekly until they advance to higher phases, and conducts their house checks and other duties of a normal probation officer. Describes herself as "the liaison from local law enforcement to the team regarding clients/community information concerns" and "the eyes on the streets." <sup>227</sup>
Judge X (non-drug court)	Justice of the Supreme Judicial Court. Adjudicates in trial courts and mostly in the superior court. <sup>228</sup>
Prosecutor X (non-drug court)	Manages all felony and misdemeanor adult cases that come out of specific police departments, with the exception of felony drug cases and Operating Under the Influence (OUI) cases. <sup>229</sup>
Defense Attorney X (non-drug court)	Criminal defense attorney. Court-appointed for most cases. Represents people accused of crimes from when they are indicted to when they are sentenced. May follow up with appeals if he loses the case. <sup>230</sup>
Detective X (non-drug court)	Worked on patrol for three years. Worked undercover in drug enforcement for four years. Now works both as a criminal detective and a task force officer for the FBI. Works on many out-of-state cases involving drugs and gangs. <sup>231</sup>
<b>County Y</b>	
Judge Y (drug court)	Former Adult Drug Treatment Court judge. Participated along with the rest of the team in overseeing the drug court. Engaged in ongoing team discussions regarding each of the participants and had direct contact with them on a weekly basis. Made final decisions on whether to impose sanctions or assisted in deciding when to reward the participants. Ultimately determined the disposition to impose when a participant was terminated from drug court. <sup>232</sup>
Prosecutor Y (drug court)	Former drug court prosecutor. Identified the right kind of defendant to come into drug court. Attended weekly meetings and weekly court

<sup>226</sup> Defense Attorney Liaison X (drug court), interview by Claire Brown, November 11, 2016.

<sup>227</sup> Probation Officer X (drug court), interview by Claire Brown, April 19, 2017. \*Clarified that anything in the interview was from her perspective and did not reflect the thoughts and policies, etc. of the Maine Department of Corrections.

<sup>228</sup> Judge X (non-drug court), interview by Claire Brown, January 19, 2017.

<sup>229</sup> Prosecutor X (non-drug court), interview by Claire Brown, November 16, 2016.

<sup>230</sup> Defense Attorney X (non-drug court), "Interview, November 14, 2016," 1.

<sup>231</sup> Detective X (non-drug court), interview by Claire Brown, November 11, 2016.

<sup>232</sup> Judge Y (drug court), interview by Claire Brown, March 3, 2017.

	sessions to check in with participants. Worked with other team members to decide on sanctions. If someone was terminated from drug court, would work with the individual's defense attorney and the other team members to determine the ultimate sentencing disposition. If someone graduated from drug court, she would make sure he or she received the sentence that was decided prior to the person's enrollment. <sup>233</sup>
Probation Officer Y (drug court)	Supervises the participants. Enforces violations and brings participants into custody and files their paperwork. Conducts bail or probation checks at the participants' residences, which entails searching and verifying the residence. Performs case management duties in terms of having the participants report to his office at least twice a month depending on the phase. <sup>234</sup>
Case Manager Y (drug court)	Supervises the participants by holding weekly sessions with them, checking to make sure they are attending their meetings, following up with their physicians on medical issues, and administering urine drug tests at least twice a week. Performs case management duties in terms of helping the participants find employment and accessing residential treatment facilities if needed. Visits participants at the jail when they are incarcerated and works on their case for releasing them. <sup>235</sup>

The role descriptions are based on interview responses to the question, "Please describe your role in Adult Drug Court/in the court system/ as \_\_\_\_."

I sought to gauge the interviewees' understandings of the purpose of drug court and how it presents an alternative to incarceration. I asked the team members to reflect on their roles in drug court and how their interactions with clients and the other team members differed from interactions in the traditional criminal justice system. I asked those unaffiliated with drug court about their impressions of the program and whether they thought it effectively responded to mass incarceration. Taken together, the interviews gave insight into how drug courts in Maine compare with traditional incarceration, probation, and criminal court with respect to the degree and type of punishment and surveillance used and bias in access. (In order to make the concept "the carceral state" tangible to the interviewees, I defined it as traditional incarceration, probation, and criminal court in the interviews). The interviews also helped reveal whether Maine's drug courts reflect the demographic (PCP) data on access and graduation rates. The PCP report acknowledges problems of disparate access and success in drug court and the interviews

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<sup>233</sup> Prosecutor Y (drug court), interview by Claire Brown, January 23, 2017.

<sup>234</sup>Probation Officer Y (drug court), interview by Claire Brown, January 1, 2017.

<sup>235</sup> Case Manager Y (drug court), interview by Claire Brown, December 15, 2016.

reveal whether these problems exist in Maine. Interviewing is important for explaining why practices are implemented and the ways in which drug court either fits within or counteracts the carceral state. For example, why might a high level of surveillance be perceived as necessary for promoting success in drug court? If there are disparities in access, why might this be the case? I obtained a first-hand perspective on the reasons for drug court's performance with respect to the selected areas of study and why aspects of the program may resemble or contradict carceral state responses to crime and drug addiction.

According to Svend Brinkmann, qualitative interviewing is important for understanding our "conversational world."<sup>236</sup> Our relationships with others and with ourselves are conversational and our ability to inquire and interpret derive from our relationships with other people.<sup>237</sup> Qualitative interviewing enables us to analyze our conversational world through "human experience, talk and interaction."<sup>238</sup> The method is ideal for studying drug court since conversation is at the core of the program's model for monitoring treatment progress. Conversations occur among the team members during team meetings, between the team and the participants at status hearings, between participants and their private defense attorneys, and among the participants with each other. Additionally, participants are required to meet regularly with a treatment provider, case manager, and a probation officer if they are on probation. Drug court also requires participants to engage in pro-social activities.<sup>239</sup> Conversation is more central to drug court than traditional criminal court in that the participant speaks directly with the judge and the prosecutor during status hearings rather than through an attorney. Fundamental to my research was studying these interactions and how our conversational world is conceptualized in drug court versus in incarceration, probation, and traditional criminal court. By comparing the "experiences, motives, and opinions" of experts in the field, I sought to accurately portray drug court and its

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<sup>236</sup> Svend Brinkmann, "Unstructured and Semi-Structured Interviewing," in *The Oxford Handbook of Qualitative Research*, ed. Patricia Leavy (Oxford University Press, 2014), 3.

<sup>237</sup> Ibid., 2.

<sup>238</sup> Ibid., 3.

<sup>239</sup> Observations of Drug Court in County X, November 4, November 18, December 6, December 12, 2016.

relationship to the carceral state.<sup>240</sup> Qualitative interviews helped me gauge the level to which drug courts utilize surveillance and punishment in promoting compliance and whether and how these interactions help include or bar people from the program.

Brinkmann warns that interviews with too much structure can impede valuable insights and interpretations that are beyond the structure. Although there can be structures with enough flexibility to allow interviewees to raise their own questions and give their full perspectives.<sup>241</sup> The interviewer should provide a structure that encourages active participation from the interviewee and does not constrain the discussion within various social science frames. “In the semi-structured interview, the researcher has a specific topic to learn about, prepares a limited number of questions in advance, and plans to ask follow-up questions.”<sup>242</sup> It provides more leeway in following the interviewer’s agenda while treating the interviewee as a source of knowledge.<sup>243</sup> There being some structure also enables the interviewer to focus the discussion on issues relevant to the research project.<sup>244</sup> Given these merits, all of my interviews were semi-structured. I began with a list of standard questions and would follow up with more specific questions or ask interviewees to elaborate on their responses if needed. I collected the data by either digitally recording the interviews (with the consent of the interviewee) or by taking detailed notes in my field notebook and then transcribing them onto Word documents. Below I display both sets of interview questions and explain how they helped me answer my research question. After reviewing the interview questions and describing my process for analyzing the data, I explain in greater detail why I chose the semi-structured style of interviewing.

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<sup>240</sup> Herbert J. Rubin and Irene Rubin, *Qualitative Interviewing: The Art of Hearing Data*, vol. 3rd (Thousand Oaks, Calif: SAGE, 2012), 3.

<sup>241</sup> Brinkmann, "Unstructured and Semi-Structured Interviewing," 16.

<sup>242</sup> Rubin and Rubin, *Qualitative Interviewing: The Art of Hearing Data*, 3rd, 31.

<sup>243</sup> Brinkmann, "Unstructured and Semi-Structured Interviewing," 18.

<sup>244</sup> Ibid.

### II.b.i. Drug Court Team Member Interviews

I began each interview with ten standard questions. The first eight allowed interviewees to broadly reflect on drug court.

1. Please describe your role in Adult Drug Court.
2. How do you measure success in Adult Drug Court?
3. What aspects of the program do you find are most important for promoting success?
4. What do you find to be the program's main weaknesses?
5. How effective do you think Adult Drug Court is as an alternative to incarceration and probation for drug offenders?
6. From your perspective, how does the drug court model differ from incarceration, probation and parole for the defendant? In what ways is it similar?
7. How do your interactions with drug court participants compare with those of defendants in the traditional justice system?
8. How does your role as part of the drug court team compare with your role in a traditional trial/criminal court?

Having the interviewees openly reflect on drug court and its effectiveness through questions 1 and 2 helped me gauge their uninhibited perceptions of drug court and their roles within it. It enabled me to appropriately frame my more specific inquiry into drug court regarding punishment, surveillance, and access and bias. Having reviewed the literature on evaluating drug court, I expected that many would say they viewed effectiveness in terms of reducing recidivism and substance abuse. I was however interested to learn whether members of the team also viewed success as the program being less punitive and more rehabilitative than probation or incarceration. Specifically, questions 3 and 4 could have potentially compelled interviewees to reflect on how methods of monitoring (e.g. drug testing) and punitive sanctions either enhance or detract from the program's success, which would be relevant to the areas of punishment and surveillance.

Beginning with question 5, I asked the interviewees to compare drug court to incarceration and probation. Questions 5-7 are open-ended in asking for the interviewees' overall perceptions of drug court as an alternative to incarceration. I expected that many would comment on the high level of surveillance for drug court participants as similar to incarceration and also that drug court conceptualized punishment in a different way from the traditional criminal justice system given its overall focus on treatment. Allowing interviewees to broadly reflect on the relationship of drug court to the carceral state could have

potentially given me a foundation for asking about this relationship more specifically with regards to the three areas of study. These more open-ended questions are what Herbert J. Rubin and Irene Rubin call “main questions,” which ensure the research question is answered from the perspective of the interviewee.<sup>245</sup> I proceeded with questions directly related to the three areas.

9. How do the mechanisms of monitoring clients’ compliance relate to the mechanisms of surveillance employed in incarceration and probation?

10. In your experience, have you found that certain defendants have more access to drug court than others?

Question 9 mentions “monitoring” and “surveillance”, and question 10 mentions “certain defendants” and “access.” I expected that responses to question 9 would give insight into differences both in the type and level of surveillance used in drug court compared with incarceration and probation. I expected that responses to question 10 would suggest if there was bias such that any one type of person was more or less likely to participate or succeed in drug court. As such, my ten questions were able to address all aspects that I was interested in: punishment, surveillance, and the possibility of bias in access.

Having asked the ten standard questions, I proceeded with questions tailored to the interviewees’ specific roles in drug court. These questions were also more specific to the three areas of study and they were based on my knowledge of each member’s expertise and involvement in drug court.

Judges:

1. Please describe the screening process for admission to Adult Drug Court.
2. What characteristics do you look for in potential participants?
3. How much is willingness to obtain treatment and change one’s life a factor in your decisions on admission to Adult Drug Court? How do you gauge this expression of willingness?
4. Have there been cases in which participants were initially reluctant but ultimately succeeded in the program?
5. Please describe the use of sanctions. In what cases and how often are jail sentences imposed?

Questions 1-4 pertain to the drug court admissions process and who can access drug court.

Question 5 mentions the use of “sanctions,” specifically “jail” which pertains to punishment and possibly surveillance as a sanction may be increasing the level of surveillance.

Prosecutors:

1. How do you determine if a case is appropriate for Adult Drug Court?
2. What characteristics do you look for in potential participants?

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<sup>245</sup> Rubin and Rubin, *Qualitative Interviewing: The Art of Hearing Data*, 3rd, 116.

3. How much is willingness to seek treatment and change one's life a factor in your decisions on admission to Adult Drug Court? How do you gauge this expression of willingness?
4. Have there been cases in which participants were initially reluctant but ultimately succeeded in the program?
5. Please describe the techniques of surveillance and judicial monitoring employed in Adult Drug Court.
6. On what do you base your recommendations for implementing sanctions for noncompliance?

Questions 1-4 pertain to decision-making in the drug court admissions process, which is key for assessing who can access the program. Questions 5 and 6 mention "surveillance," "judicial monitoring," and "sanctions," and thus pertain to surveillance and punishment.

Defense Attorney Liaison:

1. Please describe how you advise clients in drug court?
2. How do you keep your clients motivated to remain in treatment?
3. In what cases do you recommend clients to enroll in Adult Drug Court? When do you advise against it?

Question 1 is open-ended to grasp how the defense attorney interacts with clients in drug court.

Question 2 is open-ended but is also connected with access to the program insofar as it asks how the attorney works to ensure that the client has continued access to drug treatment and other services.

Question 3 asks about advising clients on whether to apply for drug court, which also enabled me to understand what types of clients were more likely to pursue admission to drug court.

Law Enforcement:

1. Please describe the mechanisms used by probation officers/law enforcement to monitor participants' compliance?
2. What is the role of probation officers/law enforcement in implementing sanctions as ordered by the court?
3. What type of information is disseminated to officers?

Questions 1 and 2 pertain to my focus on surveillance and punishment with specific key words of "monitor" and "sanctions." Question 3 also relates to surveillance by implicitly asking how much information on the participants' lives is accessible to law enforcement in drug court.

II.b.ii. Traditional Criminal Justice Interviews

I asked those unaffiliated with drug court all the same five questions. There were no predetermined questions tailored to each professional because none had a direct role in drug court. I

sought to draw out their knowledge and perspectives on drug court and its use as an alternative to incarceration and traditional criminal court.

Similar to the set of interview questions tailored to the drug court team members, there are a number of broad questions meant to capture the interviewees' overall understandings of the program and its relationship to the carceral state. I expected the responses to help direct how I asked about drug court's relationship to the carceral state pertaining to the three areas of study. I also included two questions that explicitly address two of the areas.

1. What is your understanding of Adult Drug Court in terms of its goals and operation?
2. Why are you not participating in Adult Drug Court?
3. Do you feel that the program responds to the general critique of mass incarceration in the United States? Why and how?
4. From your perspective, how do the mechanisms of monitoring client's compliance relate to the mechanisms of surveillance employed in incarceration?

Questions 1 and 2 are open-ended and meant to gauge the interviewees' overall understandings of drug court and their relationship to it. Question 3 invited the interviewees to reflect on the relationship of drug court to the carceral state in a broad sense. This question also relates to access insofar as it asks how drug court might help reduce the prison population by placing more people in treatment. Question 4 contains keywords of "monitoring" and "surveillance," which I thought would help me ask about surveillance.

Both sets of interview questions contain more open-ended questions than questions specific to the three areas of study. I structured the questions in this way for two reasons, 1) I wanted to gain a thorough understanding of the individuals' perspectives to best direct the discussion, and 2) based on the literature it seemed that certain subjects pertaining to the three areas of study such as monitoring and punishment were central to discussions of drug court.

The semi-structured aspect of this interview protocol was important. First, it allowed me to account for variation in implementation of drug court between the two courts. Additionally, interviewees could potentially mention unfamiliar terms or concepts. As Rubin and Rubin state, follow-up questions

enable the interviewer to gain more depth and detail and to clarify examples, concepts and themes.<sup>246</sup> I was able to clarify new information as well as ask directly about the three areas of study if the responses to the predetermined questions did not give enough insight.

Following the interviews, I reduced the data to discussions of the three areas by coding the interviews for specific terms pertaining to each area. Coding means “[marking] on a copy of the transcript a word or phrase that represents what you think a given passage means.”<sup>247</sup> Below are some key words and how I chose to define them for coding interview responses in relation to each area.

1) Punishment:

“Sanctions” – consequences imposed by the court on participants for noncompliance.

“Termination” – when a participant is expelled from drug court.

“Jail sanction” – when a participant is sentenced to time in jail for noncompliance.

“Non-compliance” – any violation of the terms of one’s participation in drug court.

2) Surveillance:

“Drug testing” – participants are randomly checked for drug or alcohol use through urinary analysis.

“Call-in” – participants must regularly call and report to their case managers and probation officers (if they are on probation).

“House checks” – when a probation officer visits a participant’s place of residence to check for evidence of drug involvement.

“Court appearances” – status hearings, admissions hearings, termination hearings, graduation.

3) Access: discussions of race, ethnicity, gender, age, socioeconomic status, etc.

I transcribed and coded each interview using (but not limited to) the above terms. Following the guidance of Rubin and Rubin, I then extracted all excerpts coded with the same theme and combined them within a single document.<sup>248</sup> I then examined the data and looked for connections to understand how the interviews as a whole defined and explained the relationship of Maine’s drug courts to the carceral state in terms of punishment, surveillance, and access and bias. I followed Rubin and Rubin’s guidance and continually referred back to the data to ensure there was sufficient and convincing evidence to support my conclusions.<sup>249</sup>

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<sup>246</sup> Ibid., 117.

<sup>247</sup> Ibid., 192.

<sup>248</sup> Ibid., 204.

<sup>249</sup> Ibid., 211.

I structured both sets of interviews to begin with a set of broad questions to gauge the interviewees' honest impressions of drug court, their roles within it (for those on the team), and how they would define its relationship to the carceral state. These responses allowed me to appropriately structure more direct questions on drug court's relationship to the carceral state with regards to punishment, surveillance, and access and bias. Beginning with more open-ended questions allowed me to gain more information and insight that might otherwise be left out in an interview that was entirely structured according to the three areas of study. In addition, the two sets of interviews enabled me to conduct an assessment of this relationship that balances perspectives directly from drug court with purely traditional criminal justice perspectives.

### II.c. Observations<sup>250</sup>

I also based my assessment of the relationship of drug court to the carceral state on my observations of actual drug court proceedings in County X, including team meetings, admissions hearings, status hearings, and termination hearings. Team meetings were held in the judge's chambers in which the team members updated each other on their understandings of the program participants' treatment progress. The team discussed each case by reporting on their interactions with the individual, thoughts on his or her potential for success in drug court, and what should be the next steps in the program. The team also, at times, discussed whether defendants should be admitted to drug court or terminated from it. Admissions hearings were where the judge would formally admit a defendant (with the assistance of his or her criminal defense attorney) into drug court. The judge checked that the defendant fully understood the terms of the program and the rights he or she would temporarily waive before obtaining his or her consent to participate. Status hearings were where the drug court team spoke directly with the program participant in the courtroom to discuss the next steps in treatment based on what

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<sup>250</sup> To avoid confusing "participants" as described in the literature as anyone being observed in a study with "drug court participants," I primarily refer to the former as "participants" and the latter as "program participants" or "defendants."

was discussed in the team meeting. Additionally, the program participant reported on his or her progress and had the opportunity to explain any non-compliant behaviors. Termination hearings were where the judge expelled someone from drug court based on failure to meet the demands of the program.

As Barbara B. Kawulich cites from Kathleen Musante DeWalt and Billie R. DeWalt's *Participant Observation: a Guide for Fieldworkers* (2002), participant observation enables researchers "to learn about the activities of the people under study in the natural setting through observing and participating in those activities."<sup>251</sup> I observed drug court directly from the judge's chambers during team meetings and from the courtroom during status hearings, but did not participate in the operation of drug court. Participant observation enables researchers to examine nonverbal expressions, determine who interacts with whom, understand how participants communicate with each other, and find out how much time is spent on different activities.<sup>252</sup> In terms of observing drug court, this meant I would examine the interactions of drug court team members amongst themselves, as wells as team member-program participant and program participant-participant interactions, and see how much time was spent discussing each program participant's case and what types of issues were afforded more discussion time. I engaged in what Kathleen M. DeWalt and Billie R. DeWalt call "passive participation," meaning the researcher observes from the actual scene of activity but only observes and does not participate.<sup>253</sup>

Whereas interviewing helped me gauge the impressions of drug court professionals on their roles and the program's effectiveness as an alternative to incarceration, the observations allowed me to see them in action. As Michael G. Maxfield and Earl R. Babbie stated, "being there is a powerful technique for gaining insight into the nature of human affairs."<sup>254</sup> I was able to gauge the dynamics of the interactions between the program participants and the team, among the participants themselves, and

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<sup>251</sup> Barbara B. Kawulich, "Participant Observation as a Data Collection Method," *Forum Qualitative Sozialforschung* 6, no. 2 (2005): 2.

<sup>252</sup> Ibid., 4.

<sup>253</sup> Kathleen Musante DeWalt and Billie R. DeWalt, *Participant Observation: A Guide for Fieldworkers*, vol. Second (Lanham, Md: Rowman & Littlefield, Md, 2011), 81.

<sup>254</sup> Michael G. Maxfield and Earl R. Babbie, "Field Observation," in *Research Methods for Criminal Justice and Criminology* (Stamford, CT: Cengage Learning, 2015), 322.

among the team members themselves. I also heard from program participants about what they found to be most helpful and most difficult in the program. Direct observations also allowed me to compare the actual operation of drug court with how it was depicted in the interviews. As Kawulich cites from Catherine Marshall and Gretchen B. Rossman's *Designing Qualitative Research* (1995), participant observation allows researchers to verify definitions of terms used in interviews, observe events that interviewees may be unable or unwilling to discuss, and observe scenarios described in the interviews, thereby revealing inconsistencies or inaccuracies in the interview content.<sup>255</sup> As well as helping me verify the interviews, my observations also generated follow-up interview questions based on what I saw.

One method of notetaking that I used for recording drug court interactions was "mapping the scene."<sup>256</sup> Maps include the layout of the physical space, the placement of people within that space, the activities and movements of the people, the interactions among people in the scene, and both verbal and nonverbal interactions.<sup>257</sup> At the beginning of the court proceedings, I would draw rough sketches of the physical space and indicate the location of the program participants (consisting of the participant who is discussing his or her case and the other participants waiting their turn), and the different team members. I also looked at how many of what type of persons (participants) were present (e.g. race, gender) and how many and what type of persons received a certain outcome in drug court (e.g. a sanction or reward). Mapping the scene was useful for examining how the team would use the layout of the courtroom as a surveillance technique.

For recording observations, I used a combination of what DeWalt and DeWalt call "jot notes," "expanded field notes," and "meta-notes."<sup>258</sup> Jot notes or scratch notes report on the dialogue and other observations recorded during the session and mostly serve as aids to memory for producing more coherent field notes.<sup>259</sup> The authors emphasize that notes should be detailed in depicting the physical

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<sup>255</sup> Kawulich, "Participant Observation as a Data Collection Method," 4.

<sup>256</sup> DeWalt and DeWalt, *Participant Observation: A Guide for Fieldworkers*, Second, 81.

<sup>257</sup> Ibid.

<sup>258</sup> Ibid., 160, 65, 70.

<sup>259</sup> Ibid., 160.

space, the participants involved, and as much of their behavior and interactions as possible. When recording speech, the observer's notes should closely reflect the words used by the participants.<sup>260</sup> During team meetings I took detailed notes, using a pen and a field notebook, on the discussion of each case and tracked who said what. These notes allowed me to assess what the team looked for in deciding whether to admit defendants or terminate them from drug court, how they measured success and failure, their intent for implementing certain incentives and sanctions, and how they made decisions. I examined these observations under the three areas of study – punishment, surveillance, and access – to further conclude how the team members decide who may access drug court, the extent to which they measure success by reductions in recidivism and other end goals mentioned in the literature on drug court, and the frequency and intensity with which they employ punishment and surveillance through monitoring and assigning sanctions. During drug court proceedings I noted the language used in conveying the court's verdict and the interactions between the program participants and the team.

As Kawulich cites from Paul Kutsche's *Field Ethnography: A Manual for doing Cultural Anthropology* (1998), the combination of interviews and observations would be useful for helping to determine how drug court team members make decisions because in doing so, the researcher attempts to build a model to help understand what participants do.<sup>261</sup> In observing drug court proceedings, I tried to capture an accurate portrayal of the discussion of each participant's case while paying attention to who said what. I also noted the body language, attitudes, and power dynamics between the various actors and viewed them in response to the circumstances of the case (e.g. a negative report of a relapse and a positive report of new employment). I kept track of how many program participants and under what circumstances they received certain outcomes (e.g. phase advancement, graduation, sanctions).

According to Maxfield and Babbie, "field notes should include both empirical observations and interpretations of them."<sup>262</sup> In addition to observing the scene, I noted any patterns I found and my

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<sup>260</sup> Ibid., 165.

<sup>261</sup> Kawulich, "Participant Observation as a Data Collection Method," 22.

<sup>262</sup> Maxfield and Babbie, "Field Observation," 309.

interpretations. Whereas jot notes consist of empirical observations, meta-notes involve inference or analysis.<sup>263</sup> “They include comments on notes, summary of the evidence for a particular argument collected to that point, preliminary interpretations, hypotheses, and questions for further research.”<sup>264</sup> DeWalt and DeWalt mention that a benefit of using a computer to capture field notes is being able to have several files open at the same time.<sup>265</sup> Transcribing my jot notes and writing my meta-notes by computer helped me to look at documents on different observation sessions and those of the different courts at the same time and draw connections.

Examples of the types of connections I looked for included: how certain circumstances (e.g. level of drug use and criminal history) factored into decisions on admission and termination; circumstances under which program participants were subject to higher levels of surveillance and punishment; the types of incentives and sanctions used most often; patterns in how the drug court team and program participants interacted (e.g. the types of questions the team would ask the participants and the attitudes and responses of the team members and the participants). My observations and corresponding analysis provided me with a picture of how drug courts in Maine operate and from which I could gain clarification and insight into the program’s relationship with the carceral state as chiefly explored through the interviews.

### **III. Conclusion**

I used a combination of empirical quantitative data from the PCP survey, qualitative semi-structured interviews, and participant observations to study the relationship of Maine’s drug courts to the carceral state. In comparing the qualitative findings with the survey data, I first determined how Maine’s drug courts fit into the national picture of drug court in terms of recidivism, drug use, and demographics. The interviews helped explain *why* drug court operates in the way it does and whether preserving certain aspects of the carceral state were seen as necessary for promoting success in the program. The interviews

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<sup>263</sup> DeWalt and DeWalt, *Participant Observation: A Guide for Fieldworkers*, Second, 170.

<sup>264</sup> Ibid.

<sup>265</sup> Ibid., 176.

gave deeper insight into the non-quantifiable evaluation of how people gain access to drug court and the types of punitive and surveillance mechanisms used in comparison with carceral state mechanisms. By using the semi-structured style of interviewing and a balance of open-ended and more direct questions, I gained a thorough understanding of what drug court was as an alternative to the carceral state and examined this relationship more specifically under the three areas of study. Together, the two sets of interviews provided the perspectives of those directly affiliated with the program and from a purely traditional criminal justice standpoint to evaluate this relationship. The observations allowed me to see drug court in action and thereby verify what was said in the interviews as well as help me generate more questions.

Evaluating drug court as an alternative to incarceration cannot simply rely on looking at the numbers of people who use drugs or recidivate. Insofar as problems of harsh punishment, high surveillance, and bias have restricted the lives, opportunities, and political participation of an enormous number of people, drug court need also be assessed in these areas. In moving from the “three Rs”<sup>266</sup> to my three areas of study, I sought an understanding of the role and approach of drug court and its relationship to the carceral state.

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<sup>266</sup> Gottschalk, *Caught: The Prison State and the Lockdown of American Politics*, 79.

## **Chapter 3: Punishment:**

This chapter examines the use of punishment in drug court in contrast with its use in incarceration and probation. It analyzes passages from the interviews to reveal differences in the emphasis on punishment versus rehabilitation, the type of punishment used, and how personalized interactions with the drug court team build mutual trust and help restore the participants' confidence in the court. Part I describes how drug court utilizes the specter of punishment or incarceration as a backstop, which is to say that the participants face a sentence of incarceration should they fail to complete the program. The consequence of an incarcerated sentence is in part meant to motivate the participants to comply and engage in drug court. Part II examines drug court's theory that the participants' criminal activity is primarily motivated by drug addiction and can be resolved through an emphasis on treatment. The section illustrates how drug court's treatment-centered approach substantially differs from incarceration and probation which focus on punishment and monitoring. Part III explains drug court's model of punishment that is based on graduated sanctions. Within this system, the team has discretion to be more lenient on participants who commit minor violations or misstep early on and have not yet been able to take full advantage of the program. It shows the team's understanding that drug addiction recovery is arduous and relapse is not unexpected. More punitive sanctions such as jail are rather reserved for severe violations of dangerous criminal conduct, consistent dishonesty, and disengagement from the program. Having explained the concept of graduated sanctions, Part IV describes how sanctions are decided through team deliberation which allows for thorough consideration of what is most appropriate. The section also highlights a criticism from Defense Attorney X (non-drug court) about not being able to have a substantial role in the team deliberations as well as a possible response from Defense Attorney Liaison X (drug court). Part V draws on interviews with drug court team members and observations of drug court in County X to show how the personalized interactions in drug court can build mutual trust between the team and the participants. As a result, the participants are more honest with the team and the team is more open to allowing the participants to manage themselves in the community. Part VI is the conclusion

and argues that despite drug court being more rehabilitative and fairer in its use of punishment through a system of graduated sanctions, it is nonetheless a part of the carceral state in relying on the threat of punishment and the team's expansive subjective power to punish.

### **I. The Underlying Sentence**

A key aspect of punishment in drug court is the underlying sentence that gets imposed if the participant is terminated from the program. Prior to enrolling in drug court, the terms of one's participation are decided, including the underlying incarcerated sentence.

<b>The underlying sentence as a motivating factor for compliance in drug court</b>
<p><b>Judge X (non-drug court):</b> “[...] they [the participants] plead guilty and they sign up and if they successfully complete the drug court, they either get released or they get a sentence that is not a serious sentence. If they flunk, if they fail out of the drug court by failing to follow the regimen by you know, by testing positive for drugs, they are subject to a serious sentence.”<sup>267</sup></p>
<p><b>Judge X (drug court):</b> “Essentially the difference is that a good sentence means no jail time, and a bad sentence means you go to jail. [...] We are not putting these people in jail and drug court is a motivating reason to avoid time in jail. We want people to say they can't live this life anymore. Even if they receive a sanction of say seven days that is much better than the underlying four years.”<sup>268</sup></p>
<p><b>Detective X (non-drug court):</b> “[...] you know they're charged with a crime, they have to plead guilty, they get into drug court, and it truly puts it back on them. If they don't want to go be incarcerated, if they want to help fix themselves, drug court gives them all the tools. So it's a chance for them to not be part of that statistical prison population, given all the tools, but it also shows that, you know, [if] they can't make [it through] that program, and they're given all these chances then maybe incarceration is what they need for a little bit.”<sup>269</sup></p>

While in drug court, the participants are continually aware of the incarcerated sentence that hangs over their heads. Therefore, a key motivation to engage in drug court is the opportunity to avoid incarceration. While drug court does not entail immediate punishment for one's crimes, there is always the threat of punishment that is meant to induce compliance.

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<sup>267</sup> Judge X (non-drug court), "Interview, January 19, 2017."

<sup>268</sup> Judge X (drug court), "Interview, December 12, 2016."

<sup>269</sup> Detective X (non-drug court), "Interview, November 11, 2016."

The role of the underlying sentence as a motivating factor can be understood through Foucault's discussion of effective punishment as conceptualized by the "great reformers" of the Eighteenth century.<sup>270</sup> The reformers sought to replace public executions with a more effective and generalizable form of punishment.<sup>271</sup> They believed punishment should function to prevent repeat offense.<sup>272</sup> Foucault explained that this "semio-technique" of punishment was based on five or six rules, one of which was "the rule of sufficient ideality."<sup>273</sup> This rule stated that the effectiveness of punishment is not in the direct infliction of pain but rather in the "idea" of pain.<sup>274</sup> The expectation is that people will be deterred from committing crimes in fearing pain or by the threat of punishment. The drug court team understands that a key motivation for compliance is the *threat* of the underlying incarcerated sentence. As Judge X (drug court) and Judge X (non-drug court) explain, participants who complete drug court receive a "good" or "not a serious sentence" of no incarceration whereas if they fail they are subject to a "bad" or "serious" sentence of incarceration. The threat of punishment is thus built into drug court and is meant to motivate compliance and discourage drug use and recidivism. Foucault also stated that beyond the general idea of pain, the "memory of pain" prevents one from repeating a crime.<sup>275</sup> In both counties, the drug court judges explained that most (but not all) of the participants have prior experience with being incarcerated.<sup>276</sup> In County Y, all of the participants are on probation and many have already completed the incarcerated portion of their sentence.<sup>277</sup> In many cases it is not only the idea of incarceration but also painful memories of being incarcerated that are meant to motivate compliance. Detective X (non-drug court) gave his impression that if the participants are not motivated to avoid time in jail or prison, then they will not make it through the program and incarceration may be what they need. It is therefore clear that drug court relies on the traditional punishment model that people can be effectively controlled

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<sup>270</sup> Foucault, *Discipline and Punish: The Birth of the Prison*, 2nd Vintage Books, 75.

<sup>271</sup> Ibid., 74-75.

<sup>272</sup> Ibid., 93.

<sup>273</sup> Ibid., 94.

<sup>274</sup> Ibid.

<sup>275</sup> Ibid.

<sup>276</sup> Judge X (drug court), "Interview, December 12, 2016." Judge Y (drug court), "Interview, March 3, 2017."

<sup>277</sup> Judge Y (drug court), "Interview, March 3, 2017."

by the threat of punishment. This practice at least suggests that drug court can never fully replace traditional incarceration precisely because it requires the specter of that system to motivate the participants' compliance.

## **II. A Rehabilitative Purpose**

A key way in which drug court differs from the traditional model is its focus on treatment and rehabilitation as opposed to monitoring and punishment.

<b>Drug court's focus on rehabilitation and treatment</b>
<p><b>Defense Attorney Liaison X (drug court):</b> "Incarceration is just failure and there's no real treatment or learning or training that goes on there. It's defeat. It engenders depression, broken families, more problems, everything. [...] Incarceration and jail is primitive. There are times when people need that. They can't be safe. [...] Most of the time these are individuals from poor, disadvantaged families and backgrounds who have come to gradually use drugs and choose sometimes to sell drugs or trade stolen items to get their drugs in the lack of any type of medical treatment that they can get. [...] We're trying to get things accomplished in the real world where people can actually change and where...umm... they can change their...learn how to control and understand their addiction."<sup>278</sup></p>
<p><b>Judge X (drug court):</b> "It's different [from probation and jail] in that the focus is on treatment and trying to help the defendant get over their addiction. We recognize that people commit crimes because they are addicted, not just because they are criminals."<sup>279</sup></p>
<p><b>Detective X (non-drug court):</b> "It's the alternative sentencing for crimes with the underlying drug nexus if you will [...] It's drug monitoring, it's counseling, it's kind of a total approach to the individual and trying to rehabilitate them so that when they're done they're not back into drugs."<sup>280</sup></p>
<p><b>Prosecutor X2 (drug court):</b> "It's very different [from probation and incarceration]. You know the reason I like drug court is I believe that it is premised upon the theory that given an opportunity, an individual who's in trouble can correct course. And so as opposed to a traditional, a case handled in the traditional model, which is you committed an offense, there should be a consequence so we're gonna impose a sentence and then we're done, in drug court you can advocate more for trying to direct them towards the alternative. Treatment's the alternative as opposed to incarceration. When you are left with a traditional model, you still have probation, but if they're not complying, you can't call the counselor for them or have someone doing extra supervision. So you just pull the trigger and send them to jail, which I'm happy to do. I mean if you're, if it's a question of public safety, and someone going to jail, they have to go to jail. But if it's a question of they're going to jail because they just didn't have the services necessary to correct course, that's frustrating."<sup>281</sup></p>

<sup>278</sup> Defense Attorney Liaison X (drug court), "Interview, November 11, 2016."

<sup>279</sup> Judge X (non-drug court), "Interview, January 19, 2017."

<sup>280</sup> Detective X (non-drug court), "Interview, November 11, 2016."

<sup>281</sup> Prosecutor X2 (drug court), "Interview, November 14, 2016."

**Defense Attorney X (non-drug court):** “[In drug court] you have much more ready access to substance abuse treatment and of the services that are mandated by the drug court team. Probation’s designed to monitor primarily, to make sure someone’s staying out of trouble. It’s not really designed to provide treatment although they try to do it. They don’t have any money for it. They just tell somebody, ‘go get your treatment’ and they’re [the probationers] like, ‘I just got out of prison. I don’t have a job. I don’t have insurance. There’s no way I can do treatment.’ They go back into jail for a probation violation because they can’t do the treatment. Because they don’t have the money and the state doesn’t provide it. So in that respect the probation is so far inferior to what drug court can do that they shouldn’t even be compared quite honestly. [...] You know incarceration will get people clean very quickly. But there’s virtually no services in there and it’s not designed to provide services. It’s designed to punish essentially. And so I...my position is that because almost all crime that I am involved in, in terms of as being the defense attorney, involves substance abuse or mental health problems, it doesn’t make sense to me to have the primary response be incarceration where they will not get the treatment that they need.”<sup>282</sup>

Judge X (drug court) and Detective X (non-drug court) conveyed that drug court is based on the theory that some people are driven to crime primarily because they are addicted to drugs or commit “crimes with the underlying drug nexus.” In a sense, the free will to choose to commit crime is depleted by the addicted mind. Furthermore, drug court recognizes that many people are incarcerated not because of a nefarious intent to commit crimes, but because they lack the services and support needed to cope with drug addiction. Defense Attorney Liaison X (drug court) stated that most of the participants are from poor, disadvantaged backgrounds and commit crimes because they cannot access needed medical treatment. Prosecutor X2 (drug court) likewise expressed his frustration about people being incarcerated because they lack the services needed to rehabilitate themselves. Defense Attorney X (non-drug court) also stated that people on probation are expected to obtain treatment on their own even when they cannot afford it. The three responses suggest a common understanding that some crimes are the result of structural problems of poverty and lack of access to treatment and that punishment is not a viable solution in these cases. There is an understanding that some people cannot be expected to obtain treatment and move on from crime on their own. Drug court is intended to address these structural problems by providing people with the resources and support needed to rehabilitate themselves.

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<sup>282</sup> Defense Attorney X (non-drug court), "Interview, November 14, 2016."

As Prosecutor X2 (drug court) indicated, drug court's rehabilitative approach is different from the traditional model which is based on the idea that one receives a sentence for committing a crime, "and then we're done." Drug court recognizes that drug-addicted offenders cannot be left to their own devices upon release from prison or jail. It thus differs substantially from probation and incarceration in its primary focus on treatment and rehabilitation. As Defense Attorney X (non-drug court) indicated, whereas probation is designed to monitor and incarceration is designed to punish, drug court actually tries to help people out of a life of crime. Similarly, Detective X (non-drug court) described drug court as "kind of a total approach to the individual." The idea is not simply to punish or and monitor but to guide people through rehabilitation and teach them to be productive and prosocial in the community. In focusing on the "individual," drug court is not merely concerned with preventing recidivism in the community but also enabling the participants to live better, more productive lives for themselves.

Drug court's rehabilitative purpose relates to Foucault's argument that "punishments must be a school rather than a festival; an ever open-book rather than a ceremony."<sup>283</sup> In other words, punishments should be learning tools as opposed to vehicles of condemnation. Foucault utilized the example of Rasphius of Amsterdam, which was a prison that conceptualized incarceration within a system of restrictions and obligations, supervision, and practices such as religious readings meant to instill virtue in prisoners and divert them from criminal behavior.<sup>284</sup> In accordance with Foucault's argument that "punishments must be a school," Defense Attorney Liaison X (drug court) criticized incarceration as "just failure" in that it entails no treatment or learning.<sup>285</sup> In his view, incarceration is largely ineffective in that it does not provide people struggling with drug addiction with the means and motivation to rehabilitate themselves. In connection with the idea of incarceration as "failure," Foucault criticized that imprisonment was contrary to rehabilitation in that it kept prisoners idle, which he believed was the

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<sup>283</sup> Foucault, *Discipline and Punish: The Birth of the Prison*, 2nd Vintage Books, 111.

<sup>284</sup> Ibid., 120.

<sup>285</sup> Ibid., 111.

general cause of most crimes.<sup>286</sup> Drug court seeks to address the problem of idleness by having the participants engage in prosocial activities.

Another way in which Foucault criticized the prison system was that it was “obscure” or isolated from normal society.<sup>287</sup> It confines and punishes people and does not prepare them for reentry. Foucault believed the prison should rather “constitute the space between two worlds” that would transform the individual into a productive, law-abiding citizen.<sup>288</sup> Drug court is essentially an extension of Foucault’s re-conception of the effective prison. It is not exactly the “space between” the worlds of incarceration and the community but is a system of surveillance, treatment, and learning situated within the community.<sup>289</sup> As Defense Attorney Liaison X (drug court) described, drug court tries to make progress in the real world. Rather than promoting rehabilitation within a space apart from the community in which that learning will ultimately be tested, the effectiveness of drug court is seen in that it teaches people how to change and attain sobriety within the community. The idea of drug court building upon Foucault’s reconceptualization of the prison as “the space between two worlds” will be explored more thoroughly in Chapter 4.<sup>290</sup>

Drug court differs from traditional probation and incarceration in its understanding that some criminal behavior stems from structural problems of poverty and lack of access to drug treatment. It addresses the suspected cause of crime, drug addiction, through treatment as opposed to simply punishment and monitoring. Drug court is also effective in trying to heal and change people within the community as opposed to incarceration where many inmates leave prison or jail unprepared for reentry and probation where there is limited oversight and support.

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<sup>286</sup> Ibid., 120.

<sup>287</sup> Ibid., 115.

<sup>288</sup> Ibid., 123.

<sup>289</sup> Ibid.

<sup>290</sup> Ibid.

### ***III. Realistic Expectations of the Team***

The drug court team has discretion over how to sanction non-compliance. A common understanding among the team members was that a relapse, at least at the beginning of one's participation, is a natural part of addiction recovery and is not deserving of harsh punishment. The team will often try to address initial relapses through heightened treatment and other rehabilitative methods as opposed to more punitive sanctions like jail.

#### **Reflections from the drug court team on the use of graduated sanctions and responses to relapses**

**Prosecutor X1 (drug court):** "We certainly don't expect people to come into drug court and stop using altogether immediately. We're realistic that you're going to have relapses. And so when you do relapse, you're put on what's called a RAP, a Relapse Action Plan, and that could be increased treatment, increased home visits, increased counseling, things like that. And that's all a team decision and it is individualized."<sup>291</sup>

**Prosecutor X2 (drug court):** "You know nobody says if you have a relapse or if you make a poor decision that you're gonna immediately get kicked out. [...] so sometimes the sanction can just be more treatment. You know, you've got to go to more meetings or you've got to do something different."<sup>292</sup>

**Defense Attorney Liaison X (drug court):** "Well, someone has a use for instance and it's reported to us, if there's no safety problems most oftentimes that person will go into some type of Relapse Action Plan whereas that person is being treated with a focus on rehabilitation instead of a more punitive measure of detention and jail. [...] To use an example, if someone from probation, they say they use drugs. They've used drugs four times. On that model that person's going to be held in jail and detained and may be at risk of revoking their entire probation, of going to jail or prison, losing their family. Drug court understands that a relapse [...] is something we can actually work with and learn from, educate that person around... and that's a huge difference."<sup>293</sup>

**Judge X (drug court):** "[...] we do expect that people will relapse and ideally we won't send them immediately to jail, but that is one of the options for sanctions."<sup>294</sup>

**Judge Y (drug court):** "Sanctions are graduated sanctions. In other words, the theory in drug court is that if somebody is early on in the program and they haven't really been given the opportunity to be exposed to, and be comfortable with, and actually incorporate the tools to be healthy that are really taught to them in the process of drug court by the treatment providers, the case managers, and the probation officers [...]. So somebody early on in the process, let's say they were found to have used in a drug test two or three weeks into the program or months into the program. Well, as a result there needs to be a sanction because there's a use. On the other hand the sanction that would be imposed

<sup>291</sup> Prosecutor X1 (drug court), "Interview, November 11, 2016."

<sup>292</sup> Prosecutor X2 (drug court), "Interview, November 14, 2016."

<sup>293</sup> Defense Attorney Liaison X (drug court), "Interview, November 11, 2016."

<sup>294</sup> Judge X (drug court), "Interview, December 12, 2016."

would be much more minor than a sanction which would be imposed upon a participant who has had the opportunity and has actually availed themselves of the opportunity to use the tools to stay healthy. [...] So somebody who missteps early on might get a sanction like a short community service that needs to be done as a result of a use or they may have to write an introspective essay to share with the others at the next drug court session about their use and what it means, how it relates to their own health.”<sup>295</sup>

The interviews suggest drug court has realistic expectations that participants will not able to immediately abstain from drug use. The Relapse Action Plan and other treatment-based sanctions show that the team views relapse as a symptom of addiction rather than a criminal act. The team also understands that a relapse can be a learning opportunity for the participants and considers what sanctions would be most appropriate in terms of recovery and education. The idea of sanctions as learning tools was conveyed by Judge Y (drug court) in his examples of possible sanctions to include community service activities and introspective essays. The treatment-centered approach to addressing relapse and the understanding that it can be handled safely within the community is very different from the traditional model, which would necessitate some form of punishment. Judge Y (drug court) suggests drug court recognizes that those who relapse early on have not yet had the opportunity to become fully integrated into the program and be able to abstain from using. Since these participants are still intensely struggling with addiction, it does not make sense to apply more punitive sanctions for less serious violations. The approach of graduated sanctions is very different from traditional probation as described by Defense Attorney Liaison X (drug court) in which a use would result in a jail sentence and possibly a probation revocation.

The understanding that relapse is to be expected and that sanctions should be graduated shows that drug court is fairer in its treatment of the participants than in the traditional model. Additionally, the various types of sanctions that are less punitive and more rehabilitative such as increased treatment and community service show that drug court sanctions are less punitive than the traditional model.

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<sup>295</sup> Judge Y (drug court), "Interview, March 3, 2017."

To understand the team's rationale for assigning more punitive sanctions, I asked the interviewees to reflect on what they based their recommendations for sanctions and, under what circumstances they would recommend jail.

#### **Reflections of the drug court team on what they base their recommendations for sanctions**

**Prosecutor X1 (drug court):** "It varies. I've seen people get jail for consistently being late. Which sounds very minor. But when it's again and again, just clear disregard for what they're supposed to be doing, or for missed appointments, or for lying to the team, or for use violations... The point isn't just to incarcerate someone when they mess up so we don't use it lightly, but it is used as a tool to remind the drug court that you will go back to jail unless you really put everything you've got into making this work."<sup>296</sup>

*When I asked Prosecutor X2 (drug court) on what he bases his recommendations for sanctions, he replied:* "Try to look if the noncompliance is addiction-based. Look to see if any new criminal conduct was committed in the process of the noncompliance. And then look to see what their history has been to date. [...] So, criminal conduct. Does it affect others in the court? Does it affect public safety? Those are the three factors I look at for how intense the sanction should be up to termination."<sup>297</sup>

*And, on the subject of when he would recommend jail, the prosecutor responded:*

"Depends what we're talking about. So if you are, if it's a use and a first-time use, I would not recommend jail. I would say you know house arrest and go to your treatments. If you are you know taking a relative's money. You know and we suspect it's to buy drugs, that to me yeah, you would do a week or something like that. And then if somebody is just relapsing on multiple occasions or taking steps to circumvent the testing, then it should be longer."<sup>298</sup>

**Judge X (drug court):** "We look for honesty. If they are not truthful we can require more counseling and more monitoring. If they cannot be honest and have continued the behavior and continued using without being honest, we will send them to jail."<sup>299</sup>

**Prosecutor Y (drug court):** "Our drug court team has always had sort of a list of available sanctions. It's not in a book that's written down but it's anywhere from writing essays to moving back a couple of weeks in your phase up to jail time. [...] It's not always jail. You try to reserve that. I mean you can't start off by sending people to jail. You have to graduate the sanctions, so we just talk about it."<sup>300</sup>

**Judge Y (drug court):** "Later on if the person's twelve, eleven months into the program and they use, the sanction would quite likely be a jail sanction of some sort. [...] I'm not saying that that would necessarily be the sanction because every case...it's always dependent on the circumstances and

<sup>296</sup> Prosecutor X1 (drug court), "Interview, November 11, 2016."

<sup>297</sup> Prosecutor X2 (drug court), "Interview, November 14, 2016."

<sup>298</sup> Ibid.

<sup>299</sup> Judge X (drug court), "Interview, December 12, 2016."

<sup>300</sup> Prosecutor Y (drug court), "Interview, January 23, 2017."

there's never a blanket decision made before...you know there's never a blanket decision that's already premade. You always consider all the circumstances to try to fashion something that makes sense. [...] Because you know if you put somebody who's that far along in the program in jail, you have to understand that you're upending a lot of the work that's been done and you're upending the circumstances in their life. For example, they may have a job and you may risk...you may present a risk that they will be fired from the job which would be entirely counterproductive. You know you may risk them losing their housing. There are a lot of different considerations that would be you know looked into when we decide what kind of a sanction to give somebody."<sup>301</sup>

A common theme among the interviews was that more punitive sanctions such as jail are typically used in cases of dishonesty and disengagement. This suggests the rationale for punishment in drug court is different from probation and incarceration where a criminal *act* is seen as deserving of punishment. In many cases drug court punitively sanctions wrong attitudes and the person who has proven to be dishonest or resistant. The severity of the punishment can be decided based on the team's impression that the person does not want to engage rather than simply because they committed a violation. This is evident in Prosecutor X1 (drug court)'s statement that people can be given jail for consistently being late because, while it seems less serious, it demonstrates the person's refusal to engage. The interviews also suggest that jail is used to sanction patterned behaviors of dishonesty and disengagement. Prosecutor X2 (drug court) said he would recommend jail for multiple relapses and instances of trying to circumvent testing and Judge X (drug court) said that while dishonesty at first may require more counseling and monitoring, continued dishonesty will result in jail. The interviews reveal that jail can be used to sanction perceived dishonesty, especially that which has been consistent.

Similarly, during my observations of County X's drug court, I noticed that many times jail sanctions and terminations were imposed for dishonesty. Multiple times the case manager would report on someone testing positive for drugs and describe it as "pulling teeth" to get them to admit they had used.<sup>302</sup> For example, the case manager of drug court in County X once said she was "disheartened by her [the participant's] thought process. She did not want to be honest that she used."<sup>303</sup> This participant was

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<sup>301</sup> Judge Y (drug court), "Interview, March 3, 2017."

<sup>302</sup> Case Manager X (drug court), Observation of Drug Court in County X, December 2, 2016, 2016.

<sup>303</sup> Ibid.,

taken into custody and then scheduled for a termination hearing. On the other hand, the team was more understanding of clients who were struggling but were honest. For example, the case manager reported on a woman who had not attended enough prosocial meetings “but was honest about it.”<sup>304</sup> Another factor that was a cause for jail or termination was disengagement from the program. They reprimanded participants who they deemed were not listening to the team and continuing doing as they pleased. About a client who had both used and violated her condition of house arrest, the treatment provider said, “she says, “I know, I know,” but doesn’t hear us.”<sup>305</sup> This participant was also taken into custody and set up for a termination hearing. What the team seemed to find most frustrating and most deserving of jail or termination were participants who were dishonest or not engaging in drug court.

The reflections of Judge Y (drug court) and Case Manager Y (drug court) also indicate there are no set circumstances in which the team decides to impose a certain sanction. The team considers a number of factors, including the best interests of the participant. Since the team members get to know the participants on a personal level, they find it more difficult to impose jail and are conscious of how a jail sanction might disrupt important aspects of their lives. Prosecutor X1 (drug court) likewise reflected, “It is a difficult decision to send these people back to jail. [...] you get to know them more, you know what you’re taking them away from when you sanction them to jail.”<sup>306</sup>

In addition to sanctioning dishonesty and disengagement, the team will also assign sanctions based on the severity of the violation. Prosecutor X2 (drug court) said he would recommend jail for more serious instances of criminal conduct and that which affects other participants or threatens public safety. Judge Y (drug court) also stated that jail can be imposed for relapses that occur later on in the program, once the participant has had enough time to avail themselves of the tools and coping strategies acquired through drug court. Both interviewees indicated that jail sanctions can be used for severe violations of criminal conduct and violations that occur further along in the program.

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<sup>304</sup> Case Manager X (drug court), Observation of Drug Court in County X, December 2, 2016.

<sup>305</sup> Treatment Provider X (drug court), Observation of Drug Court in County X, December 2, 2016.

<sup>306</sup> Prosecutor X1 (drug court), "Interview, November 11, 2016."

The jail sanction also invokes the traditional punishment model of the carceral state by utilizing the threat of incarceration. The statement of Prosecutor X1 (drug court) that jail sanctions are meant to remind the participants of the possibility of ending up in jail shows they are not mere punishments for violations. They are meant to induce compliance by reinforcing the underlying incarcerated sentence in the minds of the participants. The purpose of jail sanctions therefore relates back to Foucault's idea that the "memory of pain" prevents one from repeating a crime.<sup>307</sup> Jail sanctions subject participants to a short period in jail, thereby reminding them of what they will face if they do not change their ways. In addition to being a form of direct carceral punishment, jail sanctions use the threat of punishment in order to induce compliance.

In conclusion, drug court is less punitive in its treatment of the participants in reserving more punitive sanctions for more serious violations. The process of sanctioning is also more humane in that the team is not simply concerned with whether a violation was committed but considers how sanctions would affect the participant's life and treatment progress. The salience of dishonesty and disengagement in deciding to impose more serious sanctions shows that drug court utilizes a type of punishment that is different from the traditional model. In many cases, drug court is more concerned with punishing the person who is resistant rather than simply the person who commits a violation. Drug court uses sanctions to motivate participants to engage in the program and to attain sobriety rather than simply to punish. Nonetheless, the jail sanction is another example of the threat of punishment being used to induce compliance. While drug court is more humane toward participants who violate, the jail sanction relies on the traditional model of punishment in using the "memory of pain" as a threat.

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<sup>307</sup> Foucault, *Discipline and Punish: The Birth of the Prison*, 2nd Vintage Books, 94.

#### ***IV. Team Approach***

With regards to sanctions and almost all decisions in drug court, the interviewees emphasized the importance of team decision-making and consensus.<sup>308</sup>

<b>Team decision-making in deciding sanctions</b>
<p><b>Probation Officer X (drug court):</b> "Sanctions we talk about as a team. If I'm worried someone is about to commit a crime, I will call for them to be in-custody as a public safety concern. We talk about these issues in drug court together and deal with matters when we see the judge but can fall off when we do not see the judge."<sup>309</sup></p>
<p><i>When I asked Prosecutor X1 (drug court) on what she bases her recommendations for sanctions, she responded:</i> "That's a group decision. Usually Maine Pretrial [case manager] is the first one to know that because they're the ones who do the UAs [drug tests]. So if there's a dirty urine test we get a notification from the pretrial person about what's going on. We try and figure out where this person is in the steps, is it early enough where this makes sense that they're still relapsing."<sup>310</sup></p>
<p><b>Case Manager Y (drug court):</b> "You know if somebody's late for a session with me, it's at my discretion what I would do for a sanction. With that said we are a really strong team and before I was to say to a client, 'listen, you're going to spend 24 hours in jail because you've missed two sessions with me,' I would consult my team and say, 'I'm thinking about doing this. What are your guys' thoughts, is there anything I need to take into consideration?' And within a couple of minutes typically we'll come to a consensus of like, 'no, maybe not 24 hours, let's do 10 hours of community service.' So I have some flexibility and autonomy. However, there's always a caveat to... you're also going to see the judge in a week or three days or whatever and he may decide to impose more. Typically what I would do is I would send an email to the judge saying 'hey, this was the infraction. You know I talked with the...you know probation and treatment. We decided that this would be an appropriate sanction. What are your thoughts?' We usually agree on it, agree on the sanction [...]."<sup>311</sup></p>

All three interview passages stress the importance of team deliberation and consensus in making decisions with respect to the participants. As indicated by Prosecutor X1 (drug court), the team does not automatically punish someone for a violation but gauges what the motivation is and the surrounding circumstances. The statement of Case Manager Y (drug court) is interesting in suggesting that although members of the team can impose sanctions unilaterally when someone violates in their presence, they will rather consult the rest of the team. Strong communication among the team also allows individual

<sup>308</sup> While I observed drug court team meetings in County X, I am not including these observations in my evaluation of the program since these meetings are not made public.

<sup>309</sup> Probation Officer X (drug court), interview by Claire Brown, November 9, 2016.

<sup>310</sup> Prosecutor X1 (drug court), "Interview, November 11, 2016."

<sup>311</sup> Probation Officer Y (drug court), "Interview, January 17, 2017."

members to make relevant information about a participant known to everyone before a sanction is decided. The emphasis on team deliberation suggests a commitment to gaining an accurate understanding of the client's situation and making sure the sanction is fair and appropriate.

<b>Team approach in drug court vs. traditional criminal court</b>
<p><b>Prosecutor X1 (drug court):</b> "In a regular trial court I am a sole team representing the state and asking for a certain sentence. [...] When I am part of the drug court I am part of the team, so my voice is one part. [...] When we meet about what we think is appropriate to do with the participants, whether it's violations, sending them back to jail, asking for more treatment, things like that, I am just one vote and then [Judge X (drug court)'s name], the judge, gets a vote, the defense attorney gets a vote, probation gets a vote, Maine Pretrial [case manager] gets a vote, and treatment gets a vote. So I become just part of the team whereas in my regular role in the court as a prosecutor I am the one asking for what I see fit as part of the state. It's a team approach. And sometimes I lose out on what I want but it's a group decision on what we think is best for that person."<sup>312</sup></p> <p><b>Probation Officer Y (drug court):</b> "You know when something's going on everybody knows about it. In a regular trial court [...] if someone's placed on probation and they do well on probation, the judge will never hear their name again from the day they sentence 'em. Out of sight out of mind. The only time a judge or the DA's [district attorney's] office gets involved is if they're not doing well so you know and over the course of you know regular probation let's say, let's say the person does well and there's never an issue, I'll never once talk to a DA on that case. Whereas if someone's in drug court and let's say they do well and there's never an issue in drug court, I'll still have a conversation weekly with the DA's office and hundreds if not sometimes upwards thousands of emails talking about clients and where they're at."<sup>313</sup></p>

The above interview passages indicate that drug court's practice of deliberative, group decision-making does not occur in normal probation and traditional criminal court. Prosecutor X (drug court) said that whereas in her traditional role she is the sole person representing the state, in drug court she works on a team. Her priorities are different in that she is concerned with what is best for the participant beyond the interests of the state. She considers the team approach to be important for making decisions that are appropriate, even if the rest of the team does not share her opinion. Probation Y (drug court) stated that whereas in normal probation, the defendant is only brought to the attention of the judge and the prosecutor in the instance of a violation, the drug court team discusses the participants regularly,

<sup>312</sup> Prosecutor X1 (drug court), "Interview, November 11, 2016."

<sup>313</sup> Probation Officer Y (drug court), "Interview, January 17, 2017."

regardless of how they are performing. Therefore, a key difference between drug court and the traditional model is that the team cares about the participants apart from when they are faring poorly. The team will consider its regular interactions with the participants, both positive and negative, when making decisions. Drug court therefore contradicts the traditional model in that it is not solely concerned with clients who misstep and when there is need for a sanction. Additionally, both interview passages indicate that drug court entails a different type of role for the prosecutor in that he or she is not solely obligated to represent the state, but also to consider the best interests of the participant.

Defense Attorney X (non-drug court), however, criticized that the team does not operate as effectively as it should in that it excludes the participants' private defense attorneys.

#### A criticism of the drug court team by Defense Attorney X (non-drug court)

**Defense Attorney X (non-drug court):** "My biggest problem with it [drug court] is they exclude the defense attorney from the deliberations, from having what I feel is a meaningful role in the decision-making process itself. [...] And [Defense Attorney Liaison's X (drug court)]'s a great guy and he's very committed to the cause, but he doesn't know my client the way that I know my client. And so what I hate about this process, just drives me crazy, is the defense part gets treated as if we're some kind of impediment to the workings of the drug court team because I think they think that the defense attorney is gonna put roadblocks in the way of the team from getting the treatment in place. But when nothing could possibly be further from the truth because these applications don't get sent in unless the defense attorney's the one shepherding them through the process. [...] When the prosecutor is a prime member of that team, probation is, and the idea that you should exclude the defense attorney I think is wrongheaded and I think that they really need to fix that part of it."<sup>314</sup>

Defense Attorney X (non-drug court) felt it was important for him to be part of the discussions that humanize the participants. He recognized the team's intent to understand the person apart from the criminal and expressed concern that the team's understanding will not be accurate without the input of the private defense attorney. He also seemed to suggest it was unfair to the best interests of the client for the team that has a prosecutor and probation officer to exclude the defense attorney.

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<sup>314</sup> Defense Attorney X (non-drug court), "Interview, November 14, 2016."

Defense Attorney Liaison X (drug court) seemed to indicate there was a reason for the private defense attorney not being part of the team. He contrasted his own roles as the drug court defense attorney liaison and being a traditional defense attorney advising individual clients.

#### **Traditional defense attorney vs. drug court defense attorney liaison roles**

**Defense Attorney Liaison X (drug court):** "We have a system where I'm representing the defendant's interest and...as much as I can and should, the particular interest of each person in drug court. But they also have at the same time their own individual attorney who's advocating for them just as an individual attorney would for any other case. I will contact their attorney lots of times, let them know the situation that's going on, maybe offer them advice. But I don't specifically counsel their clients and that's much different. In that kind of way I can also be reasonable. I can...if I was just someone who's always a hundred percent of the time saying the defendant is always right, the prosecution's always wrong, that wouldn't advance the process very much."<sup>315</sup>

Defense Attorney Liaison X (drug court) highlighted the importance of distinguishing his role in drug court from his role as a traditional defense attorney. He explained that in his traditional role he would be required to advocate for what the client wants regardless of what he thought was most appropriate. By contrast, in drug court he is able to make decisions that are fair and reasonable, even if they are in fact contrary to the expressed preferences of the participant. This reasoning seems to come from an understanding that while struggling with addiction, the participants may not exercise the best judgement and it would make it more difficult to arrive at a team consensus if the defense attorneys were always advocating for their clients' preferences. The debate regarding whether the participant's defense attorney should be given a more substantial role in drug court is interesting in that on the one hand, it is important to ensure the interests of the participant are adequately represented but also there is the realization that the addicted person may not have the best judgment at the time.

In conclusion, the centrality of collective decision-making in drug court shows that the process of deciding sanctions is different from punishment in probation and traditional criminal court. The process is more humane in that the team cares about the participants beyond when they are faring poorly.

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<sup>315</sup> Defense Attorney Liaison X (drug court), "Interview, November 11, 2016."

However, Defense Attorney X (non-drug court) criticized that the decisions could be better informed if the participant's defense attorney had a more substantial role in drug court. Defense Attorney Liaison X (drug court) suggested a reason for this may be the team's understanding that the drug-addicted participant does not necessarily have his or her best interests in mind and that having someone on the team solely advocating for those interests would impede the decision-making process. It is an interesting debate as to whether the team gains enough information about the participants through regular interactions or whether the defense counsel should have a more active role.

#### **V. Honesty and Building Trust**

The County Y prosecutor and case manager both reflected that the frequent and personalized interactions in drug court encourage the participants to be honest with the team and engaged in the program. Honesty and engagement breed mutual trust between the participants and the drug court team.

##### **Honesty breeds mutual trust between the team and the participants**

**Case Manager Y (drug court):** "Being honest about your relapses and being honest about your use will get you further in treatment as opposed to lying and covering up and creating more sanctions for yourself. I think once that sort of lightbulb goes off for people, they're able to recognize that 'yeah, they're not just here to supervise me and bust me, you know, send me to the department of corrections because I used. They really do care. They really do want the best for me and if I'm just honest with them about my, you know my situations, my triggers, my cravings, my inability to be around people that are using, they're gonna support me rather than just say, you know too bad you're going back to jail.' [...] You know there's unfortunately a lot of negative talk in the jail about drug court. You know, 'you're never gonna make it. It's too hard. They just wanna see you fail.' I mean I think early on for clients that are in the referral process they still feel that. And I think that's overall the flavor of being in jail as well for you know people in the court system. I think once people are into drug court and they've been able to function and adapt to the scheduling, the treatment, I think it's almost a self-esteem booster because they're feeling like they are getting more competent in being outside of jail and being successful, paying their bills, being sober, going to your appointments. I think there is a switch. I think it doesn't happen early on. I think it's probably I would say three months into the program where, you know. You start letting, you know letting their hands go and say 'okay, now you're starting to do this on your own. This is something you're really able to do,' and they start getting it."<sup>316</sup>

**Probation Officer Y (drug court):** "You get to know them again as a person and not just a name and a number. You know I like to think that that breeds trust on both ends. That you know the flip side of

<sup>316</sup> Case Manager Y (drug court), "Interview, December 15, 2016."

it, they get to know me a little bit too and hopefully when they're in a pinch, when they're in a tight spot, they feel a little more comfortable picking up that phone and saying 'Hey, I'm struggling. This is what's going on.' Or if they do mess up, you know me saying 'Hey [participant's name], come in, let's deal with this.' And instead of going on the run and me having to put a warrant out for them, they have some faith knowing, 'hey, [probation officer's name]'s not a bad guy. He's just doing his job and I know that he'll do good by me.' And even if that means them going to jail. For example, this morning a guy came in to see me and he knew he was going to jail. Yet he showed up and did so and when I dropped him off at the jail, we parted ways, he said, 'thank you.' I said, 'Hey, behave yourself here and we'll see you soon.' Those interactions don't tend to happen with a probation officer who's got a caseload of 150 and you know, again, hasn't been able to take that time to get to know that person and what their struggles and strengths are."<sup>317</sup>

Case Manager Y (drug court) suggested that initially participants tend to be wary of the drug court team based upon previous negative experiences in the criminal justice system. They at first view the team as merely concerned with punishing them for violations. However, as the participants develop personalized and supportive relationships with the team members, they come to understand that "they really do care." This newfound trust leads the participants to become more open with the team about when they are struggling and when they have committed violations. Case Manager Y (drug court) also indicated that honesty from the participants makes the team more inclined to trust them to manage themselves in the community and who will then loosen the reins on the supervision and program requirements. The participants are also more trusting upon receiving positive reinforcement from the team when they are doing well.

Similarly, Probation Officer Y (drug court) indicated that as the participants get to know him, they are more honest about when they are struggling and they seek help. Interestingly, he reported on a case in which the participant was so trusting that he even turned himself in for a violation in knowing he would be jailed. It is important to note that the probation officer recalls ending the exchange with, "we'll see you soon." The participant turned himself in because he knew it was not the probation officer's intent for him to stay in jail. Rather both were looking forward to when the participant would be released and they could start afresh and renew progress.

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<sup>317</sup> Probation Officer Y (drug court), "Interview, January 17, 2017."

In my observations of drug court in County X, I noticed that the team would attempt to build confidence and trust in the participants through positive reinforcement. About a client who was struggling with prosocial engagement but improving otherwise, the judge had other participants stand up and speak on his behalf. She then said, “Did you hear the positive things people said? You’re doing great.”<sup>318</sup> Another telling example of encouragement from by the team was regarding a client who had recently spent time in a recovery center:

**Observation of drug court in County X: An example of encouragement from the team**

**Judge:** “Tell me what you learned [in the recovery center].”

**Participant:** “Not to make assumptions. Do my best.”

**Judge:** “Not to make assumptions, what does that mean?”

**Participant:** “Just because things do not look the brightest [...]”

**Judge:** “Who *is* this person?!”

**Participant:** “I’m [participant’s name]!”

**Treatment Provider:** “You’re coming for help. You’re talking. Doing what we’re asking you to do.”

**Defense Attorney Liaison:** “You’re carrying yourself in a different way.”<sup>319</sup>

The participant exuded a palpable expression of confidence when he said, “I’m [participant’s name]!” The exchange demonstrated how the team’s positive reinforcement and having the participant reflect on his progress was important for restoring his sense of human dignity. It showed that the team was not simply concerned with him complying, but wanted him to internalize the importance of living a sober life.

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<sup>318</sup> Judge X (drug court), Observation of Drug Court in County X, December 2, 2016.

<sup>319</sup> Observation of Drug Court in County X, December 9, 2016.

A similar expression of care came from the judge at the end of one of the status hearings when she made a compassionate speech before all of the participants.

**Observation of drug court in County X: The judge's words of encouragement to the participants**

**Judge X (drug court):** "What you're doing is the hardest thing I can imagine to do. Waking up and saying I'm not going to use drugs today. I'm going to be part of my life and the world. We learn from you every day. What you say, what you go through, it helps us live better lives."<sup>320</sup>

The judge reminded the participants that she understood that drug court is demanding and that remaining sober is difficult. In discussing how drug court helps her and the rest of the team live better lives, she assured the participants that they are valued by the team and in the community and are not just names on a court docket. In doing so, the judge presented herself as a caring and compassionate human apart from an authority figure. The passage reveals that not only are the participants and the team connected through their direct and personalized interactions, but that both benefit from drug court as an opportunity to learn from each other.

This section shows how the regular and personalized interactions of drug court are important for rebuilding the participants' trust in the court system and their sense of human dignity. They also suggest the program's ability to build the team's trust in the participants as they demonstrate engagement and responsibility. Additionally, drug court is a learning process for both the participants and the team. The participants learn to cope with drug addiction and become prosocial and the team is alerted to the difficulty of overcoming drug addiction and the powerful impact that regular, personalized interactions can have in changing people's lives for the better.

## **VI. Conclusion**

According to Foucault, the effectiveness of punishment is in manifesting the idea of pain in the mind of the potential offender.<sup>321</sup> The idea of pain is the threat of punishment which incites fear and

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<sup>320</sup> Judge X (drug court), Observation of Drug Court in County X, December 2, 2016.

<sup>321</sup> Foucault, *Discipline and Punish: The Birth of the Prison*, 2nd Vintage Books, 94.

deters someone from committing crimes.<sup>322</sup> The literature on the modern carceral state further indicates that a key component of punishment is control through the threat of punishment. Defendants may consent to plea deals with prosecutors, whether or not they are innocent or guilty, in fear of receiving longer sentences if found guilty.<sup>323</sup> The effectiveness of drug court relies on the threat of punishment as a source of control through the underlying sentence and through jail sanctions. An awareness of the underlying sentence as well as painful memories of being incarcerated are meant to motivate compliance. Insofar as drug court depends on the threat of punishment as a source of control, it can never truly be an alternative to the carceral state.

In considering Joshua Kaiser's concept of hidden sentences, the team's discretion in sanctioning can also be seen as an extension of carceral state control.<sup>324</sup> Kaiser stated that in the case of hidden sentences, punishment need only follow from an authority's perception of wrongdoing.<sup>325</sup> Similarly, the drug court team has the power to define what constitutes dishonesty and disengagement. It is these violations that often lead to more punitive sanctions such as jail. In other words, the team may punish based on their own perceptions of dishonesty and disengagement rather than stable definitions of wrongdoing. Therefore, drug court is an extension of carceral state development both in terms of relying on the threat of punishment and the subjective power to punish.

While not distinct in its model of control, drug court is more humane in its treatment of the participants given its focus on addiction rehabilitation rather than punishment and monitoring. The team has a more humanized view of the participants as driven to crime primarily by drug addiction rather than criminal intent. It recognizes that many addicts resort to crime because they lack the support, resources, and motivation to stop using. Drug court is unique in that some of the sanctions for non-compliance are treatment-based rather than formal punishments. The team also has realistic expectations that the

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<sup>322</sup> Ibid., 95.

<sup>323</sup> Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*, 87.

<sup>324</sup> Kaiser, "Revealing the Hidden Sentence: How to Add Transparency, Legitimacy, and Purpose to ‘Collateral’ Punishment Policy."

<sup>325</sup> Ibid., 155.

participants will misstep in the beginning and will likely refrain from imposing more punitive sanctions in these cases. This is different from the traditional model in which a violation requires formal punishment.

While incarcerated people are restricted from drug use within a controlled environment, they do not leave prepared to cope on the outside where they may encounter drug-involved peers and other triggers. Similarly, those on probation are largely expected to stay clean and obtain treatment on their own. The literature on the carceral state describes how many ex-offenders are branded as criminals in normal society and thus have restricted access to important resources including housing, employment, and education.<sup>326</sup> Although drug court cannot ultimately decide how people will be treated in the community, it does facilitate access to treatment and other resources and teaches the participants to be prosocial. Drug court therefore works to undermine the stigma imposed by the carceral state that people cannot move on from their criminal pasts.

Drug court's model of punishment is also unique in that sanctions are decided through team deliberations and that the team cares about the participants apart from when they misstep. The team also considers how sanctions will impact the participants' lives and treatment progress. Although there is a debate on whether the participants' defense attorneys should be given a more active role in the team deliberations. Drug court sanctions also seem less harmful than carceral state punishments in that they do not tend to undermine the participants' trust in the team. The interviewees described how the participants gradually learn that the team wants to see them succeed and is not solely looking to punish. This is in contrast to the attitudes of incoming participants who may be wary of the team based on previous negative experiences in the criminal justice system. The participants grow to be honest with the team and the team becomes more trusting of the participants to be independent.

With respect to punishment, drug court is more humane in its treatment of people through a system of graduated sanctions. Nevertheless, the very fact that drug court relies on the threat of traditional incarceration as a source of control, which is heightened by the subjective power to punish,

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<sup>326</sup> Gottschalk, *Caught: The Prison State and the Lockdown of American Politics*, 46; Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*, 141.

indicates that drug court can never be a true alternative to the carceral state. Instead, it is a part of it; it relies on it in order to function optimally.

## **Chapter 4: Surveillance**

This chapter contrasts the use of surveillance in drug court with that of probation, incarceration and traditional criminal court. The contrast is depicted both in the amount and more substantively in the type of surveillance. Part I describes how surveillance in drug court operates through a relationship of mutual accountability between the team and the participants and the participants with each other. Part II consists of interview reflections on how the surveillance used in drug court relates to that used in probation, incarceration and traditional criminal court. Part III shows that the personalized interactions between the team and the participants make surveillance in drug court more humanizing than in the traditional model. This section also includes two criticisms of drug court in County X with respect to unrealistic expectations for participants to find and manage employment along with their drug court responsibilities as well as change their peer associations. Part IV reflects on the issue of participants graduating from drug court and then struggling to live independently in the community. Part V discusses a recommended solution of providing participants and recent graduates with sober housing. Part VI displays my observations of a drug court graduation proceeding and remarks on how it signals both a congratulations and a warning not to relapse and recidivate. Part VII is the conclusion and argues that while surveillance in drug court is more rehabilitative and humanizing in terms of the team's treatment of the participants, insofar as it does not attend to larger structural issues surrounding reintegration, it is not an alternative to the carceral state.

### **I. Mutual Accountability**

The interview respondents agreed that the degree of surveillance used in drug court is more intense than is used in probation. There was also agreement that the level of surveillance is higher in incarceration, although many also suggested the intensity of the surveillance in drug court is greater than or at least comparable to incarceration. The variation in responses regarding the comparison with incarceration depended on how the respondents defined "surveillance." All of the interviewees implied

drug court was built on a mutually accountable relationship between the participants and the team and with each other based on: 1) the frequency and variety of ways in which the team conducts monitoring, 2) the duty of the participants to check in and fulfill many requirements as ordered by the team, 3) the team members communicating regularly about the participants, and 4) the participants knowing about each other's cases through group meetings and status hearings. In fact, many of the interviewees described "accountability" as one of the most important aspects for promoting participants' success or that it was an essential part of the surveillance used in drug court. Those who thought surveillance in drug court was more intense than incarceration incorporated this relationship of mutual accountability into their definitions of surveillance whereas those who thought it entailed less intense surveillance had a more traditional definition of surveillance as monitoring being done to someone. The remainder of this section uses interview and observational data to elaborate on the nature of the mutually accountable relationship.

Surveillance Roles in Adult Drug Court	
Participant Duties	Team Duties
Call-ins to the case manager and probation	House checks
Attending treatment	Phone checkups
Prosocial engagement, e.g. AA meetings	Drug testing
Drug testing	In-court status hearings
In-court status hearings	Pre-court team meetings
House arrest	Treatment meetings

This table lists the duties (gleaned from the interviews and observations) of the participants and the team that enable surveillance in drug court. Notice how the number of duties is equal between the two roles, hinting at the salience of mutual accountability. In-court status hearings, treatment, and drug testing are listed in both columns because they rely on the responsibility of both the team and the participants.

Since the participants have the freedom to live in the community as opposed to being confined in jail or prison, they have to prove to the team that they are engaged in drug court and are abstaining from drug use. A variety of monitoring (by the team) and self-reporting methods (by the participants) are employed to ensure these outcomes. It was conveyed that the case manager and probation officer conduct most of the supervision but all members of the team contribute in one way or another. One surveillance mechanism mentioned often was participants calling in each day to the case manager.

### Participant call-ins to the case manager

**Case Manager Y (drug court):** "They [the participants] call in every morning to my office between 7:00 and 7:30 and what I do is I leave a message. Everybody has been assigned a color. And if I say that color on the message, they have to report to me within the hour. If not, they have to say their first name, they have to spell their last name, and it's time-stamped so that I can see if they actually did call in on time."<sup>327</sup>

If a participant's color is called, he or she must report for drug testing. The schedule is randomized so that the participant does not know when he or she will be called. Case Manager Y (drug court) explained, "weekends, holidays, it doesn't matter. They still have to call in."<sup>328</sup> This is different from probation where drug testing happens on a set schedule.<sup>329</sup> Call-ins are a telling example of the mutually accountable relationship between the team and the participants. Drug testing not only depends on the decision of the case manager to call a specific color group but also on the agency of the participant to call in on time and report for testing. Other ways in which the participants enable their own surveillance include attending status hearings in which they appear before the entire team once a week or once every other week, reporting to probation as regularly scheduled if they are on probation, meeting with the treatment provider, requesting out-of-county passes if they wish to travel and are not on a phase that allows it, as well as prosocial engagement such as attending Alcoholics Anonymous (AA) meetings.

<sup>330</sup> Therefore, surveillance in drug court not only relies on the team monitoring the participants but on the active role of the participants to report to the team and enable their own surveillance

While observing drug court in County X, I noticed that the judge would use the layout of the courtroom as a surveillance tool. Usually the team (apart from the judge who sat on the bench as in a traditional court) would sit at a bench across the room from the participants who sat in the jury box.

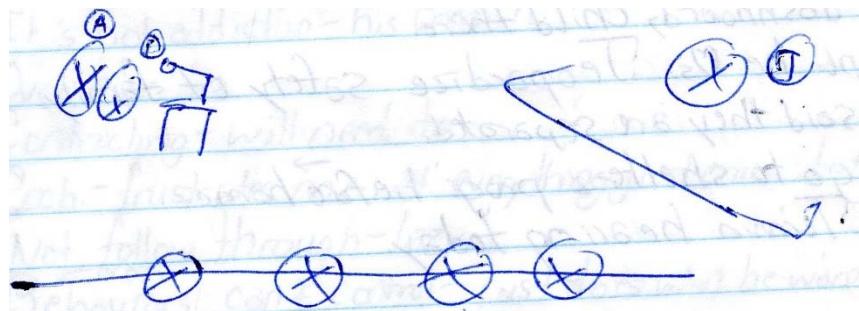
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<sup>327</sup> Case Manager Y (drug court), "Interview, December 15, 2016."

<sup>328</sup> Ibid.

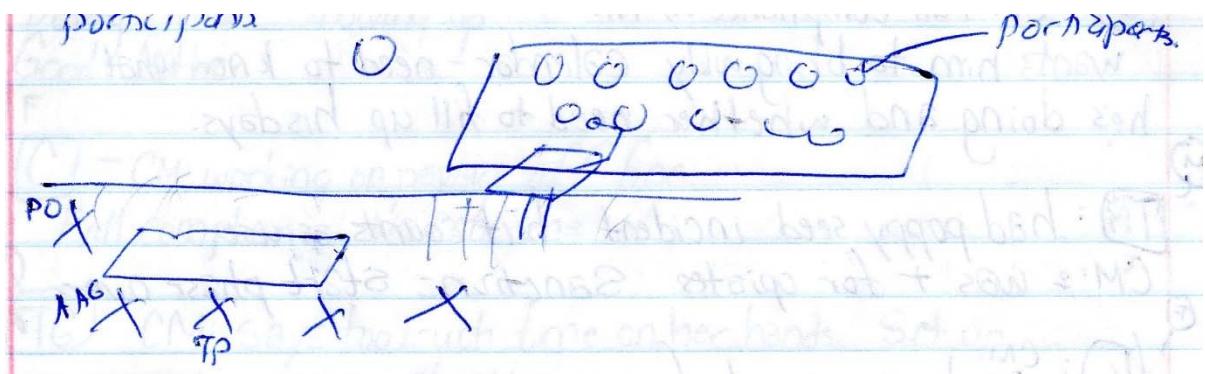
<sup>329</sup> Judge X (drug court), "Interview, December 12, 2016."

<sup>330</sup>Prosecutor X1 (drug court), "Interview, November 11, 2016."



A rough sketch (not to scale) of the typical drug court courtroom in County X: the two Xs at the top left represent the participant who is checking in and his or her defense attorney (who occasionally participates in drug court hearings) by the podium facing the judge. The X at the top right represents the judge on the bench. The four Xs at the bottom represent the rest of the drug court team (case manager, prosecutor, defense attorney liaison, treatment provider, and probation officer). Not depicted but still present are the rest of the participants who sit in the jury box behind the participant who is being called.<sup>331</sup>

On a day in which she was reprimanding a number of participants for dishonesty, the judge had the rest of the team sit in “the well,” a row of chairs located much closer to and facing the participants.<sup>332</sup> It seemed as though she wanted to remind the participants of their responsibility to be honest with the team and that the team would ultimately find out about their missteps if they tried to hide them.



A rough sketch (not to scale) of the drug court courtroom in County X in which the drug court team (except for the judge who sits on the bench) sits in the well. The participants are represented by the circles in the jury box (the rectangle in the back right). The single circle on the top left represents a participant who is sitting beside but not within the jury box. In front of the participants is the podium where the participant who is being called stands. The Xs in front of the participants represent the drug court team (case manager, prosecutor, defense attorney liaison, treatment provider, and probation officer) who sit in the well and are much closer to the participants than usual.<sup>333</sup>

<sup>331</sup> Observation of Drug Court in County X, November 18, 2016.

<sup>332</sup> Observation of Drug Court in County X, December 2, 2016.

<sup>333</sup> Ibid.

On a different day (not pictured) the judge had five of the participants sit in the middle of the courtroom below the jury box where the rest of the participants sat. Each of the five participants were being reprimanded. Some were behind on their court fees (criminal fines and restitution) and one person had tried to substitute his AA meeting requirement with volunteer work. The setup resembled a public shaming. The sketches show how the drug court team would use the structure of the courtroom to make the surveillance more or less intense depending on the circumstances of the cases being heard. The surveillance seemed more intense on days in which more participants were being reprimanded.<sup>334</sup>

The team members also described how they monitor the participants outside of the courtroom.

<b>Monitoring of the participants outside of the courtroom</b>
<p><b>Prosecutor X2 (drug court):</b> "We have treatment providers that meet with them every week and they talk to them about what they've done. The treatment providers are connected with a lot of the group meetings that occur in the community. So if somebody's not going to the meetings, they usually get that information back even if the person...especially if the person's professing that they are going."<sup>335</sup></p>
<p><b>Case Manager Y (drug court):</b> "They [the participants] have to prove that they went to at least five prosocial meetings a week. The probation officer, myself, we'll go check those meetings, make sure they're there."<sup>336</sup></p>
<p><b>Probation Officer Y (drug court):</b> "I'm the one who does either the bail or the probation checks at their given residences. I'm often out...you know I try to be out at least one night a week, and if not night early mornings when I tend to find people home. That's when I make sure that folks are sticking to their conditions of probation and bail. Through these checks. I usually go with another officer and we do searches at the residence if need be."<sup>337</sup></p>

Prosecutor X2 (drug court) and Case Manager Y (drug court) described how the team verifies that the participants are at the meetings they claim to be attending. Also, Probation Officer Y (drug court) will conduct house checks at the participants' places of residence.

<sup>334</sup> Observation of Drug Court in County X, December 2, 2016.

<sup>335</sup> Prosecutor X2 (drug court), "Interview, November 14, 2016."

<sup>336</sup> Case Manager Y (drug court), "Interview, December 15, 2016."

<sup>337</sup> Probation Officer Y (drug court), "Interview, January 17, 2017."

In addition to the participants in County X reporting to the team, it seemed they were also called upon to monitor each other. At status hearings, the judge would take attendance and then call the participants one-by-one to ask how they were doing and inform them of the team's understanding of their progress. Each participant observed everyone else's check-in and occasionally the judge would ask one of the team members or another participant to weigh in on someone's situation. An instance of participants offering advice to another occurred in the case of someone who had recently completed a jail sanction for failing to report for drug testing and then trying to evade the team.<sup>338</sup>

<b>Observation of drug court in County X: The importance of being honest</b>
<p><b>Judge:</b> "What did you learn from being in jail?" <b>Participant:</b> "Not to lie. Be honest." <b>Judge:</b> "How hard is it to do?" <b>Participant:</b> "Hard." <b>Treatment Provider:</b> "Honesty is the hard part." <b>Judge:</b> "Learn from your peers. Honesty, honesty, honesty."<sup>339</sup></p>

The judge then had two other participants explain the importance of being honest in drug court. One person said, "Everyone's talking about how it's hard to be honest. But it's a lot harder to lie."<sup>340</sup> The judge would also advise the participants to learn from each other's mistakes. As two participants were being handcuffed on a jail sanction, the judge asked the participant standing before her, "How does it feel to watch that?"<sup>341</sup> Additionally, the judge would acknowledge role model participants. She stated to the rest of the group regarding a participant who had recently experienced a traumatic event, "She's asked for help and is getting help."<sup>342</sup> It seems that accountability in drug court is not only based on interactions between the team and the participants, but also the participants are accountable to each other. In this way drug court attempts to foster a sense of community among the participants as well as create another mechanism of accountability. In fact, Prosecutor X1 (drug court) said she viewed the participants

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<sup>338</sup> Observation of Drug Court in County X, December 9, 2016.

<sup>339</sup> Ibid.

<sup>340</sup> Ibid.

<sup>341</sup> Judge X (drug court): Observation of Drug Court in County X: December 9, 2016.

<sup>342</sup> Judge X (drug court): Observation of Drug Court in County X: December 2, 2016.

as a team. "I mean their treatment and counseling is individualized [...] but as a prosecutor who only sees them in court once a week, I do view them as a team."<sup>343</sup>

This section depicts the various mechanisms of surveillance used in drug court, which depend on mutual accountability between the team and participants and the participants and each other. The team is responsible for monitoring the participants to make sure they are in compliance and the participants contribute to their own surveillance by actively reporting to the team and showing proof of compliance. The participants are also accountable to each other in that they meet regularly and observe each other's check-ins with the team during status hearings. The next section illustrates how some of the interviewees incorporated this relationship of mutual accountability into their definitions of surveillance.

## **II. Levels of Surveillance Compared with Probation and Incarceration**

### **II.a. Comparison with Probation**

The type of surveillance used in drug court was said to be more similar to probation than incarceration. However, the level of surveillance in drug court was said to be much higher.

<b>Similarities between drug court and probation</b>
<b>Judge Y (drug court):</b> "There are some similarities with regards to probation but they are the obvious similarities that are... I don't think are very significant. For example, the person's out on...the person's out in the community like they are on probation. They have some entity that's monitoring them to some degree like they have on probation. And they're required to obey certain rules that are much more stringent than you and I have to obey." <sup>344</sup>

<sup>343</sup> Prosecutor X1 (drug court), "Interview, November 11, 2016."

<sup>344</sup> Judge Y (drug court), "Interview, March 3, 2017."

The consensus that the surveillance used in drug court is higher than in probation was in part based on the fact that the team conducts the monitoring as opposed to a single probation officer. Also, the participants have much less privacy because the team knows a lot of personal information about them.

<b>Descriptions of the drug court team's monitoring of the participants</b>
<p><b>Prosecutor X2 (drug court):</b> "You have the treatment providers, you have the case manager, and then you have a... if you're on a probate, a probation officer, and then you have the judge you know sitting on the bench, sitting there staring at you every couple of weeks. So the level of oversight is much greater. Much more intense."<sup>345</sup></p>
<p><b>Probation Officer X (drug court):</b> "We [the team] talk about everything, including clients' relationships, educational needs, and mental health. We learn about their whole world. We know a lot of information about people, such as who are all of their doctors. [...] I spend more time focused on the drug court folks. We meet twice a week and they have to report in to me. In my regular caseload there's weekly reporting but they only come to court for a probation violation."<sup>346</sup></p>
<p><b>Defense Attorney Liaison X (drug court):</b> "When you're in drug court you probably have a lot less privacy because the participants sign releases and all of the information is discussed by the team. I don't think probation has that ability. I'd say the process of getting information, such as from a cellphone, Facebook, or email is similar to someone on probation but even more intrusive I guess would be the word. I don't mean it in a negative way."<sup>347</sup></p>

Prosecutor X2 (drug court) described the level of surveillance as higher in drug court than in probation in that the participants are monitored by an entire team. Probation Officer X (drug court) and Defense Attorney Liaison X (drug court) agreed that the level of surveillance in drug court is greater based on the large amount of information the team knows about the participants. Probation Officer X (drug court) said the team knows about the participants' "whole world" and that she has more direct contact with the participants than with normal probationers. Defense Attorney Liaison X (drug court) described the way in which the team accesses information about the participants as more "intrusive" than in probation. Taken together, these passages show that the process of being monitored by an entire team as opposed to one probation officer, more direct contact, and the greater amount of information known about the participants means drug court entails a higher degree of surveillance than probation.

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<sup>345</sup> Prosecutor X2 (drug court), "Interview, November 14, 2016."

<sup>346</sup> Probation Officer X (drug court), "Interview, November 9, 2016."

<sup>347</sup> Defense Attorney Liaison X (drug court), "Interview, November 11, 2016."

The consensus that surveillance is higher in drug court than probation further stressed that the team monitors the participants more often.

#### A comparison of the frequency of monitoring within drug court and probation

**Detective X (non-drug court)** described regular probation as a type of “loose monitoring.” “[In probation] you [the probationer] check in occasionally. You might have to take a drug test. With drug court they’re not getting a free pass as far as you know just not going to prison. I mean there is a lot of work they have to do to be successful. Just as a whole, a general probationer has way more freedom and lack of supervision than a drug court individual. Probation, as long as you don’t get in trouble or get arrested, you know they don’t drug test as much. They don’t...the supervision’s not to the same degree.”<sup>348</sup>

**Probation Officer Y (drug court):** “I can’t even venture a guess you know...how much higher it is that we supervise [in drug court] but it’s significant. For example I would think a drug court client probably gets upwards of 120-150 drug tests a year versus a standard client on probation with a random search and test condition for alcohol and illegal drugs may get maybe a dozen if they’re really high risk.”<sup>349</sup>

In comparison with the surveillance used in drug court, Detective X (non-drug court) described probation as a type of “loose monitoring.” Drug court participants are monitored on a regular basis and have to undergo more drug testing. Additionally, Detective X (non-drug court) said more work is required of the drug court participants. Probation Officer Y (drug court) further emphasized that drug court participants are drug tested much more frequently.

In conclusion, while drug court and probation use similar methods of surveillance and both operate within the community, the surveillance in drug court is greater and more intense. An entire team monitors the participants as opposed to only a probation officer and the team knows much more about them. There are also more frequent interactions with the participants as well as more monitoring done by the team. Additionally, the surveillance in drug court relies on the participants devoting a lot more effort to engaging with the team as opposed to a normal probationer with his or her probation officer.

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<sup>348</sup> Detective X (non-drug court), "Interview, November 11, 2016."

<sup>349</sup> Probation Officer Y (drug court), "Interview, January 17, 2017."

## II.b. Comparison with Incarceration

While all agreed that incarceration required the highest level of surveillance, some interviewees viewed surveillance in drug court as more *intense* than in incarceration (see Figure 4-1). These interviewees remarked on the difference in the unique mutual accountability of drug court whereas surveillance in jail or prison does not rely on the agency of the inmate.

**Figure 4-1**

<b>Opinions of the interviewees in comparing the intensity of surveillance in drug court compared with incarceration (Total: 6 Respondents)</b>	
More intense	3
Less intense	3

A count of the number of interview (drug court) responses regarding whether drug court is more or less intense than incarceration. The table includes only six responses because not everyone shared an opinion on the intensity of the surveillance in drug court compared with incarceration. Others described differences in the type of surveillance used but did not indicate whether they believed the surveillance was more or less intense in drug court than in jail or prison.

<b>Interview opinions suggesting surveillance in drug court is more intense than in incarceration</b>
<b>Defense Attorney Liaison X (drug court):</b> "It's actually more severe from probation and jail in terms of...there's a lot of things that the people have to do and comply with." <sup>350</sup>
<b>Case Manager Y (drug court):</b> "I think that you know in jail it's a constant supervision. You know there's not a lot of decisions to be made. There's not a lot of education going on. You know you're basically told from the moment you wake up to the moment you go to bed what to do [...] You kind of have a deflated ability to not do anything other than be in jail and be unhappy. But you know oftentimes when I have people who sort of give up and feel like they can't do it [drug court], the tagline they often say to me is, 'I'm just gonna do my time. It's easier.' The reality is it probably is easier. It probably is easier to sit for two years and do your time and do nothing, but you're not getting out of jail in two years any better. You're not having the ability to work on those life skills, to work on you know the substance abuse treatment and recovery skills. You're not able to [...] you know go to prosocial activities and meet sober people who are you know good influences. You know they're just coming out of jail probably worse than they went in." <sup>351</sup>
<b>Probation Officer Y (drug court):</b> "[...] you know if they're incarcerated that's a controlled environment. [...] they may be sober for six months in a year they're incarcerated but until they're out in the community and put that to practice and put them back in their old situation, it really doesn't mean anything. So while they're incarcerated, it's easy to keep an eye on them. Obviously out in the community it's more difficult, takes a little more effort. You know but we see...you know we see what's really happening. We've got people who are model inmates. Never have an issue and

<sup>350</sup> Defense Attorney Liaison X (drug court), "Interview, November 11, 2016."

<sup>351</sup> Case Manager Y (drug court), "Interview, December 15, 2016."

when they're in the community they're a nightmare because you know everything that was going wrong or can go wrong does and they don't handle stress well."<sup>352</sup>

The interviews highlight the difference in the intensity of the surveillance in terms of the amount of freedom the individual retains. Inmates are under constant supervision and have almost no freedom to make decisions whereas in drug court surveillance relies on the decisions of the participants to comply. Yet given their many obligations, their freedom is quite limited. The main decision for drug court participants may be whether or not to follow the program. Case Manager Y (drug court) depicted incarceration as “easier” in that the inmates are passively monitored and do not have to make a concerted effort to enable their own surveillance. By contrast, in drug court participants have to actively engage in substance abuse treatment and in the community and prove that they are complying. Probation Officer Y (drug court) also said that the drug court participants being monitored within the community as opposed to within a controlled environment makes it a more meaningful type of monitoring. Drug court actually tests the participants’ abilities to live drug free and productively within the community.

Chapter 3 discussed how drug court was a reconceptualization of Foucault’s argument that the prison should constitute the space “the space between two worlds” in that the participants are permitted to live in the community.<sup>353</sup> Another way in which drug court resembles this idea is that it is intended to be a medium between the controlled environment of prison and living independently within the community. The drug court participants have the freedom to make decisions but it is largely limited by their many program obligations and by the intense monitoring. Incarceration may be seen as “easier” or less intense in that the participants are within a controlled setting and do not have to actively resist temptations to use out in the community. In this way, surveillance in drug court was seen as more intense in that the participants have to actively enable their surveillance. Surveillance in drug court was also seen as more meaningful in that it prepares the participants to live out in the community.

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<sup>352</sup> Probation Officer Y (drug court), "Interview, January 17, 2017."

<sup>353</sup> Foucault, *Discipline and Punish: The Birth of the Prison*, 2nd Vintage Books, 123.

Prosecutor X (non-drug court) and Detective X (non-drug court) rather viewed the level of surveillance in incarceration as more intense than in drug court but held a different definition of surveillance that did not incorporate the active role of the participant.

<b>Interview opinions suggesting surveillance in drug court is less intense than in incarceration</b>
<p><b>Prosecutor X (non-drug court):</b> "I think that the kind of monitoring that someone deals with when they're in drug court is obviously less stringent than if they were in jail because to a certain extent we're trusting or we're trying to trust that these people can be out in the community and just avoid all of these pressures to use substances or do criminal behavior, whereas for the most part in jail there's obviously a much smaller percentage of that even being possible. In jail [...] it's much stricter because they're actually confined somewhere and the possibilities of that happening are severely limited whereas in drug court there's very stringent monitoring I know at least at the beginning of drug court and I think they wean them off [...]. And I think that's done purposefully too. That's the incentive for people to do well. That eventually those restrictions will be lightened a little bit but comparatively, obviously I think that with incarceration the monitoring is a lot higher than it is with drug court."<sup>354</sup></p>
<p><b>Detective X (non-drug court):</b> "So in prison, you can monitor every aspect of a person's life, their letters, their phone calls, their communication, there's no surprises. You know with drug court, you might not be able to monitor everything, you know you might not know about a phone, you might not know about an email account."<sup>355</sup></p>

Prosecutor X (non-drug court) understood the surveillance in drug court to be less intense than in incarceration in that the participants are allowed the freedom to remain in the community. She also noted that the level of monitoring for drug court participants becomes less intense as they progress in the program. Detective X (non-drug court) saw surveillance in incarceration as more intense in that inmates are under constant supervision within a controlled environment as opposed to living in the community. These interviewees suggested holding a more traditional conception of surveillance as monitoring being done to someone. People in jail or prison are heavily restricted and monitored whereas drug court participants have the freedom to make decisions and are not monitored within a controlled environment.

The disagreement among the interviewees suggests the freedom to make decisions in drug court is seen as entailing more or less surveillance based on one's definition of surveillance. Those who saw

<sup>354</sup> Prosecutor X (non-drug court), "Interview with Prosecutor from County X."

<sup>355</sup> Detective X (non-drug court), "Interview, November 11, 2016."

surveillance in drug court as more intense than incarceration considered the active role of the participants in enabling their own surveillance. In other words, the intensity of the surveillance was measured in terms of the large amount of work required of the participants. By contrast, those of the opposite opinion viewed the freedom to make decisions as opposed to being confined in a facility as involving less intense surveillance. They noted how the drug court team reduces its supervision as participants enter higher phases whereas inmates are kept under constant supervision. These interviewees defined surveillance in drug court by the amount of monitoring done by the team without considering the active role of the participants in enabling their own surveillance.

Surveillance in drug court relies on a relationship of mutual accountability between the team and the participants. Accountability in drug court therefore seems to contradict traditional notions of surveillance, typically thought of as being passively monitored. The freedom to make decisions was seen as evidence of surveillance being either more or less stringent than in jail or prison depending on how one defined surveillance. Those who described it as more intense included in their definitions of surveillance the large amount of work required of the participants. Those who described it as less intense held a more traditional notion of surveillance as monitoring and restricted freedom. Surveillance in drug court differs qualitatively from its use in incarceration by incorporating an active role for the person being supervised. The intensity of the surveillance in drug court also makes it more effective than probation and incarceration in that the participants develop important life skills with the support of the team and are able to apply them within the community.

### *II.c. Justifying the High Level of Surveillance*

The interviewees stressed that there is a unique need for the high level of surveillance in drug court because the participants are addicted to drugs and cannot be trusted to hold themselves accountable.

<b>Explanations for the high level of surveillance in drug court</b>
<b>Defense Attorney Liaison X (drug court):</b> "You [the participant] have to trade off your privacy for your ability to stay out of jail and treat your addiction. [...] it's important to monitor them, and to challenge

them or to check on them, because they have an addiction. That they can't trust themselves. But that attitude filters down to our drug court clients and they know that.”<sup>356</sup>

**Probation Officer Y (drug court):** “I mean they can sit in treatment all day long and say, ‘I’m doing well and I’m hanging out with good people and making good decisions.’ It’s not until I’m out there and knocking on the door after curfew at 9:30 and finding out they’re not home and then tracking down where they’re at or knocking on the door and seeing that you know ‘oh, there’s [name],’ another probationer I know who’s not doing well who’s hanging out with him [...] folks who are addicts are master manipulators and you know they survive by lying and being dishonest so until you actually get out there, boots on the ground, and you’re seeing that their putting into practice what they’re learning, it’s kind of pointless.”<sup>357</sup>

**Prosecutor Y (drug court):** “I think it keeps the drug court clients honest about what they’re doing and that kind of supervision is necessary because you can’t take them at their word that they’re not using and that they’re not breaking curfew and that they are going to meetings. You have to be able to verify all of those things. After a time the things that you want them to do will become a habit and you don’t have to check up as much but at the beginning of the program you have to verify all of that.”<sup>358</sup>

*With regards to how he keeps his clients motivated in drug court:*

**Defense Attorney X (non-drug court):** “As you know drugs are a chemical. They change your brain, the brain’s chemistry to the point where they want to have drugs rather than take care of their own kids. So you’ve got to get that poison out of their system. While that process is occurring they want to relapse and so you’ve got to stay in touch with them, have them stay in touch with their care providers and make sure that people are listening to them.”<sup>359</sup>

The interviews indicated that the intense surveillance in drug court is necessary because the participants’ sense of reason and self-control is impeded by drug addiction. They cannot be trusted to operate on their own schedules and avoid drugs in the community where they likely have friends and family who are drug-involved. As Probation Officer Y (drug court) stated, addicts are “master manipulators.” The interviewees also suggested that high accountability is important for keeping the participants honest with the team. As Prosecutor Y (drug court) indicates, the team will reduce its watch on participants who have shown significant treatment progress and have made positive lifestyle choices.

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<sup>356</sup> Defense Attorney Liaison X (drug court), "Interview, November 11, 2016."

<sup>357</sup> Probation Officer Y (drug court), "Interview, January 17, 2017."

<sup>358</sup> Prosecutor Y (drug court), "Interview, January 23, 2017."

<sup>359</sup> Defense Attorney X (non-drug court), "Interview, November 14, 2016."

Towards the beginning, however, when the participants' decision-making is distorted by their drug dependency, the team has to verify that they are abstaining from drugs and are in compliance.

The interviews reveal that the effectiveness of drug court relies on there being high surveillance because the participants are addicted to drugs and are not able to care for themselves in the community. Additionally, the high level of surveillance was seen as important for keeping the participants honest and thus maintaining that relationship of mutual accountability with the team. Prosecutor Y (drug court) revealed that the team is deliberate and fair in deciding how closely to monitor the participants and will allow them to exercise more freedom after having demonstrated considerable progress. Surveillance in drug court is therefore more meaningful than in probation and incarceration. It uniquely enables the participants to rehabilitate themselves within the community while also closely monitoring them at appropriate levels.

### **III. Humanizing Surveillance**

In addition to being qualitatively different from surveillance in probation and incarceration through a relationship of mutual accountability, surveillance in drug court is seen as more humanizing in that the team gets to know the participants on a personal level. Having this thorough knowledge of the person enables the team to see the participants as people and not just addicts and criminals. Surveillance in drug court occurs through personalized interactions in which the participants share with the team how they are doing as well as their strengths and weaknesses, and the team listens and helps them accordingly. The interview passages below from drug court judges and prosecutors convey how their interactions in drug court differ substantially from those in traditional criminal court.

<b>Comparing interactions with drug court participants with interactions with defendants in traditional criminal court</b>
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<b>Judge X (drug court):</b> "In traditional trial court I do not have much interaction with defendants. Just during sentencing where I only listen to what they say and what people say on their behalf. I also often do not address defendants directly. In drug court I have direct communication with the defendant. In drug court people look at them as people, not just criminals. We try and help them out
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of a life of addiction and help them understand that there is a positive experience for them. The interactions personalize the system. We are concerned about them and not just about crime.”<sup>360</sup>

**Judge Y (drug court):** “My experience has been that the...even though the judge only spends a few minutes, literally a few minutes, maybe four or five minutes with each participant during drug court sessions face-to-face, I think those minutes are very valuable and I think they've...I think they tend to be underestimated, undervalued in terms of how efficacious it is in the grand scheme of keeping the person healthy. [...] I became so connected with the participants and so involved in their circumstances that [...] I almost felt like the dad to everybody that was in the program. And I think there's a certain relationship, judge and participant, that is much, much different in the drug court than it is in a traditional criminal court setting, judge and defendant. [...] And you know I'm not suggesting that there's this you know intimate father-child relationship at all. I'm not saying that. What I'm saying is, because there's this much greater knowledge of the person, their life, their circumstances and there's a clear connection made so that I think most participants in drug court understand the judge really is concerned about them in a way that is quite different from the judge to defendant in a criminal, standard criminal court setting. It's much, much different in the drug court. And I think the participants understand that very quickly. They get to understand that and I think they benefit from that.”<sup>361</sup>

*In contrasting his interactions in drug court with traditional criminal court, Prosecutor X2 (drug court) stated, “It’s more familiar. You know more about their lives. [...] Because of the regular meetings, you know when they’re having stress in their life because of a family issue or because of job issues. Whereas on a regular defendant, typically they walk in the courtroom, all I know about them is what I’ve read in the police report and what their criminal history tells me. So it’s a much more familiar process. [...] It makes me more human to them and them more human to me. We make better decisions when you have a better understanding of the situation the person’s in.”*<sup>362</sup>

**Prosecutor X1 (drug court):** “[In traditional criminal court], as a prosecutor I cannot legally talk to a defendant if they are represented by an attorney. I can’t just go up to a defendant in court and say ‘hey, what do you think about this?’ and talk about the case. That’s a violation. In drug court, you are openly talking about their issues with them, so you get to know them, you get to know their families, where they work, what they do. It’s a conversation, which is incredibly different. I usually have zero interaction with the defendants themselves in regular cases, whereas I talk to defendants in drug court every week.”<sup>363</sup>

In drug court, the participants have personalized interactions with the team that they would not have with members of a traditional criminal court. As Judge X (drug court) stated, the direct communication and thorough understanding of the person enables the team to see the participants as people and not just as criminals. And in the same way, the team is concerned with the wellbeing of the

<sup>360</sup> Judge X (drug court), "Interview, December 12, 2016."

<sup>361</sup> Judge Y (drug court), "Interview, March 3, 2017."

<sup>362</sup> Prosecutor X2 (drug court), "Interview, November 14, 2016."

<sup>363</sup> Prosecutor X1 (drug court), "Interview, November 11, 2016."

person beyond reducing crime in the area. Prosecutor X2 (drug court) also conveyed that the frequent and personalized interactions are humanizing and that knowing the participants on a personal level enables the team to make better decisions. Judge Y (drug court) even described that in a sense he felt like the father figure to the participants. He reflected that although the judge only meets with the participants briefly, he believes the direct and personalized contact is important for them coming to understand that the judge truly cares about them. The interactions in drug court are therefore more humanizing than in traditional criminal court.

Likewise, in my observations of drug court in County X, the judge seemed to sincerely care about the participants as people. She would often encourage and sometimes probe them to reflect on their sobriety. Around the time of Thanksgiving, the judge concluded each check-in by asking the participant what he or she was thankful for.<sup>364</sup> Some responses included: being sober, one's children and family, and one person even said "to be me."<sup>365</sup> The judge also began most check-ins by asking the participants, "How are you doing?"<sup>366</sup> When the responses were brief and unrevealing such as "good," and "fine," she would respond, "not fine, not good, not happy, tell me how you are," or "tell me something good," probing them to reflect on why they felt the way they did.<sup>367</sup> By holding the participants accountable to their word, the judge seemed to want them to internalize the importance of being sober, being honest, and engaging in drug court.

For example, one participant had attended AA meetings outside of Maine over the holidays and said he had enjoyed meeting new people and hearing their stories:

<b>Observation of drug court in County X: The judge having a participant to be reflective</b>
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**Judge:** "Tell me somebody's story."

**Participant:** "I'm drawing a blank right now."

**Judge:** "Tell me in a minute."<sup>368</sup>

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<sup>364</sup> Judge X (drug court), Observation of Drug Court in County X, November 18, 2016.

<sup>365</sup> Ibid.

<sup>366</sup> Judge X (drug court), Observation of Drug Court in County X, December 2, 2016.

<sup>367</sup> Ibid.

<sup>368</sup> Ibid.

After checking in with another participant, the judge re-called him and told him to share one of the stories he had heard.<sup>369</sup> Key to surveillance in drug court is following up with the participants to keep them honest and let them know they will be held accountable for what they say and do. Having the participants reflect on their lives not only kept the participants honest but seemed to help restore their sense of individual dignity. Drug court was keeping the participants very busy and the judge gave them the opportunity to remind themselves why they were in the program and how it was helping them. This reflection also allowed the participants to engage in a deep self-evaluation that they probably could not have done in the past when under the influence of drugs. The personalized interactions and ability to reflect in drug court seemed important both for the participants' rehabilitation and for restoring their human dignity. For those who reported doing poorly, the judge had them reflect on why they were struggling. She was firm with people for being non-compliant but also reminded them that the team cared about them and wanted to help.

In addition to showing sincere care for the participants, the interactions I observed in County X also showed that the team knew a lot about their personal lives. The team knew about each person's daily routine including his or her living situation, relationship status, and employment status. The team was concerned with knowing what the participants were doing outside of drug court and wanted to make sure they were engaged in enough prosocial activities. Regarding a participant who only recently enrolled in drug court in County X, the team wanted him to bring in a weekly calendar "to know what he's doing and whether we need to fill up his days."<sup>370</sup>

The team in County X seemed particularly concerned with monitoring the participants' social lives. Participants were told that they needed to interact with different people and leave behind their drug-involved peers. "You may want to move on from the people who brought you here."<sup>371</sup> "You're

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<sup>369</sup> Ibid.

<sup>370</sup> Case Manager X (drug court), Observation of Drug Court in County X, December 2, 2016.

<sup>371</sup> Defense Attorney Liaison X (drug court), Observation of Drug Court in County X, November 18, 2016.

hanging out with the same wrong people.”<sup>372</sup> Leaving behind their former drug-involved peers seemed to be one of the main challenges for participants. Some of these people were likely close friends and family members. The team would tell the participants that they had to let go of these peers but it seemed unrealistic to expect them to walk away from those they loved and who loved them, despite being poor influences. The judge seemed to acknowledge how difficult it was when she told the participants, “It is the hardest thing to leave people behind, but sometimes you have to.”<sup>373</sup> One criticism, therefore, is that drug court can have unrealistic expectations that the participants will be able to leave behind their close friends and family who are poor influences. Perhaps rather than trying to entirely detach the participants from these people, drug court can encourage sober peer associations while also teaching people to cope while in relationships with people who are drug users or criminals. It seems especially important for the participants’ to develop these coping strategies since many return to drug-involved communities after graduating from drug court.

Another criticism of monitoring in drug court is that because the program is so demanding, it may interfere with the participants’ employment schedules. In County X, when there would be the problem of one’s employment conflicting with drug court, a typical response from the team would be, “this is drug court, not work court.”<sup>374</sup> I once observed a participant who was reprimanded by the team for not attending enough prosocial meetings. She explained it was difficult to fit the meetings into her work schedule but the team was not sympathetic. The team told to her to ask her boss about changing her work schedule.<sup>375</sup> However, the participant likely did not have the authority to ask her employer to accommodate her schedule. While drug court provides the participants’ with structure and trains them to be responsible, it is important to remember that they are also dealing with the responsibilities of normal life. They need to earn enough money to support themselves and their families and pay for the services they receive in drug court. Gainful employment should be regarded as more of an achievement,

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<sup>372</sup> Case Manager X (drug court), Observation of Drug Court in County X, December 2, 2016.

<sup>373</sup> Judge X (drug court), Observation of Drug Court in County X, December 2, 2016.

<sup>374</sup> Observation of Drug Court in County X, November 18, 2016.

<sup>375</sup> Ibid.

especially since it is so difficult for people with drug convictions to find work. Employment can also keep people busy and help them avoid relapse, which will be important when people graduate and no longer have the drug court team monitoring them. Drug court should therefore try to accommodate participants' employment schedules. A related criticism is the way in which the team would demand that the participants find work. "You must find over the table work. There are jobs out there."<sup>376</sup> The team should fully consider how difficult it is for people with drug convictions to obtain work, especially that which would fit a demanding drug court schedule. Similar to the way in which the team wants people to abandon their drug-involved peer associations, it seems that the team unrealistically expected people to find work but did not appreciate it enough when they had it.

As described in the interviews, interactions in drug court are more humanizing than in traditional criminal court in that the team makes better decisions in getting to know the participants on a personal level. The team views the participants as people and not just as criminals. The interactions I observed in County X humanized the participants in the eyes of the team, kept them honest, and in many cases helped restore their sense of human dignity. Apart from the general nature of how the participants were treated, however, the team in County X at least did not always seem to be fair in addressing matters related to the participants' employment and social lives. This shows that while the surveillance in drug court may be more humanizing, it may not always account for surrounding structural obstacles in the participants' lives. The next section discusses the problem of participants from disadvantaged communities relapsing and recidivating upon leaving drug court.

#### **IV. The Consequences of Intense and Personalized Surveillance**

Drug court conducts surveillance that is less restrictive than jail or prison but entails more monitoring and accountability than normal probation to keep the participant from relapsing.

<b>Intended advantages of the type of surveillance in drug court</b>

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<sup>376</sup> Judge X (drug court), X (drug court), Observation of Drug Court in County X, November 18, 2016.

**Detective X (non-drug court):** "The advantage to drug court monitoring is, it's kind of a halfway point. If you're in prison, it's like a feaster famine. When you're in prison you have like no communication or limited communication, and then we let them out and they're on probation, all of a sudden they went from being strictly monitored to like the gates are wide open. Drug court's kind of an in between. So you're kind of easing them back into hopefully beneficial behavior [...]. [In drug court] they kind of wean them off the monitoring. It's more of a...it's a good way to kind of ease them into it if that makes sense."<sup>377</sup>

Detective X (non-drug court) explained his impression that surveillance in drug court is meant to provide enough oversight and accountability in the beginning to keep people from reverting back to drugs and crime. The surveillance is scaled back over the course of one's participation to prepare him or her to live independently upon graduation. This is different from incarceration in which the individual is under constant supervision and then released on probation in which the surveillance is much less intense. Drug court is unique in that monitoring is deliberately used to ease the individual back into the community.

The interviewees mentioned, however, that even with the gradual lightening of the surveillance, former participants may struggle to stay sober and may recidivate in lacking the support and accountability they had while in drug court.

#### **Difficulties faced upon leaving drug court**

**Defense Attorney X (non-drug court):** "And so the most dangerous time is when they, not during drug court, is when they get out of it. And they lose all that support and then they're back in their same very difficult community. We're taking people out of that community, putting them in front of a team that are watching them like hawks, and then setting them free. Kicking them out of the nest. Unfortunately they have to fly right back into that nest. And that's where recidivism comes in when they lose the support."<sup>378</sup>

**Detective X (non-drug court):** "Some of the tough parts are, you know I can take you out of the community and I can rehabilitate you and I can do all these different things for you. But when I'm done with you, if I take you and I put you right back in the same neighborhood, the same friends, the same community you grew up in, how long do you think it's going to be before you fall back into your same ways? And I see that as sometimes we'll take people out and we'll rehabilitate them, but when they go back into literally the same neighborhood, the same friends, and the same lifestyle, it's only a matter of time before they kind of fall back into their ways."<sup>379</sup>

<sup>377</sup> Detective X (non-drug court), "Interview, November 11, 2016."

<sup>378</sup> Defense Attorney X (non-drug court), "Interview, November 14, 2016."

<sup>379</sup> Detective X (non-drug court), "Interview, November 11, 2016."

**Judge X (drug court):** "When they get out of drug court they are no longer monitored and do not have the same treatment resources. They return to their old friends who got them here in the first place and it is hard for them to let go of those friends."<sup>380</sup>

**Prosecutor X (drug court):** "The last couple of people that have graduated drug court in the last say three months have already used substances or committed new criminal conduct. [...] The people that graduated seemed to do very well in drug court, didn't seem to have any issues. We're now reevaluating whether or not that means they just knew how to get through the program but we weren't really hitting what we needed to change in their perspective so that when they got out without all of these resources from the drug court team they could manage on their own."<sup>381</sup>

The drug court team attempts to provide enough freedom for the participants to learn to lead productive lives but is also aware that they cannot be trusted to stop using drugs on their own. The surveillance is more intense towards the beginning of the program as the clients are intensely struggling with addiction. The supervision is gradually diminished as the participants advance to higher phases. However, the interviews indicate that the process of weaning them off of the surveillance does not always sufficiently prepare people to live on their own in their original, drug-involved communities. Defense Attorney X (drug court) emphasized this point in describing the team as watching the participants "like hawks" and then setting them free in the community where they may face a number of addiction triggers. It seems that the participants may grow accustomed to the drug court schedule and come to depend on it. Similarly, the personalized interactions mean the participants learn to trust the team and reach out for help. The participants may struggle in lacking those supports in the community and where people know them as drug users and criminals. Therefore, the high and personalized surveillance, while important for monitoring addicts and helping restore their sense of individual dignity, does not resolve the structural problems associated with living in difficult, drug-involved communities.

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<sup>380</sup> Judge X (drug court), "Interview, December 12, 2016."

<sup>381</sup> Prosecutor X1 (drug court), "Interview, November 11, 2016."

#### IV.a. Sober Housing

One possible way in which drug court attempts to help the participants find more sustainable living situations is through sober housing.

<b>Descriptions of sober housing and its role in drug court</b>
<p><b>Case Manager Y (drug court):</b> "So what ends up happening is a sober house will have a manager who typically owns it or runs it. And they will have you know curfews in place which they [the participants] already have one with us but you know for the house as well. They will have random drug tests at their house as well. They will have AA expectations. They will say you know, in order to live in this house you need to be going to three AA meetings a week. They also get rewarded for working hard. You know they can be leaders in the house. They can be able to run their own AA meetings in the house. So overall there's another set of eyes. There's a structured environment and they're in the house with other people who are in the same kind of situation that they're in, working to try and figure it out."<sup>382</sup></p>
<p><b>Judge Y (drug court):</b> "It [sober housing] plays a role because there are lots of times very limited or not very useful places for people to live. Frequently, people have come into drug court and their options of living in certain circumstances are quite lousy. They may have spent... they may have a single option with a family member, or a friend, or something like that and that person that they are living with or near is, you know, is a substance abuser himself or there may be other circumstances that are completely contrary to the aim of getting the person healthy and substance-free. [...] So sometimes sober houses are an option that the case manager, the probation officer look into to see if the person can live in that kind of a setting. And the right kind of sober house, that can really make a big difference and be very helpful for people."<sup>383</sup></p>
<p><b>Judge X (drug court):</b> "A critical component of getting sober is changing 'people, places and things.' Hanging out with the same people and living in the same location does not bode well for success. That doesn't mean it can't happen, it's just more challenging."<sup>384</sup></p>

Case Manager Y (drug court) described sober housing as providing participants with living situations away from drugs and with more accountability. Sober housing also seems to provide the participants with opportunities for demonstrating initiative in that they can be leaders and run their own AA meetings. Additionally, sober housing allows people struggling with drug addiction to build a support network with others in similar situations. Judge Y (drug court) conveyed that sober housing can make a positive difference in people's lives in that it removes people from unsustainable living situations.

<sup>382</sup> Case Manager Y (drug court), "Interview, December 15, 2016."

<sup>383</sup> Judge Y (drug court), "Interview, March 3, 2017."

<sup>384</sup> Judge X (drug court), "Interview, December 12, 2016."

Judge X (drug court) conveyed that changing one's living situation can be important for being able to succeed in drug court.

Judge Y (drug court) explained that while there are many more sober housing options available in County Y than in other parts of Maine, there is still the problem of limited availability.<sup>385</sup> Judge X (drug court) explained that there is one sober house in County X. While there is no formal affiliation between drug court and the owner of the sober house, she will let the team know if there is an opening. Judge X (drug court) expressed that the team is grateful for there being at least one sober house in County X, but wishes there were more.<sup>386</sup>

#### **Reflection on the need for a residential component to drug court in County X**

**Defense Attorney Liaison X (drug court):** "It would be wonderful if we had a drug court residential, either long-term or short-term, residential part of our program where people could, instead of coming out of jail, and were going to that program, that residential part of our program instead of going to a shelter. [...] There are, especially with opiate addiction, it's real hard for somebody from a troubled part of our community who lives next to people who are using drugs...by who....who encounter people every day who know them as drug users maybe even criminals. It's real hard for people to have the perspective and the ability not to relapse and...umm and some of that is just, especially people that don't have homes or go to shelters, it's ... it's not just treatment it's their environment that... If you can imagine how you'd feel if you went home tonight to a shelter instead of a place where people are there and supporting you and caring about you in a more obvious way."<sup>387</sup>

Since a problem in drug court is participants not being able to manage themselves in the community outside of drug court, sober housing would be a way to help them attain better living situations. Living amongst other people seeking to get sober would also provide participants with additional support. Consistent with the recommendations of Defense Attorney Liaison X (drug court), it would be ideal to add a residential component of the program that would allow the participants to build more sustainable lifestyles. Additionally, part of a residential program might be to help drug court graduates acclimate for a period of sober living outside of drug court before having to face the

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<sup>385</sup> Judge Y (drug court), "Interview, March 3, 2017."

<sup>386</sup> Judge X (drug court), interview by Claire Brown, March 13, 2016.

<sup>387</sup> Defense Attorney Liaison X (drug court), "Interview, November 11, 2016."

responsibilities of normal life on their own. This idea in particular was suggested by the drug court treatment provider in County X.<sup>388</sup>

## **V. Graduation/Commencement**

In my observations of drug court in County X, I witnessed one woman graduate from the program. Graduation was an emotional interaction in which the judge came down from the bench to hand the graduate her certificate and give her a hug. Next, every other member of the team stood up and congratulated her. The treatment provider and case manager walked up to stand right in front of her as they congratulated her and also hugged her. Following the words of the team, the graduate addressed the rest of the participants and encouraged them to remain in the program and to trust the team.<sup>389</sup> The judge concluded by saying, “remember, it’s hard when you leave. You need people to help you and are always welcome to come back.”<sup>390</sup> Although drug court graduates are no longer obligated to report to the team, they are encouraged to come back in times of need. Post-graduation, the drug court is viewed as a voluntary support system rather than a surveillance mechanism. It therefore seems that part of the surveillance in drug court is teaching the participants to reach out for help.

Pertaining to the idea of accountability in drug court carrying forward post-graduation, the judge recently decided to replace the term “graduation” with “commencement.” “Graduation sounds final. Commencement is heading forward.”<sup>391</sup> The idea seems to be that the participants’ time in drug court essentially never ends because hopefully the coping mechanisms, sober connections, and life skills they gain will remain with them throughout their lives. They transition from the mutual accountability of the team’s supervision to informal self-policing in which they know what is important in life, how to avoid relapse, and when to reach out for help.

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<sup>388</sup> Treatment Provider X (drug court): Observation of Drug Court in County X: December 2, 2016.

<sup>389</sup> Observation of Drug Court in County X.

<sup>390</sup> Judge X (drug court), "Interview, December 12, 2016."

<sup>391</sup> Ibid.

Following the commencement ceremony, all of the drug court participants exited the courtroom and the graduate underwent her official sentencing. The prosecutor and defendant (drug court graduate) sat where they would during a normal criminal sentencing. The judge reviewed the graduate's convictions and explained that having successfully completed drug court, her prison sentence was entirely suspended.<sup>392</sup> The sequence of events was interesting. Following the celebratory event of graduation, it was reinforced that this was all because she had committed crimes. It suggests that upon completion of drug court the state forgives you but wants the last word to be a reminder that you have done wrong and that your record is not clean. Additionally, undergoing her official sentencing reminded the graduate that if she were to recidivate and get caught, she would face incarceration. It suggests a dual surveillance in which the state has watched and helped you rehabilitate yourself and it will still be watching to make sure you do not relapse. In this way, drug court reinforces carceral state control by concluding one's participation with the threat of punishment.

## **VI. Conclusion**

In terms of the type of surveillance used, drug court seems to be distinct from incarceration, probation, and traditional criminal court. There was a consensus that surveillance in drug court was greater and more intense than in probation, and some even saw it as more intense than in jail and prison. The latter opinions incorporated the relationship of mutual accountability between the participants and the team into their definitions of surveillance. The high level of surveillance in drug court was seen as necessary because, at least in the beginning, the participants cannot be trusted to manage themselves in the community while severely struggling with addiction. The participants must actively enable their own surveillance and are accountable to the entire team. This is in contrast to being passively monitored within a controlled environment while incarcerated or loosely monitored by a single probation officer. Whereas people leave prison and jail no more prepared to avoid drug use and recidivism, drug court

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<sup>392</sup> Observation of Drug Court in County X.

actually teaches people to live and change for the better within the community. Similar to the focus on treatment rather than punishment discussed in Chapter 3, surveillance in drug court also stresses providing the participants with resources and opportunities in contrast with the carceral state. The literature indicates that carceral state surveillance largely causes people to withdraw from important aspects of society such as avoiding the police, the courts, and local hospitals in fear of being re-incarcerated.<sup>393</sup> Drug court, by contrast, provides the participants with treatment and other services and connects them with prosocial opportunities. Therefore, whereas the carceral state uses surveillance largely to restrict ex-offenders from participation in various aspects of life, drug court prioritizes providing people with resources and involving them in the community.

The surveillance in drug court is also qualitatively different and more humanizing than in traditional criminal court. The literature on the carceral state suggests that the surveillance is largely intended for catching people who commit crimes and probation violations. People also tend to have adversarial and dehumanizing interactions with the criminal justice system such as being stopped and searched without one's consent.<sup>394</sup> In drug court, interactions with the team are much more direct, frequent, and personalized. The team cares about the participants as people and does not simply view them as criminals. Additionally, the team is able to make better decisions for the participants in knowing more about them. In this sense, drug court is effective in diminishing the enduring criminal status bestowed upon defendants by the carceral state.

The humanizing, personalized relations in drug court also have implications for surveillance with respect to Foucault's portrayal of carceral surveillance through Jeremy Bentham's Panopticism.<sup>395</sup> The Panopticon is a circular-shaped prison in which the inmates occupy prison cells along the circumference and the prison guards are situated in a high tower in the middle of the building.<sup>396</sup> According to Foucault, the structure maximizes discipline by having the inmates monitor one another in addition to being under

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<sup>393</sup> Gottschalk, *Caught: The Prison State and the Lockdown of American Politics*, 248.

<sup>394</sup> Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*, 94.

<sup>395</sup> Foucault, *Discipline and Punish: The Birth of the Prison*, 2nd Vintage Books, 201.

<sup>396</sup> Ibid.

the watch of the prison guards.<sup>397</sup> The mutual accountability of drug court might be likened to the Panopticon in that the participants are not only supervised by the team but also supervised by each other. My observations of drug court in County X reveal that in having the participants monitor each other, the team is not only concerned with maximizing discipline through greater accountability. Rather the judge would help foster meaningful relationships between the participants by distinguishing role models and encouraging the participants to advise one another. The team also uses a more humanizing form of surveillance in that it is not only intended to discipline the participants. Rather the team gets to know the participants and is concerned with their wellbeing beyond their ability to avoid relapse and recidivism. Foucault describes the skewed power dynamic within the Panopticon in that the inmates are “totally seen, without ever seeing” and the guard in the central tower “sees everything without ever being seen.”<sup>398</sup> Whereas the guard can monitor all of the inmates from the central tower, the inmates cannot see him or her. While the drug court team has a lot of control over the participants in being able to monitor them heavily, the surveillance is not like in the Panopticon where compliance is seen as contingent on the inmate not seeing the guard.<sup>399</sup> In drug court, by contrast, the participants have direct contact with the team members on a regular basis. Compliance is therefore in part promoted through the participants building trust with team as opposed to inciting fear of being caught in violation.

The effectiveness of drug court is largely seen in its being a medium between the constant surveillance of incarceration and the loose monitoring of probation. The team attempts to prepare the participants to live independently in the community by gradually reducing the monitoring over the course of the program. However, the interviews suggest that even with the strategic diminishing of the surveillance, drug court does not always work for people from disadvantaged, drug-involved communities. It seems that participants grow attached to the personalized, regular interactions with the team and may not know how to manage themselves once they lose the support and resources. In this

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<sup>397</sup> Ibid., 207.

<sup>398</sup> Ibid., 202.

<sup>399</sup> Ibid.

sense, drug court does not necessarily present an alternative to the carceral state in that it does not disrupt the cycling of people from disadvantaged, drug-involved communities in and out of the criminal justice system. The team in County X also seemed to treat those with structural disadvantages less fairly in that they were unrealistically expected to leave behind close peer associations instead of learning to cope in these relationships. The team also expected the participants to find stable work despite having a record with a drug felony but was not as appreciative when they had work that conflicted with drug court. This is potentially problematic in that the participants also have to deal with the responsibilities of normal life outside of drug court and will need a stable job upon completing the program. Lastly, drug court seems to be an extension of carceral state development in that carceral surveillance is maintained through the underlying sentence. This was evident in seeing the participant undergo a formal sentencing after her graduation ceremony. Her participation in drug court ending with receiving a suspended prison sentence reinforced that built into the drug court model is the threat of punishment.

In conclusion, the type of surveillance in drug court is different and more humanizing than traditional carceral surveillance. The participants are more productive in enabling their own surveillance, they have the freedom of living in the community, and they have personalized interactions with the team and the other participants. The uniquely humanizing surveillance strengthens their sense of individual dignity. Nevertheless, drug court is an extension of carceral state development insofar as people can grow dependent on the surveillance and may end up relapsing and recidivating and then back in the criminal justice system. Additionally, people from disadvantaged communities are more prone to failure post-graduation. Therefore, while surveillance in drug court is in many respects more humanizing, it does not present an alternative to the carceral state given its larger structural implications. Chapter 5 will further discuss structural as well as other forms of bias in drug court on the subject of access.

## **Chapter 5: Access and Bias**

This chapter examines whether there is bias in access to drug court, both in terms of who is accepted and who succeeds in the program. Part I frames the chapter by providing an overview of the drug court screening and admissions process from the perspectives of the two drug court judges. Parts II and III examine two distinct points of access to drug court: the process of applying and admissions. Part II draws upon the reflections of Defense Attorney X (non-drug court) and Defense Attorney Liaison X (drug court) to determine whether there is any type of bias in their decisions to have clients apply for drug court. While the chapter suggests no bias on the part of the defense attorneys, the threat of punishment through the underlying sentence can discourage people who could otherwise benefit from the treatment from applying. This section also suggests there are certain structural advantages that might determine success over failure in the program. Part III discusses access to drug court at the admissions stage and suggests that while there is no intentional bias in the teams' decisions, some groups of people are unintentionally excluded from participation. Part IV examines a specific point of disagreement among the interviewees regarding the importance of candidates expressing a willingness to obtain treatment and change their lives in order to gain admission. Some interviewees argued that an expression of willingness was not essential at this stage but was rather developed during one's participation in drug court whereas others believed an initial expression of willingness was an important predictor of success in drug court. Part V examines a third point of access, the participant's success in the program, and suggests there are certain factors prior to drug court, having the right attitude and structural advantages, that can be conducive to success in the program. This section also highlights the variety ways in which the interviewees measure success and effectiveness in drug court. Interestingly, many of the interviewees measured success and effectiveness in ways other than the traditional metrics of reducing recidivism and substance abuse and saving money. Most were concerned with the ability of the participants to lead healthy and productive lives and incorporate the skills learned through drug court beyond simply avoiding future criminal behavior. Part VI is the conclusion and argues that drug court is an extension of carceral

state development in that there are a number of biases in access and some of which may perpetuate biases within the carceral state.

### ***I. Overview of the Admissions Process***

To enroll in drug court one must first apply and be screened by the team, which then decides whether or not to admit the person into the program.

In order to apply for drug court in County X, the applicant must have at least one pending serious criminal charge or be subject to a probation revocation and pose a significant risk of committing future crimes.<sup>400</sup>

#### **Explanation of the drug court screening and admissions process in County X**

**Judge X (drug court):** "They have to be screened by the case manager and the treatment provider and they have to have their criminal history looked at by the district attorney's office and have the nature of their crimes discussed. Their attorneys have to present. Probation weighs in. It is also different for higher scrutiny cases which are more in-depth."<sup>401</sup>

Judge Y (drug court) explained that in County Y the person is first referred to the drug court by a defense attorney, prosecutor, or probation officer.<sup>402</sup> He or she is referred to the drug court probation officer who then informs the rest of the team. The team discusses the referrals in its regular meetings and determines whether or not to screen the referents. The treatment provider would then meet with the applicant and to conduct the screening. If the screening process indicates that the applicant would benefit from the program, the team meets again to consider the results and then decides whether to admit the applicant. The judge also mentioned that the applicant's defense attorney can attend the meetings and explain why he or she should be admitted.<sup>403</sup>

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<sup>400</sup> "County X' Adult Drug Treatment Court: Purpose, Goals, Eligibility Guidelines and Procedures," 2.

<sup>401</sup> Judge X (drug court), "Interview, December 12, 2016."

<sup>402</sup> Judge Y (drug court), "Interview, March 3, 2017."

<sup>403</sup> Ibid.

## ***II. Access through Application***

Defense attorney X (non-drug court) and Defense Attorney Liaison X (drug court) described the types of cases in which they would have clients apply for drug court. Defense Attorney Liaison X (drug court) clarified that in his drug court role he typically does not counsel participants as their private defense attorneys would.<sup>404</sup> He mainly assists the participants' attorneys but will assume a more traditional role when standing in for someone's attorney during a court proceeding. He nonetheless was able to reflect on his experience in advising clients in the application process as a traditional defense attorney outside of drug court. He explained that he withdraws from being the client's attorney once he or she enrolls in drug court.<sup>405</sup>

### **Regarding which cases the defense attorneys would have clients apply or not apply to drug court**

**Defense Attorney X (non-drug court):** "If you've got a kid, an eighteen-year-old kid who's tellin' me to go F myself and you know he's gonna do whatever he wants and blah, blah, blah...he's not going to drug court. Right? But if I've got some young...I've got a young lady right now. I just adore her. [...] She's got so much hope. Great family. All this stuff. I really want her into drug court. But then you get the forty-year-old guy who's just comes to me and says '[Attorney's first name], I need ya. I really need a change. I can't keep doing this.' I'll put him in drug court. So my job is to kind of look at them, talk to them, assess them, whether I think a) they're appropriate for the program, but even if they are appropriate for the program, do I think they can finish it."<sup>406</sup>

*He elaborated on when he recommends clients enroll in drug court.*

**Defense Attorney X (non-drug court):** "The easy one is to answer when I advise against it. That's people who are not motivated, who I suspect are just trying to avoid jail time. Because they're gonna fare worse in the long run. Also people that I just think lack perhaps the intellectual capacity to participate in this program, mentally compromised to the point where I... they just can't participate cause they have an inability to understand. [...] The hard ones are, you know you get some nice person that you like. They've had a long-standing substance abuse but they've got a significant criminal history."<sup>407</sup>

"The people who I do put in are the people who are motivated. You just get a sense with people. But I'll be honest with you too. I get fooled all the time. You know people come in and they say the right thing and I, because I want to believe, they fool me. [...] And so those guys that you want to believe them, I'll refer them too. Even some guys if I don't think they can make it. Because I can be wrong. You know they can get in and they just love the program. So...but it's...you also have to realize that

<sup>404</sup> Defense Attorney Liaison X (drug court), "Interview, November 11, 2016."

<sup>405</sup> Ibid.

<sup>406</sup> Defense Attorney X (non-drug court), "Interview, November 14, 2016."

<sup>407</sup> Ibid.

there's a screening process. Right? So it's not my decision to put them in. It's my decision to submit an application. And then guys who I don't think are gonna get through that screening process by the way, I'm not putting them in either. Because I know how the process is."<sup>408</sup>

*Regarding when to recommend clients apply to drug court, Defense Attorney Liaison X (drug court) stated, "If there's a case where someone's criminal behavior is a product of their addiction...that the state can prove that case beyond a reasonable doubt, and that the person is amenable to treatment and can probably benefit from that treatment and be able to stay out of jail, that's when I'll work them in or I'll have a person apply to drug court. [...] I would advise against it when...the person isn't able to meet the criteria for drug court, let's say they...I don't think they really have an addiction. That when their crimes are involving serious violence or they have serious records in their history of violence and I know that the odds of them getting in are slim to none."*<sup>409</sup>

The above passages reveal that both attorneys base their decisions on whether to have a client apply for drug court on their impressions of the person's eligibility and ability to complete the program. Defense Attorney X (non-drug court)'s example of the resistant eighteen-year-old kid in contrast with the forty-year-old man who says he is ready for a change suggests he looks for motivation in assessing a client's likelihood for success. He is reluctant to have someone apply who will not engage in the program and is only looking to avoid jail, knowing they will likely be terminated and worse off in the end. Similarly, Defense Attorney Liaison X (drug court) looks for clients who are open to treating their addictions. Motivation seemed to play a factor in both attorneys' decisions.

Defense Attorney X (non-drug court) conveyed that while he is not biased in having clients apply for drug court, there are certain factors he believes would make one more or less likely to succeed in drug court. His example of the young lady who has "so much hope. Great family. All this stuff," shows his belief that having resources and supports outside of drug court increases the client's chances of graduating. The attorney's emphasis on "wanting to believe" people suggests he generally does not base his decisions on his own biased impressions of who is most likely succeed. He will have people apply even who he thinks might not graduate. He would rather give clients the benefit of the doubt and allow them to access the treatment and other resources. Having clients apply even when he is not confident

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<sup>408</sup> Ibid.

<sup>409</sup> Defense Attorney Liaison X (drug court), "Interview, November 11, 2016."

they will finish suggests his belief in the ability of drug court to induce substantial, positive change in people. While this attorney is relatively unbiased in his decisions to have clients apply to drug court, he nonetheless indicated that having structural advantages prior to entering drug court increases one's chances of success. Both attorneys suggested that part of their baseline criteria for deciding whether to have someone apply for drug court is the client's demonstrated motivation, although Defense Attorney X (drug court) indicated motivation alone might not be sufficient for determining success.

#### **Negotiation of a better sentence as a barrier to accessing drug court**

**Defense Attorney X (non-drug court):** "You know if I can negotiate it down to a misdemeanor because it's a weak case, you know those are harder because I want my clients to get the treatment but I can't subject them to a felony plea and probation when I think I can get them a misdemeanor and get them out of the situation, so I have to. And they want me generally to do that for them. So those guys won't. They won't be going to drug court either although they probably need it."<sup>410</sup>

**Defense Attorney Liaison X (drug court):** "[I will advise against it] where the result I will achieve without drug court is far more favorable than anything they'd get in drug court, or where, I'll give you an example, of whereas I think they can achieve and I could attain this as a negotiation, where they could be on probation, stay out of jail and successfully complete their probation instead of going into the long, difficult, intensive, drug court program."<sup>411</sup>

Both attorneys said they would not recommend clients apply for drug court who would otherwise receive a lighter penalty in traditional criminal court. The decision not to recommend drug court for these clients who might otherwise be eligible for and benefit from drug court highlights a potential problem of access. The threat of punishment that is built into drug court can create a barrier to access. Those who do not pursue drug court in seeking a "better deal" may be worse off in the end since they do not acquire the resources or motivation to keep from using drugs and recidivating. In essence, they leave with a more lenient sentence but are more likely to relapse and reoffend having not addressed the underlying addiction issue. This is not to the fault of the defense attorney since any client would likely prefer a lighter penalty than having to go through the arduous process of drug court and live with the threat of a more severe sentence. However, the way in which the underlying sentence in drug court can discourage people from

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<sup>410</sup> Defense Attorney X (non-drug court), "Interview, November 14, 2016."

<sup>411</sup> Defense Attorney Liaison X (drug court), "Interview, November 11, 2016."

applying indicates that many are not getting the treatment and supervision that they need. In connection with Chapter 3, not only does the threat of punishment serve as a way to motivate participants to comply in drug court but also in the case of negotiating a sentence, it can preclude one from accessing the program and from obtaining needed treatment.

#### **Imbalance of power in negotiating the terms of one's participation in drug court**

**Defense Attorney X (non-drug court):** "Before they even enter drug court [...], I enter into negotiations with the prosecutor and I have no leverage in those negotiations. That's one thing that can be fixed by the way. I think the judge...judges can sometimes and sometimes do but they need to get more involved in the negotiation process with the prosecutors because they [the prosecutors] can at this point tell us, because I... because I'm not on the team remember, they can tell me what they want to do and we...my client pretty much has to do it."<sup>412</sup>

Defense Attorney X (non-drug court) suggested that the problem of the threat of punishment barring access to drug court may stem from a power imbalance in the negotiations. He argued that the prosecutor has too much power to determine the terms of one's participation in drug court. The prosecutor may be able to impose a harsher sentence than is fair and necessary that would dissuade someone from pursuing drug court. Defense Attorney X (non-drug court) therefore believes the judge should take a more active role in making sure the negotiations are fair.

In conclusion, when deciding to have clients apply for drug court, defense attorneys look at their clients' eligibility and likelihood of finishing the program. A client's motivation to overcome his or her drug addiction and make substantial lifestyle changes is seen as a predictor of success. This section highlights two ways in which there is bias in access to drug court through the application process. Firstly, although he does not let it influence his decisions on having clients apply for drug court, Defense Attorney X (non-drug court) suggested that people with existing supports are more likely to finish the program. Additionally, both attorneys said the threat of punishment in terms of the underlying sentence can preclude people from acquiring the treatment and oversight they need.

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<sup>412</sup> Defense Attorney X (non-drug court), "Interview, November 14, 2016."

### ***III. Access through Admissions***

Having outlined the first point of access being the application process, this section evaluates access at the stage of admissions. There was variation among perceptions of equal access to drug court in admissions. Figures 5-1 and 5-2 display the distribution of interview responses on questions of bias in access to drug court through the admissions process.

**Figure 5-1**

<b>Drug court team interview responses on the question of bias in access to drug court (Total: 9 respondents)</b>	
<u>Response</u>	<u>Number of Interviewees</u>
No bias	3
Yes, there is bias	6
More than one type of bias	4

A count of the number of interview (all are drug court team members) responses to the question of whether certain types of people have more access to drug court than others. The table includes the number of interviewees whose responses indicated “no bias,” or “yes, there is bias,” and within the group of those who answered “yes,” the number of interviewees who indicated more than one type of bias.

**Figure 5-2**

<b>Number of interviewees who mentioned each type of bias (Total: 9 respondents)</b>	
<u>Type of Bias</u>	<u>Count</u>
Immigrant or refugee status	3
Serious mental health issues	3
Violent criminal history	3

A count of the number of interviewees (all are drug court team members) who mentioned each type of bias in access to drug court. These were the most commonly mentioned types of bias. Each category of bias represents a reason someone might *not* be admitted to drug court.

Figure 5-1 indicates that there likely is bias in access to drug court in that 6 out of the 9 interviewees (more than half) said certain types of people had more access to drug court than others. Figure 5-2 indicates that the types bias most commonly mentioned were in terms of someone being an immigrant or refugee, having serious mental health issues, or having a violent criminal history.

<b>No Bias in Admissions</b>
<i>On the question of whether she found that certain defendants have more access to drug court than others, Judge X (drug court) responded, “Not really.”<sup>413</sup></i>

<sup>413</sup> Judge X (non-drug court), "Interview, January 19, 2017."

**Judge Y (drug court):** "I didn't experience that in my work as [the] [County Y] drug court judge, not in my tenure there and I don't think I've ever heard that it was a concern there. [...] The team has no interest in screening folks based upon their economic situation, their social situation, or any other situation. [...] We took every measure to get folks into the drug court who should be in drug court."<sup>414</sup>

#### Bias 1: Immigrant and Refugee Status

**Probation Officer X (drug court):** "We struggle most in getting immigrants in the program. It's complicated. There are difficulties when they're out on bail."<sup>415</sup>

**Prosecutor X2 (drug court):** "The only group that I'm curious about is immigrants. And I'm not sure if it's because they think that there's language barriers that would prevent them from being able to actively participate. Or if it requires them to plead to specific charges, and that means it would trigger deportation issues for them [...] I think [name of the location]'s population includes 7-10% Somali population and are charged, and then the cases that are brought in clearly reflect you know at least 7-10% involving Somali individuals. So why aren't we seeing that number correlated in our drug court. That's the only group that I think to myself, where are they?"<sup>416</sup>

**Defense Attorney Liaison X (drug court):** "We haven't figured a way to allow the refugee population to apply to drug court and that's because they can't plead guilty to a federal, to a felony especially a felony involving drugs because the federal criminal justice system considers even a plea to a felony as a conviction, subjecting the refugee to deportation."<sup>417</sup>

Judge Y (drug court) explained that when he served on the drug court team for County Y, there were participants who were not born in the United States but not very many. He explained that people who were not born in the United States would not be able to access drug courts like in County X, in which people are facing new, non-adjudicated criminal charges and would have to plead guilty in order to enroll. Federal immigration law causes those non-citizens who plead guilty to face the possibility of deportation. He explained that this application of federal law does not affect drug court in County Y because all of the participants have already been convicted and are on probation.<sup>418</sup>

<sup>414</sup> Judge Y (drug court), "Interview, March 3, 2017."

<sup>415</sup> Probation Officer X (drug court), "Interview, November 9, 2016."

<sup>416</sup> Prosecutor X2 (drug court), "Interview, November 14, 2016."

<sup>417</sup> Defense Attorney Liaison X (drug court), "Interview, November 11, 2016."

<sup>418</sup> Judge Y (drug court), interview by Claire Brown, March 9, 2017.

## Bias 2: Serious Mental Health Issues

**Prosecutor X2 (drug court):** "So, if you have significant mental health issues, we don't have the resources to deal with mental health issues in conjunction. And I mean significant. You know somebody who's psychotic. You know we just...we're not gonna help much. So that would preclude you from getting in."<sup>419</sup>

**Defense Attorney Liaison X (drug court):** "If you have a very serious mental health condition but you have a drug addiction, we can't take you but we'd hopefully refer that person to co-occurring court in Augusta."<sup>420</sup>

**Prosecutor Y (drug court):** "The only real barrier to our drug court would be if the person has significant mental health issues that they couldn't succeed in our drug court, which doesn't...it focuses on substance abuse issues, not mental health issues."<sup>421</sup>

This group of interviews suggested that drug court, given its focus on substance abuse, does not have the resources to treat people with serious mental health issues.

## Bias 3: Violent Criminal History

**Probation Officer X (drug court):** "[...] we look at violent histories under heightened scrutiny for the safety of the team and the community. Meaning we look at the case more intensely. Public safety is priority."<sup>422</sup>

**Prosecutor X1 (drug court):** "As a usual rule, we do not accept violent criminals. There are exceptions. These are not black and white rules. We have taken people who have violent criminal pasts. But that's a very large concern for the safety of everyone that's involved in the drug court to make sure we're not putting people in unsafe positions."<sup>423</sup>

**Prosecutor X2 (drug court):** "So if you have somebody who is committing armed robberies with a firearm, not a good idea to put them in drug court, you know but... if you have somebody who committed say a heinous assault of some sort, because of the public safety issues...they become so great, you know I, you can't take that risk on behalf of the community. If you have somebody who committed a burglary on a camp because of addiction issues but there was no crime against the person and there was nobody who felt threatened, than that individual to me is somebody who is low risk for the community with the possibility of a high outcome."<sup>424</sup>

<sup>419</sup> Prosecutor X2 (drug court), "Interview, November 14, 2016."

<sup>420</sup> Defense Attorney Liaison X (drug court), "Interview, November 11, 2016."

<sup>421</sup> Prosecutor Y (drug court), "Interview, January 23, 2017."

<sup>422</sup> Probation Officer X (drug court), "Interview, November 9, 2016."

<sup>423</sup> Prosecutor X1 (drug court), "Interview, November 11, 2016."

<sup>424</sup> Prosecutor X2 (drug court), "Interview, November 14, 2016."

Another potential barrier to admission is having a violent criminal history. Both drug courts in County X and County Y have denied people who have committed violence due to public safety concerns. A violent criminal history, however, does not automatically preclude people from admission. Rather they are examined under “higher scrutiny,” meaning the team examines them more intensely to make sure they would be able to live in the community without posing serious threats public safety.

There were other characteristics said to be barriers to enrollment that were each mentioned by one interviewee. Defense Attorney Liaison X (drug court) mentioned that some private defense attorneys are less open to drug court than others.<sup>425</sup> Additionally, in order for participants to be eligible for drug court they have to live in the community where the court is located. In my observations of drug court in County X, I noticed it had roughly an equal number of male and female participants, all of which were white.<sup>426</sup> Probation Officer X (drug court) said there have not been many Hispanic or African Americans in the drug court because they have not been referred by their lawyers and probation officers. She said African Americans had been particularly absent in drug court because they tended to have had violent histories deemed to be public safety concerns. She also mentioned drug court does not accept sex-offenders.<sup>427</sup> The interviewees conveyed that socioeconomic status does not preclude someone from drug court and Defense Attorney X (drug court) said most of the participants in County X are facing poverty.<sup>428</sup> Two interviewees, Prosecutor X1 (drug court) and Probation Y (drug court), said that one obstacle can be if someone does not have insurance due to the intensive treatment and counseling that is provided in drug court. Although both interviewees stated that this has never been a reason for not admitting someone. If someone does not have the ability to pay the drug court will use sliding scale fees or find grants for them.<sup>429</sup>

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<sup>425</sup> Defense Attorney Liaison X (drug court), "Interview, November 11, 2016."

<sup>426</sup> Observations of Drug Court in County X, November 4, November 18, December 6, and December 12, 2016.

<sup>427</sup> Probation Officer X (drug court), "Interview, November 9, 2016."

<sup>428</sup> Defense Attorney Liaison X (drug court), "Interview, November 11, 2016."

<sup>429</sup> Prosecutor X1 (drug court), "Interview, November 11, 2016."; Probation Officer Y (drug court), "Interview, January 17, 2017."

Unequal access does not appear to be the result of intentional bias in favor of certain types of candidates. Nonetheless, the program's design, capacity, and broader criminal law implications create perhaps unintentional exclusions. Immigrants (County X only) cannot access drug court due to federal immigration law requirements, those with serious mental health issues cannot participate because drug court does not equipped to treat them, and certain violent offenders may be denied in the interests of public safety after being examined under higher scrutiny.

#### The limited capacity of drug court

**Defense Attorney Liaison X (drug court):** “[...] part of it is just our ability to take people. We don't have the ability to take in huge amounts of people under drug court, because there are limitations, so, umm, that's also an obstacle to people getting in.”<sup>430</sup>

**Judge Y (drug court):** “Well, I think one of the weaknesses [of drug court], it happens to be is the number of participants that can join the process. Because it's such an intensive process. And because there are limited judges available to conduct drug courts and because there are limited probation officers, and prosecutors, and defense lawyers that are available to do this and social workers, I think that the limitation is the number of people who can actually participate. Where I was in [name of county], there were, we had pretty good numbers in our court by and large but there were times when there were people that probably could have been admitted to the drug court but we just didn't have the room for them.”<sup>431</sup>

Another barrier to access apart from the type of candidate is the sheer size of the caseload, which pales in comparison to the overall number of drug-addicted offenders involved in the criminal justice system.<sup>432</sup> Given the unique intensiveness of the surveillance of the program, drug court can only afford to accept a handful of participants. County X reported having 26 participants in its drug court and County Y reported having 25.<sup>433</sup> This is much fewer than a normal probation caseload which, according to Probation Officer Y (drug court), consists of about 150.<sup>434</sup> Prosecutor X2 (drug court) said the drug court is limited in how many people it can admit also because the team members have additional

<sup>430</sup> Defense Attorney Liaison X (drug court), "Interview, November 11, 2016."

<sup>431</sup> Judge Y (drug court), "Interview, March 3, 2017."

<sup>432</sup> Ibid. Prosecutor X2 (drug court), "Interview, November 14, 2016."

<sup>433</sup> "Interview, November 14, 2016." Case Manager Y (drug court), "Interview, December 15, 2016."

<sup>434</sup> Probation Officer Y (drug court), "Interview, January 17, 2017."

responsibilities in the traditional criminal justice system. Ideally there would be a team of professionals designated solely for drug court but there is not enough funding for it.<sup>435</sup>

In conclusion, the interviewees indicate there is no intentional bias in admitting certain types of persons, although immigrants and refugees, people with serious mental health issues, and some violent offenders may not access this program. Perhaps the greatest obstacle to accessing drug court is the program's capacity, which is significantly smaller than other court dockets and probation.<sup>436</sup>

#### **IV. The Importance of an Expression of Willingness:**

Nonetheless, there was some evidence of bias in terms of seeking to admit people with the "right attitude." There was stark disagreement in perspectives on the importance of an applicant expressing a willingness to obtain treatment and change one's life as an important factor in a team member's admissions decisions. Most expressed that it was not important for applicants to demonstrate a strong willingness prior to participation (see Figure 5-3). There was no indication that any particular type of person (e.g. gender, race, class) has demonstrated more or less of a willingness.

**Figure 5-3**

<b>Drug court team interview responses on the importance of candidates expressing a willingness as a factor in admissions decisions (Total: 7 respondents)</b>	
Important	3
Not important	4

A count of the number of interviewees (all are drug court team members) who thought an expression of willingness from candidates to obtain treatment and to change their lives was either an important or was not an important factor in their decisions on whether to admit someone to drug court.

<b>An expression of willingness is <i>not</i> important</b>
<b>Judge X (drug court):</b> "At the time of admission they have to say "yes, I want to participate." But everyone says that. We are not really looking for willingness at the time that they get into drug court. It's something we hope they'll develop over the course of the treatment." <sup>437</sup>
<b>Judge Y (drug court):</b> "It [willingness] goes a long way, but I can't tell you that it's dispositive or that it's one of the most important factors that's looked at because there are plenty of people, probably

<sup>435</sup> Prosecutor X2 (drug court), "Interview, November 14, 2016."

<sup>436</sup> Ibid. Probation Officer Y (drug court), "Interview, January 17, 2017."

<sup>437</sup> Judge X (drug court), "Interview, December 12, 2016."

the majority of people who come into drug court at least in [County Y], are people who did not want to be there but they had no other choice because of the circumstances they were in. In other words they were looking at going to prison for months or years as a result of their circumstances nearly certainly. So their only best option was really, even though they didn't want it, was to be in drug court and that's okay. We took a lot of folks like that and we were hopeful that the participation in the process would change their attitude and change their view and many, many, many times it did. Sometimes it didn't. There were a few people who came to the drug court who were really motivated, at least they expressed motivation. They expressed a desire to do the right thing and maintain the right attitude and those folks succeeded sometimes and sometimes didn't so you can...I don't think you can really put a predictive value on somebody's attitude and statements that they make as they come into drug court."<sup>438</sup>

Both judges expressed that their main prerequisites for admission are that the person has a drug addiction that likely explains the criminal behavior and that he or she voluntarily agrees to participate. An initial expression of willingness to engage was not seen as a decisive factor. Judge Y (drug court) even expressed that in his experience, those who expressed an initial willingness to engage were no more likely to succeed than those who were more resistant at the beginning.

In fact, the only team members who viewed the expression of willingness as important in their decisions on admissions were all of the drug court prosecutors.

#### An expression of willingness is important

*Regarding what characteristics she looked for in potential participants* **Prosecutor X1 (drug court)** responded, "basically making sure that they have a real willingness and a real want to get better because we can force all of the counseling and treatment on people but if they are not ready to make that change in their life, it's impossible. It's really hard to get sober if you don't want to and you're just doing it because other people are telling you to. So that's the main thing we look is for. Someone who, whether it's their rock bottom or just the time that they realize they can't keep living this life."<sup>439</sup>

**Prosecutor X2 (drug court):** "It's important and it pans out. You know if you aren't willing to do that you will not successfully complete drug court. So you really ought to just go do your sentence. But if you are, then it increases your prospects of getting through the program that much better."<sup>440</sup>

**Prosecutor Y (drug court):** "The biggest characteristic I look for is someone who exhibits a willingness to make, as I said, fundamental changes like not to associate with people they have been associating with, willingness to go to in-patient treatment, willingness to live somewhere else, willingness to abide by the rules. My red flag is always someone who says 'well, can I get out of jail?' It's the people

<sup>438</sup> Judge Y (drug court), "Interview, March 3, 2017."

<sup>439</sup> Prosecutor X1 (drug court), "Interview, November 11, 2016."

<sup>440</sup> Prosecutor X2 (drug court), "Interview, November 14, 2016."

who would do anything to be in the program that I think have a higher level of success overall in the program.”<sup>441</sup>

*The prosecutors elaborated on how they gauged these expressions of willingness.*

**Prosecutor X1 (drug court):** “The people [applicants] that come or their attorneys say. A lot of times people that come into drug court are already on services so they have had contact with a Maine pretrial person or they’re on probation and their probation officer will come in and say ‘they’re applying to drug court because they told me they don’t want to do jail anymore.’ That definitely weighs heavily on us to not want to accept them. But when you have people who have been trying to get sober and just cannot do it on their own...and you see that in a lot of these cases where they’re making attempts, they’re trying to do it and they just are failing over and over again, and that’s sort of what we look for. A willingness and open-mindedness that they can be part of a team and that they’re going to be able to open up.”<sup>442</sup>

**Prosecutor X2 (drug court):** “You look to see if they have sought out treatment but that...hey, that’s the thing about addiction, people generally can’t you know successfully get through treatment. That’s why they’re committing crimes. So, you...you have to tell us you are willing to do it by signing the application and asking to come into court. You’re confirming you’re going to engage in treatment but we don’t look to see have you done it on your own initiative. Most of the time the answer’s going to be no or if you did, you failed miserably.”<sup>443</sup>

**Prosecutor Y (drug court):** “Sometimes it’s letters that the defendant will write to the drug court team. Oftentimes it’s things that they say to their probation officer. And it’s frequently in [an applicant’s] willingness to accept a condition to go to drug court without they’re being any pending violation. So what that means is there’s nothing in it for them other than accessing the treatment. They’re not avoiding jail time. [...] their desire to do drug court comes from a true desire to do drug court.”<sup>444</sup>

The difference in opinion on the importance of candidates articulating a willingness to be in drug court (beyond voluntarily agreeing to participate) as a factor in the interviewees’ admissions decisions is interesting. It suggests disagreement about the belief in the capacity for drug court to substantially change people’s thinking and attitudes. Those who saw an initial expression of willingness as unimportant believed it was a mindset that develops during one’s participation in drug court. The prosecutors viewed an initial expression of willingness as important for distinguishing who will likely succeed in drug court. They seemed to view drug court as being less capable of fostering substantial

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<sup>441</sup> Prosecutor Y (drug court), "Interview, January 23, 2017."

<sup>442</sup> Prosecutor X1 (drug court), "Interview, November 11, 2016."

<sup>443</sup> Prosecutor X2 (drug court), "Interview, November 14, 2016."

<sup>444</sup> Prosecutor Y (drug court), "Interview, January 23, 2017."

change in participants' attitudes. For example, Prosecutor X1 (drug court) stated her impression that counseling and treatment will not help unless the person is already willing to engage. There were also direct contradictions in perceptions of people who enroll in drug court solely to avoid jail. According to Judge Y (drug court), most of the participants enroll in drug court because they are facing a prison sentence and that this is okay since many times drug court has changed participants' attitudes. By contrast, Prosecutor Y (drug court) saw someone trying to avoid jail as a "red flag" and Prosecutor X1 (drug court) likewise said a report from probation of such a case weighed heavily in the decision not to admit that person. Those who saw the initial expression of willingness as important viewed willingness as a precondition for success in drug court whereas those who viewed it as unimportant for predicting success believed it could be developed over the course of one's participation.

Interviewees of both opinions reported that there have been successes among those who were initially reluctant to engage in drug court. The interviewees in the passages below seemed to interpret success in terms of graduation from drug court in this context.

<b>Reports of success among participants who were initially reluctant to engage in drug court</b>
<p><b>Prosecutor Y (drug court):</b> "But generally the people who are reluctant and come in I say 'kicking and screaming,' they don't have much success. But yes, it has happened. But that's the exception not the rule. The people who don't want to be there in the first place, generally bow out pretty quickly."<sup>445</sup></p>
<p><b>Prosecutor X1 (drug court):</b> "Apparently before my time there were people in drug court who, I don't know if I would say reluctant but nobody thought it was going to work out well. They were accepted because the team thought that this person could do it but there wasn't as much willingness as maybe the team wanted to see. And that person recently graduated with flying colors. Struggled through the first part of it but really came out of it as an entirely different person and I think he was in drug court for probably two years, so it was not something that happened over night."<sup>446</sup></p>
<p><b>Judge Y (drug court):</b> "[...] people who come into the drug court, who clearly are not happy to be there have been just as successful mind you in terms of percentage as the number of people who come into drug court with a really terrific attitude to begin with."<sup>447</sup></p>

<sup>445</sup> Ibid.

<sup>446</sup> Prosecutor X1 (drug court), "Interview, November 11, 2016."

<sup>447</sup> Judge Y (drug court), "Interview, March 3, 2017."

Judge Y (drug court) acknowledged that those who initially did not show a willingness were just as likely to succeed as those who came into drug court with the right attitude. The two prosecutors said that while there had been successes among those who were less enthusiastic at the beginning, it was not the norm in County Y and has taken longer in County X. Evidence of success among those who were initially reluctant to engage shows that drug court has the capacity to change people's thinking and improve their perceptions of the criminal justice system. The team should therefore not limit access to those who display the "right" attitude from the beginning. The literature on the carceral state suggests current policies have fostered deep mistrust in the criminal justice system and the government through a harsh regime of punishment, surveillance and bias. These problematic patterns persist beyond incarceration into the marginalization of ex-offenders in public life. Assuming that potential participants who lack the "right" attitude are less likely to succeed in drug court further stigmatizes people involved in the criminal justice system by assuming they have limited prospects for improvement and are less deserving of second chances. Additionally, the distrust felt by those involved in the criminal justice system means people who enter drug court likely come in with deep-seated reservations towards criminal courts. When viewed in the context of drug court's core value of team decision-making, this difference in opinion is especially problematic in that it suggests some members of the team have a higher bar for eligibility than others. The drug court team should ensure that decisions in admissions are as cohesive as they are described in Chapter 3 with respect to sanctions.

Another reason not to favor those who express a willingness prior to entering drug court is that, as illustrated in the previous two chapters, drug court has distinct conceptions of punishment and surveillance that breed trusting and honest relationships between the team and the participants. The regular and personalized interactions of drug court go a long way in showing the participants that the team cares about them and does not simply want to inflict punishment. This change in one's attitude towards the team, however, is only attainable if one can access drug court.

### **Participants receive services and support in drug court that they did not have before**

**Judge Y (drug court):** “[...] in drug court there’s an intensive connection between the participant and the team, all the team members, and I think that goes a long way for the participants in drug court. Some of the people that participate in drug court are people who have had very little of the advantages that you and I and many other people have in their lives where they’ve had love, they’ve had support, they’ve had people in their families and some of their friends that have been very, very helpful to them throughout their lives. A lot of people in drug court don’t have that and for the first time some of them have that with respect to the drug court experience.”<sup>448</sup>

**Prosecutor Y (drug court):** “The [drug court] judge is usually the first figure in the court system that’s ever been kind or interactive with the defendants, and that’s what makes a drug court really different from every other treatment program. It’s that personal interaction with the judge.”<sup>449</sup>

The above passages show that in addition to being more humanizing than traditional criminal court interactions, support and personalized interactions are privileges many of the participants never had before. It would make sense for participants to be less willing to engage in drug court if they have not had trusting relationships before and their prior interactions with the criminal justice system have been largely unpleasant. In the way that the team recognizes the importance of not incarcerating people for a first-time use, it should also have realistic expectations for people coming into drug court that they might not be as open to engaging in the program at the beginning. In fact the practice seems contrary to the recommendations of the Adult Drug Court Best Practice Standards Vol. 1 (2013), which states that eligibility and exclusion criteria should be objective and not based on personal impressions of candidates’ suitability for drug court.<sup>450</sup>

In conclusion, there was significant disagreement among the team members as to the importance of participants displaying a willingness to engage in drug court prior to enrolling. Those who viewed it as unimportant saw this willingness as an attitude to be developed during one’s participation and were not concerned that some people came into drug court only looking to avoid jail. Those who viewed an initial expression of willingness as important saw it as a predictor of success and did not see drug court as

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<sup>448</sup> Ibid.

<sup>449</sup> Prosecutor Y (drug court), "Interview, January 23, 2017."

<sup>450</sup> "Adult Drug Court Best Practice Standards, Volume I," 5.

capable of improving people's attitudes to the same degree. Interviewees of both opinions nonetheless mentioned previous successes among participants who were initially reluctant. In considering that many of the participants have never before received the type of support and kindness given to them in drug court, it would be unrealistic to expect them to come in necessarily willing to engage in drug court. Therefore, the team should refrain from using its impression of a participant's willingness as a factor in its admissions decisions. Having outlined team member biases in predicting success, the following section examines bias in observed patterns of success for certain types of participants.

#### **V. Bias in Prospects for Success in Drug Court**

A few of the interviewees said there were no disparities in success among the participants whereas others suggested there were factors outside of drug court that could strengthen or weaken one's chances of success.

No differences in success
<p><b>Judge Y (drug court):</b> "I saw no evidence at all, anecdotally of course, in my experience of the drug court judge of any factor in a person's life that might predict success over failure."<sup>451</sup></p>

The participant's attitude as a factor in predicting success
<p><b>Prosecutor Y (drug court):</b> "[...] the people who are the most successful in our drug court are the people, who for whatever reason, really want to be in the program and they're not doing it just as a way to avoid jail. So the biggest success stories we have are the people who, they didn't care if they had to spend six months or nine months or whatever in jail or prison before joining the court. They just wanted the services that the court had to offer. The people who are the least successful are the people who are trying to get out of jail and get out of a conviction and get out of doing time and they see drug court as a way to do that. So the most successful people are the ones who grasp the opportunity to live a different life. And what we, what we don't do a good job of doing is identifying who those people are who are truly ready to make monumental changes."<sup>452</sup></p> <p><b>Prosecutor X2 (drug court):</b> "What will happen is you will see more relapses for the people who are not interested in changing or you'll see them taking steps to try and circumvent our supervision. [...] But if a person sincerely is seeking out treatment and engaging in the process, you can also see a</p>

<sup>451</sup> Judge Y (drug court), "Interview, March 3, 2017."

<sup>452</sup> Prosecutor Y (drug court), "Interview, January 23, 2017."

difference in them as an individual. You know they stand straighter, they usually look healthier and usually smile a little bit more.”<sup>453</sup>

#### **Structural factors in predicting success**

**Prosecutor X2 (drug court):** “[In admissions] I look to see do they have potential employment because I think when people are employed they’re far less, they’re far more likely to succeed and far less likely to relapse. Do they have strong support? Although this does not determine whether they get in. If you have a strong family sort of support surrounding you or community support, you fare better.”<sup>454</sup>

**Case Manager Y (drug court):** “I think overall the services for females is really difficult in the state. So they have a harder time accessing services in drug court. [...] The services don’t exist. There’s I’d wanna say ninety-six sober houses in County Y. I think there’s about five female sober houses. I think there is at least eight to ten residential treatments for men in the state and I wanna say there’s probably at best four for females. As far as funding goes, if you’re a young female without Mainecare, without children, you’re probably at the highest risk for waiting the longest for services.”<sup>455</sup>

The interview passages in the table, “The participant’s attitude as a factor in predicting success” indicate there may be some bias in the likelihood of succeeding in drug court depending on the person’s attitude coming in. Both interviewees stressed how a participant’s desire to make significant changes in their life is a significant factor in predicting his or her chances of success. Also in this context, most seemed to interpret success as graduating from drug court. Prosecutor Y (drug court) said the people who have the most success in drug court want to and take steps to “live a different life” and similarly Prosecutor X2 (drug court) stated that those who are not interested in changing tend to relapse more. Note that these interviewees were also among those who looked for prospective participants to express a willingness to change one’s life and obtain treatment prior to entering drug court.

Besides the participant’s attitude, the table “Structural factors in predicting success” indicates that certain structural factors might in part determine success or failure. Prosecutor X2 (drug court) said having potential employment as well as strong community support can promote success in drug court. In line with Defense Attorney X (non-drug court)’s assessment of his clients’ chances for success in drug

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<sup>453</sup> Prosecutor X2 (drug court), "Interview, November 14, 2016."

<sup>454</sup> Ibid.

<sup>455</sup> Case Manager Y (drug court), "Interview, December 15, 2016."

court in Part II, Prosecutor X2 (drug court) agrees that having support and resources outside of drug court can increase one's chances of success. In terms of structural factors for predicting success in drug court, it is also important to reconsider one of the unfortunate outcomes of drug court mentioned in Chapter 4. There have been problems of participants who reside in difficult communities not being able to maintain drug-free, law-abiding lives upon leaving drug court. Therefore, not only is there evidence of bias in access to drug court, but also bias in opportunities for success. Case Manager Y (drug court) conveyed that females may find it more difficult to succeed in his drug court in that there are insufficient services to support women in drug court, especially those without children. Both interviewees indicated bias in success both in terms of factors within and outside of the program.

In addition to differing opinions on there being bias in success, interestingly the interviewees had various definitions of success and effectiveness in drug court apart from the traditional definitions of reducing recidivism and substance abuse and cost-effectiveness (see Figure 5-4).

**Figure 5-4**

<b>Counts of different measures of success and effectiveness (Total: 9 respondents )</b>	
<u>Measure of Success or Effectiveness</u>	<u>Number of Interviewees</u>
Reduced recidivism and criminal-thinking	5
Attain and maintain sobriety	4
Prosocial engagement and community connections	3
Able to pick themselves up after falling	3
Babies born non-addicted	3

This table lists the most commonly mentioned ways in which the interviewees (all are drug court team members) measured success and effectiveness. Each category is not exclusive, meaning an interviewee may have mentioned more than one of the different measures of success and effectiveness listed. "Reduced recidivism and criminal-thinking" - reducing criminal activity and motivations for committing crimes, "Attain and maintain sobriety" - becoming and remaining drug-free, "prosocial engagement and community connections" - building relationships within sober communities and becoming involved in positive community activities (e.g. employment), "able to pick themselves up after falling" - ability to use the skills developed in drug court to put their lives back on track in the case of relapse or recidivism after graduation or termination from drug court, , "babies born non-addicted" - pregnant women in drug court becoming drug-free and giving birth to babies that are not addicted to drugs.

Most of the interviewees had traditional conceptions of success and effectiveness as reducing recidivism and drug use but there were a number of alternative interpretations as well. All of the

interviewees viewed success in terms of improving the quality of life of the participants in being able to attain sobriety and develop valuable skills and prosocial connections that would last throughout their lives. For example, Judge Y (drug court) explained that while many view success as reducing recidivism, in his view that was not the primary explanation for success in drug court. He mainly viewed drug court as a success in that for the period of time that the participants are involved in drug court, their lives and the lives of their family and friends are “immeasurably better.”<sup>456</sup> Defense Attorney Liaison X (drug court) even described success not simply in terms of better outcomes for the individual but also regarding to the effectiveness of the team. He identifies success in cases where the team is able to see that a person’s criminal activity is in fact connected to their drug use when the district attorney’s office views him or her as more criminal than addict.<sup>457</sup> Additionally, three interviewees (depicted below) had definitions of success that somewhat contradicted the traditional definition as reducing recidivism. They viewed success in terms of those who graduated and receded into drug use and criminal activity and even those who were terminated being able to then apply what they learned in drug court to rehabilitate themselves.

#### **Measures of success even upon failure in drug court**

**Defense Attorney Liaison X (drug court):** “I measure success even when someone doesn’t successfully complete drug court but they’re able down the road to apply...realize that they have to change their lives and they do so. And we’ve had people who have not successfully completed drug court, who have come back and stood in front of the drug court clients, explaining their circumstances, encouraging them to really apply themselves and trust the process.”<sup>458</sup>

**Prosecutor Y (drug court):** “I guess I can say, people who have graduated from drug court, have offended and committed worse crimes. And likewise people who are terminated from drug court, went and did a jail or prison sentence, and then found their way to sobriety and never came back in the criminal justice system.”<sup>459</sup>

**Probation Y (drug court):** “To me, success is if they fall down again or if they struggle with addiction, they’ve learned some tools to pick themselves back up and seek help for themselves rather than it

<sup>456</sup> Judge Y (drug court), "Interview, March 3, 2017."

<sup>457</sup> Defense Attorney Liaison X (drug court), "Interview, November 11, 2016."

<sup>458</sup> Ibid.

<sup>459</sup> Prosecutor Y (drug court), "Interview, January 23, 2017."

leading to new criminal charges or even worse, you know death which with the opiate crisis that... that happens quite a bit now.”<sup>460</sup>

All three interviewees did not measure success in terms of the participants being able to complete the program and never resort to drug use or crime again. Rather they viewed success as the participants becoming more responsible and being able to apply what they have learned on their own.

A few interviewees said they viewed success in terms of reducing recidivism and this is indeed important for ensuring public safety and that the participants are fully rehabilitated. However, it was interesting to see that the team members more so understood success in terms of promoting the participants’ wellbeing and showing them their lives had value apart from drug use. The three reflections on success in terms of participants being able to apply what they learned in drug court when they are struggling shows these interviewees are not simply concerned with reducing the amount of crime in the area. They are more concerned with people learning to take responsibility and to reach out for help.

This section shows that there is bias in access to drug court in terms of succeeding in the program based on participants having the right attitude and structural advantages such as community support and employment. However, this section also reveals that the drug court team members had more nuanced conceptions of success and effectiveness beyond the traditional metrics of reducing recidivism and other end goals.

## **VI. Conclusion**

In terms of access, drug court is an extension of carceral state development although the team does have alternative and more rehabilitative conceptions of success and effectiveness. The defense attorneys suggested that the threat of punishment built into the underlying sentence can create problems of access in applying for drug court. Some people who are eligible might be deterred from applying if given the option of a lighter penalty. These people nonetheless leave the criminal justice system without

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<sup>460</sup> Probation Officer Y (drug court), "Interview, January 17, 2017."

having received the treatment and support they need and are thus at a greater risk of reoffending. In some cases, drug court can be another vehicle of carceral state development in that the threat of punishment can limit access to drug treatment and thereby contribute to the people entering and reentering the criminal justice system and to mass incarceration. The threat of punishment, in addition to being a key part of carceral state control as discussed in Chapter 3, can also be a barrier to accessing drug court. Defense Attorney X (non-drug court) said that part of the problem is that the prosecutor has too much power to decide the terms of one's participation in drug court. Therefore, drug court might also contribute to carceral state development in that it maintains the power imbalance in favor of the prosecutor discussed in Chapter 1.<sup>461</sup>

Most interviewees who indicated bias in admissions said there were certain groups, mainly immigrants and refugees, people with serious mental health issues, and people with particularly violent criminal histories that would not be able to access drug court. These exclusions were not seen as the result of intentional bias, but rather due to implications of federal immigration law, lack of mental health treatment, and public safety concerns. The underrepresentation of immigrants and minorities in the two courts seems particularly problematic in considering that these populations have been principal targets of the criminal justice system. It is also potentially problematic in light of the national survey on drug court presented in Chapter 2 that indicates African American and Hispanic or Latino populations were underrepresented in drug court admissions and success rates in 2016.<sup>462</sup> Although with respect to lower participation among minorities, it is important to also consider that Maine is the whitest state in the U.S. Nonetheless, if in fact there is racial bias, drug court in Maine can be considered an extension of carceral state development in that the same racial groups that have been historically targeted by the criminal justice system are also underrepresented in drug court. Overall, the findings suggest that even unbiased eligibility criteria can yield biased outcomes.

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<sup>461</sup> Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*, 87.

<sup>462</sup> Marlowe, "Painting the Current Picture: A National Report on Drug Courts and Other Problem-Solving Courts in the United States."

In the application and admissions processes, the defense attorneys and the drug court prosecutors sought prospective participants with the “right attitude.” The defense attorneys looked for motivation and the prosecutors looked for an expression of willingness. However, Defense Attorney X (drug court) mentioned that he would have some clients apply for drug court even when they were not as motivated and he believed they might not graduate. His outlook on success in drug court therefore was more similar to the drug court judges who suggested an initial expression of willingness was not important. Evident in these opinions is the belief that drug court can bring about substantial change in people’s attitudes. The drug court prosecutors suggested drug court was less transformative in that they viewed an initial expression of willingness as a predictor of success. However, it seemed unrealistic to expect that people would be very willing to engage in a criminal court program if their past interactions with the criminal justice system and even in normal life had been hostile and non-supportive. As Judge Y (drug court) and Prosecutor Y (drug court) suggested, for some drug court is the first time where people are treated with kindness by the court and have been able to develop social bonds they had not had in their lives before. Limiting participation to those who are “willing” underestimates the power of the uniquely humane interactions in drug court, especially since there have been successes for those who were less willing. Biased expectations of people having “the right attitude” coming into drug court can be considered another way in which drug court is a form of carceral state development. Such admissions policies deepen the stigma of the criminal status by suggesting that some people are incapable and should not be given the opportunity to change. The bias may in turn target people from disadvantaged backgrounds. What is worse is that the bias can be circular if the “wrong attitudes” stem from negative criminal justice interactions and then preclude people from changing within this more humane type of criminal court.

It was also suggested that bias based on structural factors may be relevant to participants’ success in drug court. In terms of graduating from drug court, some interviewees believed certain structural advantages could enhance participants’ chances of success. Both Defense Attorney X (non-drug court) and Prosecutor X2 (drug court) said people with existing supports and resources, such as employment and strong familial bonds had greater chances of success. This finding seems to complement the data in

Chapter 4 on surveillance that drug court can have limited benefits for those from disadvantaged and drug-involved communities. This is important to consider since the interviews suggested that most of the drug court participants are dealing with poverty and many lack important social benefits. Therefore, while drug court primarily tries to help people from disadvantaged communities escape crime and drug abuse, it was suggested that such structural disadvantages actually preclude success whereas structural advantages can enhance it. Therefore, drug court can be considered an extension of carceral state development in that it can perpetuate the criminalization of people from poor and disadvantaged communities.

Despite there being evidence of bias in all three stages of access to drug court, it is important to note the various ways in which the team members defined success and effectiveness in drug court. As a whole, the team had more nuanced and rehabilitative definitions of these terms than the traditional notion of reducing recidivism. While recidivism was the most commonly mentioned measure, the interviewees also measured success and effectiveness in terms of how drug court improves the everyday lives of the participants. Three of the interviewees even held views of success that almost seemed to contradict the traditional definition of recidivism. They recognized success as participants who may fall back into drug use and crime being able to recover themselves using the skills and support acquired during drug court. This is another example of how, internally, drug court is a more humane form of social control. The team cares about the participants beyond the general concern of reducing crime in the area.

In terms of access, drug court is therefore another vehicle of the carceral state development based on the presence of bias. First is that the threat of punishment through the underlying sentence can be a barrier to access for those who can benefit from the treatment and oversight of the program. Additionally, drug court maintains biases against groups targeted by the criminal justice system, namely immigrants and people with structural disadvantages, although this bias may be unintentional. Nonetheless the goals of the program itself can still be considered more humane and rehabilitative in that the team holds more substantial measures of success and effectiveness in addition to reducing recidivism and other end goals.

## **Conclusion**

This thesis makes visible what recidivism hides. Given drug court's unique approach to reducing crime of treating drug addiction, it is tempting to assume it is an alternative to traditional incarceration. However, Foucault indicated that the prison continues even with rehabilitative institutions through society's use of disciplinary control.<sup>463</sup> Evaluating drug court in terms of reducing recidivism and other end goals does not sufficiently capture its relationship to the carceral state to determine whether it is in fact an alternative to incarceration. In other words, it does not examine whether drug court reproduces core aspects of the carceral state of punishment, surveillance, and bias. This thesis has uncovered what recidivism hides by subjecting drug court to a level of scrutiny comparable to that which is experienced by the participants. In the way that the drug court team considers nearly all aspects of the participants' lives beyond their criminal histories, I have evaluated drug court in Maine beyond its capacity to reduce recidivism to how it affects people's lives both within the program and in relation to broader structural issues. I have shown how the limitations of focusing on recidivism in evaluating criminal justice institutions can be overcome through a framework of Foucauldian and carceral state perspectives.

In its treatment of the participants, drug court in Maine is an improvement upon carceral state conceptions of punishment and surveillance as well as success and effectiveness. The overall focus on drug treatment as opposed to monitoring and punishment is more rehabilitative. Drug court also conceptualizes punishment within a fairer system of graduated sanctions, some of which are treatment-based as opposed to formal punishments. The personalized interactions of drug court build mutual trust between the participants and the team and help restore the participants' sense of individual dignity. The unique conceptions of punishment and surveillance show that internally drug court is not simply an extension of Foucault's definition of "the carceral" as knowledge of people used for disciplinary purposes.<sup>464</sup> The team is not only concerned with ensuring compliance and preventing recidivism but

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<sup>463</sup> Foucault, *Discipline and Punish: The Birth of the Prison*, 2nd Vintage Books, 302-03.

<sup>464</sup> Ibid., 296.

truly cares about the participants and uses its deep knowledge of them to help them live better lives. The team members also held definitions of success and effectiveness that were more humane than the traditional definitions of reducing recidivism and other broader end goals. Drug court is therefore a normative improvement upon traditional carceral state conceptions of punishment and surveillance as well as success and effectiveness.

Despite these distinctive features that suggest drug court is an alternative to the carceral state, it is in fact another vehicle of carceral state development. First is that drug court relies on the threat of punishment in order to function. Foucault described how discipline through the threat of punishment is central to the effectiveness of “the carceral.”<sup>465</sup> I have shown that the threat of punishment is relevant to drug court in all three core aspects of the carceral state of punishment, surveillance, and bias. The underlying sentence is the threat of punishment and the jail sanction is the “memory of pain” meant to motivate compliance.<sup>466</sup> In terms of surveillance in County X, imposing the suspended sentence was the court’s final interaction with and a warning to the drug court graduate.<sup>467</sup> In terms of access, the threat of punishment can also be a barrier to obtaining the treatment and support needed to overcome a life of drug addiction and crime. Gottschalk shows that focusing on reentry and reintegration overlooks the punitive aspects of alternatives to incarceration.<sup>468</sup> While more humane in its direct treatment of the participants, drug court is still a part of the carceral state in relying on a punitive and disciplinary mode of control.

Drug court was seen as an effective alternative to incarceration, probation, and traditional criminal court in that it provides the participants with the support, resources, and skills needed for rehabilitation from drug addiction and crime. However, there remains a significant problem of participants being unable to manage themselves in the community upon leaving drug court. This is in large part because many return to struggling communities in which they lack the support and resources they had in drug court. Additionally, some of the interviewees said that having structural advantages

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<sup>465</sup> Ibid., 94.

<sup>466</sup> Ibid.

<sup>467</sup> Observation of drug court in County X, December 12, 2016

<sup>468</sup> Gottschalk, *Caught: The Prison State and the Lockdown of American Politics*, 94.

outside of drug court can enhance one's chances for success. Gottschalk likewise indicated that reentry programs with the goal of developing beneficial personal traits that reduce recidivism are often not attentive to structural impediments to reintegration.<sup>469</sup> She suggests that rather than lacking personal traits, successful reintegration is mainly a factor of social and economic conditions.<sup>470</sup> The indications of bias in access to drug court based on structural factors suggests it perpetuates the limitations of carceral state solutions that tend to ignore structural obstacles to reintegration.

In addition to structural factors in predicting success, a few interviewees described their expectations that people come into drug court with the “right attitude.” People who expressed a willingness to change and undergo treatment were seen by some as more likely to succeed in the program. Another criticism from Gottschalk is that reentry and reintegration do not address the general disregard of law enforcement for the potential for offender rehabilitation.<sup>471</sup> By expecting the participants to come in with an already strong willingness to participate underestimates the potential for drug court to change people. It also does not consider that the participants have had mainly adversarial experiences with the criminal justice system in the past and would be more wary of the team initially. Insofar as some members of the team viewed an expression of strong willingness to be important for their admissions decisions, this can have the effect of perpetuating the criminal label by underestimating the potential for offender rehabilitation.

Drug court being another form of carceral state development does not mean it is a wholly problematic institution. In the way that the team gets to know the participants as people and that the participants gain a renewed sense of human dignity, drug court is a significant improvement in the state’s treatment of offenders. To understand the full effect of these personalized relations, further research should interview the participants themselves to understand how their experiences in drug court compare with those in the traditional criminal justice system. In considering Amy Lerman and Vesla Weaver’s

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<sup>469</sup> Ibid., 82.

<sup>470</sup> Ibid., 84.

<sup>471</sup> Ibid., 94.

study entitled “The Political Consequences of the Carceral State,” we might extend the analysis of drug court within the field of American Political Development in order to determine whether participation makes people any more or less likely to be politically engaged and how it affects their perceptions of the government.<sup>472</sup> Speaking of involvement in government institutions, I made an interesting observation during the graduation/commencement ceremony in County X. Sitting in the back of the courtroom was a group of former drug court participants who had returned to help the current participants in the program. They too stood before the graduate and offered words of encouragement. Participation in drug court therefore built lasting trust in the team and motivated them to become involved in the court system in a positive way.<sup>473</sup>

While the team’s direct treatment of the participants can be considered an improvement upon carceral state conceptions of punishment and surveillance as well as success and effectiveness, drug court is nonetheless an extension of carceral state development in that it relies on the threat of punishment and does not sufficiently address structural obstacles to reintegration. Nonetheless, it is hopeful to see that the team members held many definitions of success and effectiveness outside of the traditional metric of recidivism. These nuanced definitions that more deeply consider how the state regards and treats offenders should guide future evaluations of the program and research into what recidivism hides.

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<sup>472</sup> Weaver and Lerman, "Political Consequences of the Carceral State."

<sup>473</sup> Observation of Drug Court in County X, December 12, 2016

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