

# Rethinking Federal Diversion: The Rise of Specialized Criminal Courts

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## INTRODUCTION

In June 2016, the federal District of Utah established the Utah Alternatives to Conviction Track (U-ACT), which it describes as “an innovative, post-guilty plea diversion program.”<sup>1</sup> A collaboration between the District Court, the U.S. Attorney’s Office, the U.S. Probation and Pretrial Services Office, and the Federal Public Defender, the program “offers participating defendants a creative blend of treatment, sanction alternatives, judicial involvement, and unique incentives to effectively address offender behavior for the purposes of promoting rehabilitation, reducing recidivism, and promoting the safety of our community.”<sup>2</sup>

Although U-ACT is described as a diversion program, and uses

<sup>1</sup> *Utah Alternatives to Conviction Track (U-ACT)*, UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, <http://www.utd.uscourts.gov/documents/uact.html> [<https://web.archive.org/web/20170223021328/http://www.utd.uscourts.gov/documents/uact.html>] (last visited Jan. 6, 2017).

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

the phrase “alternatives to conviction” in its name, the program is more complex than a traditional diversion program, which usually results in the dismissal of all charges.<sup>3</sup> Participants with minimal criminal histories whose criminal conduct “appears to be an aberration” can have the charges against them dismissed if they successfully complete this program. Participants whose crimes are believed to have been committed to “feed an underlying substance abuse habit” cannot. Instead, those participants will receive a sentence of probation if they successfully complete the program.<sup>4</sup> Thus the program can operate either as *diversion*, whereby the defendant does not receive a criminal conviction, or it can operate as an *alternative to incarceration* program, whereby the defendant avoids the negative impacts of a prison sentence, but will still receive a conviction. This distinction is important in view of the significant direct and collateral consequences of criminal convictions.<sup>5</sup>

U-ACT is the newest of an increasing number of “front-end specialized criminal courts” operating in the federal system. Specialized criminal courts (also referred to as “problem-solving courts”) are courts that offer alternative case processing to certain groups of defendants, generally based on: a) their status, such as veterans; b) the crime with which they are charged, such as domestic violence; or c) a “problem” they have that may contribute to the criminal conduct, usually drug addiction or mental illness.<sup>6</sup> These courts can include both “front-end”

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<sup>3</sup> See *infra* Part I.A.

<sup>4</sup> *Interagency Agreement, Utah Alternatives to Conviction Track (U-ACT)*, UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, <http://www.utd.uscourts.gov/documents/UACTSIGNED.InterAgency%20Agreement.pdf>

[<https://web.archive.org/web/20170104235847/http://www.utd.uscourts.gov/documents/UACTSIGNED.InterAgency%20Agreement.pdf>] (last visited Jan. 6, 2017).

<sup>5</sup> See generally Michael Pinard, *An Integrated Perspective on the Collateral Consequences of Criminal Convictions and Reentry Issues Faced by Formerly Incarcerated Individuals*, 86 B.U. L. REV. 623 (2006); Christopher Uggen & Robert Stewart, *Piling On: Collateral Consequences and Community Supervision*, 99 MINN. L. REV. 1871 (2015).

<sup>6</sup> See generally Candace McCoy, *The Politics of Problem-Solving: An Overview of the Origins and Development of Therapeutic Courts*, 40 AM. CRIM. L. REV. 1513 (2003) (discussing the origins of problem-solving courts); Allegra M. McLeod, *Decarceration Courts: Possibilities and Perils of a Shifting Criminal Law*, 100 GEO. L.J. 1587 (2012) (using the term “specialized criminal court”). Following McLeod’s lead, I choose to use the term “specialized criminal court,” because it encapsulates the variety of different types of non-traditional courts. See also Erin R. Collins, *Status Courts*, 105 GEO. L.J.

courts, operating before a defendant has been sentenced, and “back-end” or reentry courts, which operate after an individual has been released from prison or while they are on probation.<sup>7</sup>

Specialized criminal courts, primarily drug courts, originated in the state systems, and until recently were an insignificant part of the federal criminal justice system. This difference was in large part because of the perception that “drug courts are an inappropriate and unnecessary program for the federal criminal system.”<sup>8</sup> A 2006 report to Congress by the U.S. Department of Justice (DOJ) expressed support for the use (and continued federal funding) of specialized courts at the state level, but highlighted the differences between the federal defendant population and those “nonviolent, substance abusing defendants” that state drug courts were designed to help; it claimed that due to the more serious offenses committed by federal defendants, “there would be very little demand for drug-court-type treatment in the federal system.”<sup>9</sup>

A decade later, specialized criminal courts are now a fixture in the federal criminal justice system. Most of these courts are drug courts, and most operate at the back-end of the system as reentry courts.<sup>10</sup> However, front-end specialized courts are becoming more common, with much of the growth in this area occurring since 2013. That year, former Attorney General Eric Holder changed the position of DOJ and expressed support for front-end specialized courts in his *Smart on Crime*

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1481,1483–84 (2017) (describing “status” courts as a new and distinct type of problem-solving court.) See also *infra* Part II.B. While these “courts,” are probably more accurately referred to as specialized dockets or programs, this paper follows the nomenclature in the extant literature in this area as well as the language of most participants, and uses the term “courts.”

<sup>7</sup> See generally CENTER FOR COURT INNOVATION, REENTRY COURTS: LOOKING AHEAD; A CONVERSATION ABOUT STRATEGIES FOR OFFENDER REINTEGRATION (2011), [http://www.courtinnovation.org/sites/default/files/documents/Reentry\\_Courts.pdf](http://www.courtinnovation.org/sites/default/files/documents/Reentry_Courts.pdf); BARBARA S. MEIERHOEFER & PATRICIA D. BREEN, FED. JUDICIAL CTR., PROCESS-DESCRIPTIVE STUDY OF JUDGE-INVOLVED SUPERVISION PROGRAM IN THE FEDERAL SYSTEM (2013), <https://www.fjc.gov/content/process-descriptive-study-judge-involved-supervision-programs-federal-system-0>.

<sup>8</sup> U.S. DEP’T OF JUSTICE, REPORT TO CONGRESS ON THE FEASIBILITY OF FEDERAL DRUG COURTS 1 (2006), [https://www.justice.gov/archive/olp/pdf/drug\\_court\\_study.pdf](https://www.justice.gov/archive/olp/pdf/drug_court_study.pdf).

<sup>9</sup> *Id.*

<sup>10</sup> Significant recent attention has been paid to federal reentry courts. The research in this area will be discussed in Part III.A.2. See MEIERHOEFER & BREEN, *supra* note **Error! Bookmark not defined.**; DAVID RAUMA, FED. JUDICIAL CTR., EVALUATION OF FEDERAL REENTRY PROGRAM MODEL (2016); Matthew G. Rowland, *Assessing the Case for Formal Recognition and Expansion of Federal Problem-Solving Courts*, 80(3) FED. PROB. 3 (2016).

Initiative.<sup>11</sup> In particular, Holder highlighted a Central District of California court program established in 2012, the Conviction and Sentence Alternatives (CASA) program,<sup>12</sup> a model for U-ACT and other similar courts.<sup>13</sup>

Specialized criminal courts (including courts like CASA and U-ACT, as well as drug courts, veterans' courts, and courts for youthful defendants) have now become the focus of innovation at the front-end of the federal criminal justice system and appear to be the dominant form of diversion. These courts, which are variously called "alternative to incarceration" programs,<sup>14</sup> "court-involved pretrial diversion practices,"<sup>15</sup> and "diversion-based court programs"<sup>16</sup> now exist in at least 21 federal districts. Their rapid proliferation is notable, given that over the same time period, the use of pretrial detention has increased, the use of existing federal diversion has declined significantly, and the imposition of alternative to incarceration sentences by judges has continued to decrease.<sup>17</sup> Specialized criminal courts now appear to be the predominant response to continuing concerns among judges and other stakeholders about the harshness of federal sentencing laws and limited federal sentencing options. Their use has been highlighted not only by the DOJ, which has sent representatives, including former Attorney General Holder, to visit several of the programs,<sup>18</sup> but also by

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<sup>11</sup> U.S. DEP'T OF JUSTICE, SMART ON CRIME: REFORMING THE CRIMINAL JUSTICE SYSTEM FOR THE 21<sup>ST</sup> CENTURY 1 (2013) [hereinafter SMART ON CRIME], <https://www.justice.gov/sites/default/files/ag/legacy/2013/08/12/smart-on-crime.pdf>.

<sup>12</sup> *Id.* at 4.

<sup>13</sup> *See infra* Part II.D.4.

<sup>14</sup> U.S. v. Dokmeci, 13-cr-00455 (Gleeson J.) & U.S. v. Jakab, 13-CR-00565 (Gleeson, J.) (E.D.N.Y., Mar. 19, 2016) [hereinafter Dokmeci & Jakab].

<sup>15</sup> U.S. GOV'T ACCOUNTABILITY OFFICE, FEDERAL PRISON SYSTEM: JUSTICE HAS USED ALTERNATIVES TO INCARCERATION, BUT COULD BETTER MEASURE PROGRAM OUTCOMES (2016) [hereinafter GAO REPORT].

<sup>16</sup> OFFICE OF THE INSPECTOR GENERAL, U.S. DEP'T OF JUSTICE, AUDIT OF THE DEPARTMENT'S USE OF PRETRIAL DIVERSION AND DIVERSION-BASED COURT PROGRAMS AS ALTERNATIVES TO INCARCERATION 15 (2016) [hereinafter OIG AUDIT] (citing EASTERN DISTRICT OF NEW YORK, SECOND REPORT TO THE BOARD OF JUDGES, ALTERNATIVES TO INCARCERATION IN THE EASTERN DISTRICT OF NEW YORK: THE PRETRIAL OPPORTUNITY PROGRAM AND THE SPECIAL OPTIONS SERVICES PROGRAM 44 (2015) [hereinafter EDNY 2015 REPORT]).

<sup>17</sup> *See infra* Part II.

<sup>18</sup> *See The Attorney General's Smart on Crime Initiative*, U.S. DEP'T OF JUSTICE (Mar. 1, 2017), <https://www.justice.gov/ag/attorney-generals-smart-crime-initiative> [<https://www.justice.gov/archives/ag/attorney-generals-smart-crime-initiative>] (describing the Attorney General's Smart on Crime Tour).

the bipartisan Charles Colson Task Force on Federal Corrections, a group created by Congress which in 2016 recommended encouraging and incentivizing alternatives to incarceration, including “front end diversion courts.”<sup>19</sup>

Despite this support, their rapid expansion in such a short time is problematic for a variety of reasons. It is not clear what goals these courts are trying to achieve. The use and effectiveness of specialized criminal courts is complicated. Research on drug and other specialized courts in both the state and federal systems shows mixed results on measures such as recidivism reduction, cost-savings, and treatment outcomes. There are also significant procedural and other equity concerns with specialized criminal courts, including unequal access to justice. Although some of these new federal front-end specialized criminal courts show high completion rates, none has been formally evaluated, and publicly available documents about them raise questions about whether they conform to evidence-based practices.<sup>20</sup>

This paper explores the origins and development of front-end federal specialized criminal courts and situates them in the existing landscape of diversion and alternative to incarceration laws and programs.

Part I examines pretrial diversion and briefly describes the rise of specialized criminal courts over the last 20 years. It explains the impact that these courts have had on the meaning of “diversion.”

Part II examines trends in federal diversion and alternatives to incarceration. It highlights four developments: first, a reduction in the number of defendants released pretrial; second, a reduction in the use of

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<sup>19</sup> CHARLES COLSON TASK FORCE ON FEDERAL CORRECTIONS, TRANSFORMING PRISONS, RESTORING LIVES 25–27 (2016), [http://www.urban.org/research/publication/transforming-prisons-restoring-lives/view/full\\_report](http://www.urban.org/research/publication/transforming-prisons-restoring-lives/view/full_report) (referring to the CASA program).

<sup>20</sup> At the time of writing, there appears to be just one ongoing evaluation. The Federal Judicial Center is currently conducting a “process-descriptive study” of the CASA program. FED. JUDICIAL CTR., ANNUAL REPORT 2015 10 (2016). In addition, the BRIDGE program has recently begun a partnership with Clemson University and Greenville Hospital System which will begin with “an independent, third-party, retrospective evaluation of the BRIDGE Program’s basic metrics in recidivism and cost savings.” BRUCE HOWE HENDRICKS, D.S.C., WRITTEN STATEMENT TO U.S. SENTENCING COMMISSION – DRUG COURTS 12 (Mar. 2, 2017). Another more recently established program in the Northern District of California specifically calls for an evaluation in its materials. *Conviction Alternatives Program Operating Agreement*, N.D. CAL., 3, <http://www.cand.uscourts.gov/CAP>.

traditional prosecutorial diversion; third, a reduction in the number of non-incarceration sentences handed down by judges; and, fourth, apparently countering these trends, the development and rapid proliferation of front-end specialized criminal courts.

Part III assesses the use of specialized criminal courts, examining them at both the theoretical and empirical levels. It then turns to the use of such courts at the front end of the federal system and highlights some potential problems with how they are currently constituted.

Finally, Part IV discusses the future of federal diversion and alternatives to incarceration and suggests some ways to ensure that existing and future specialized criminal courts can achieve their goals. It also explores some alternative reforms that may achieve these same goals.

At the outset, it is important to note that the continued existence of these specialized courts is dependent on support and guidance from the DOJ in Washington D.C.<sup>21</sup> While they had support from the DOJ under the Obama Administration, it is unclear whether and to what extent they will receive similar support under the Trump administration or whether the Bush Administration's opposition to drug courts will be resurrected. In light of Attorney General Jeff Sessions' May 10, 2017 "Department Charging and Sentencing Policy" memorandum, there is some cause for concern. This memo directs prosecutors to "charge and pursue the most serious, readily provable offense," and, while it rescinds some previous policies on charging and sentencing, it does not specifically address the position of specialized criminal courts.<sup>22</sup>

## I. DIVERSION IN THE CRIMINAL JUSTICE SYSTEM

Traditionally, pretrial diversion was a procedure by which an individual accused of a crime could comply with certain conditions and in return have their case dismissed.<sup>23</sup> Over the last 20 years, there have been significant changes in the role of diversion in the criminal justice

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<sup>21</sup> See generally Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 YALE L.J. 1420 (2008) (discussing the relationship between Main Justice and local line prosecutors).

<sup>22</sup> OFFICE OF THE ATT'Y GEN., MEMORANDUM: DEPARTMENT CHARGING AND SENTENCING POLICY (May 10, 2017), <https://www.justice.gov/opa/press-release/file/965896/download>.

<sup>23</sup> See generally Note, *Pretrial Diversion from the Criminal Justice Process*, 83 YALE L.J. 827 (1974).

system, including the development of specialized criminal courts, the change from a pre-plea to a post-plea system, and a shift in thinking about what the outcome of diversion should be: a dismissal of all charges, and thus diversion from the criminal justice system, or something less than that, like a non-incarceration sentence, or “diversion” from prison.

### A. Traditional Pretrial Diversion

Diversion in (or from) the criminal justice system can mean a variety of different things. At an informal level, it can mean a law enforcement officer choosing to warn someone who has apparently violated the law rather than arresting or citing them. A growing type of pre-booking law enforcement diversion involves referring people with mental illness who are accused of low-level offenses to treatment rather than arresting them.<sup>24</sup>

Diversion can also occur formally after an individual has been arrested and, in many cases, after charges have been filed. This type of diversion is known as “pretrial diversion” and such programs have existed since the late 1960s.<sup>25</sup> It has been defined by the National Association of Pretrial Services Agencies (NAPSA) as “a voluntary option which provides alternative criminal case processing for a defendant charged with a crime that ideally, upon successful completion of an individualized program plan, results in a dismissal of the charge(s).”<sup>26</sup> Traditional diversion programs “typically rely on established community supervision programs (e.g. probation) and can be rapidly implemented.”<sup>27</sup> Conditions include drug testing, restitution,

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<sup>24</sup> See generally JENNIFER WOOD, ET AL., CENTER FOR BEHAVIORAL HEALTH SERVICES & CRIMINAL JUSTICE RESEARCH, POLICE INTERVENTIONS WITH PERSONS AFFECTED BY MENTAL ILLNESSES: A CRITICAL REVIEW OF GLOBAL THINKING AND PRACTICE (2011), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1781909](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1781909); Pamela K. Lattimore, et al., *A Comparison of Prebooking and Postbooking Diversion Programs for Mentally Ill Substance-Using Individuals with Justice Involvement*, 19 J. CONTEMP. CRIM. JUST. 30 (2003).

<sup>25</sup> *Pretrial Diversion from the Criminal Justice Process*, *supra* note 23, at 828–30 (describing the origins of pretrial diversion and early programs).

<sup>26</sup> NATIONAL ASSOCIATION OF PRETRIAL SERVICES AGENCIES, PERFORMANCE STANDARDS AND GOALS FOR PRETRIAL DIVERSION/INTERVENTION 1 (2008), <https://netforumpro.com/public/temp/ClientImages/NAPSA/2bf61b50-6b7d-4292-8837-e6b48a1b2a7a.pdf> [hereinafter NAPSA STANDARDS].

<sup>27</sup> Michael Mueller-Smith & Kevin T. Schnepel, *Avoiding Convictions: Regression Discontinuity Evidence on Court Deferrals for First-Time Drug Offenders* 1 (Nov. 30, 2016) (working paper),



community service, and counseling.<sup>28</sup>

The goals of pretrial diversion have remained fairly constant over time.<sup>29</sup> According to NAPSA, its purpose is “to enhance justice and public safety through addressing the root cause of the arrest provoking [sic] behaviors of the defendant, reducing the stigma which accompanies a record of conviction, restoring victims and assisting with the conservation of court and criminal justice resources.”<sup>30</sup> More recently, the American Law Institute has proposed a new Model Penal Code provision on “deferred prosecution,” whose purpose “is to facilitate offenders’ rehabilitation and reintegration into the law-abiding community and restore victims and communities affected by crime.”<sup>31</sup> Deferred prosecution is similar to pretrial diversion but is designed to operate before any charges have been filed.<sup>32</sup>

Although there are different models of pretrial diversion, in general the process works as follows:

Eligible defendants will apply for admission into pretrial diversion. They will be screened by a pretrial diversion program and a decision made by either the prosecutor or the court to accept or deny the

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[https://www.dropbox.com/s/1r5jp32hitag4hz/Avoiding\\_Convictions\\_NOV302016.pdf?dl=0](https://www.dropbox.com/s/1r5jp32hitag4hz/Avoiding_Convictions_NOV302016.pdf?dl=0). Other diversion programs, like New York City’s Adjourment in Contemplation of Dismissal, or ACD, do not require participation in programs or other conditions and are simply delayed dismissals, whereby a defendant’s case will be dismissed after a certain period, usually 6 months, if they do not get into trouble during that time. *See* N.Y. CRIM. PRO. § 170.55.

<sup>28</sup> NATIONAL ASSOCIATION OF PRETRIAL SERVICES AGENCIES, PRETRIAL DIVERSION IN THE 21<sup>ST</sup> CENTURY: A NATIONAL SURVEY OF PRETRIAL DIVERSION PROGRAMS AND PRACTICES 17 (2009) [hereinafter NAPSA SURVEY], <https://netforumpro.com/public/temp/ClientImages/NAPSA/18262ec2-a77b-410c-ad9b-c6e8f74ddd5b.pdf>.

<sup>29</sup> *See, e.g., Pretrial Diversion from the Criminal Justice Process, supra* note 23, at 827 (describing three generally agreed upon goals of pretrial diversion: “(1) unburdening court dockets and conserving judicial resources for more serious cases; (2) reducing the incidence of offender recidivism by providing an alternative to incarceration. . . ; and (3) benefiting society by the training and placement of previously unemployed persons”).

<sup>30</sup> NAPSA STANDARDS, *supra* note 26, at 2. *See also* NATIONAL DISTRICT ATTORNEYS ASSOCIATION, NATIONAL PROSECUTION STANDARDS 55 (3d ed. 2009) (Diversion Commentary) (highlighting the conservation of resources and the desire to reduce recidivism through more effective and less costly alternatives than those available in continued prosecution).

<sup>31</sup> MODEL PENAL CODE § 6.02A(2) (Tentative Draft No. 3, 2014), <https://www.ali.org/publications/show/sentencing/#drafts>.

<sup>32</sup> *Id.* at Reporter’s Note (a).

application. If accepted, participants enter into an agreement, usually with the prosecutor but in some jurisdictions with the court, to abide by certain terms, such as attendance at counseling, community service, or restitution to victims. Their criminal case is held in abeyance while they are in the diversion program. If they abide by the terms within the diversionary period the charge is dismissed. If they fail to do so, the diversion is terminated, and their case is reinstated to the court docket for prosecution.<sup>33</sup>

Traditional diversion is operated by prosecutors' offices. A 2009 report estimated that there were at least 253 such diversion programs nationwide, although there are probably far more.<sup>34</sup> These programs usually require "an informal admission of responsibility" but neither NAPSA nor the National District Attorneys Association (NDAA) require a formal guilty plea.<sup>35</sup> NAPSA expresses concern that requiring a guilty plea may lead to programs becoming just "another form of plea bargaining" rather than an alternative to prosecution.<sup>36</sup> While the NDAA prosecution standards call for "mechanisms to safeguard the prosecution of the case,"<sup>37</sup> they do not require a guilty plea, and instead mention admissions of guilt, stipulations of facts, and depositions of witnesses.<sup>38</sup>

All programs have eligibility criteria, the most of common of which relate to prior criminal history, current charge, substance use history, mental health history, victim approval, restitution amount imposed, and arresting officer approval.<sup>39</sup> Over 90% of the programs that responded to NAPSA's survey identified prior criminal history or

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<sup>33</sup> JOHN CLARK, PRETRIAL JUSTICE INSTITUTE, PRETRIAL DIVERSION AND THE LAW: A SAMPLING OF FOUR DECADES OF APPELLATE COURT RULINGS I-1 (N.D.), [http://www.pretrial.org/download/diversion/PJI%20Pretrial%20Diversion%20and%20the%20Law%20A%20Sampling%20of%20Four%20Decades%20of%20Appellate%20Court%20Rulings\(2007\).pdf](http://www.pretrial.org/download/diversion/PJI%20Pretrial%20Diversion%20and%20the%20Law%20A%20Sampling%20of%20Four%20Decades%20of%20Appellate%20Court%20Rulings(2007).pdf).

<sup>34</sup> NAPSA SURVEY, *supra* note 28. The report refers to "known programs" but does not provide a source for the number, so it is not known how accurate this number is. Further, the survey described in the report ran from 2004 to 2007. This author believes that this number is outdated and that it likely underestimates the number of programs nationwide, given that programs operate at the city, county, state, and federal district levels.

<sup>35</sup> NAPSA STANDARDS, *supra* note 26, at 12 (noting that enrollment should "not be conditioned on a formal plea of guilty").

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

<sup>37</sup> NATIONAL DISTRICT ATTORNEYS ASSOCIATION, *supra* note 30, at 4-3.6.

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

<sup>39</sup> NAPSA SURVEY, *supra* note 28, at 13.

current charge as one of their eligibility criteria.<sup>40</sup> Ultimately, however, the decision to allow a defendant to participate in a diversion program is discretionary. This discretion has been criticized by some, with one scholar arguing that diversion is essentially “a sentencing activity by nonjudicial personnel” and as such “should be subject to judicial control,” but this position is an outlier.<sup>41</sup> As with plea-bargaining, courts have rarely required judicial involvement in pretrial diversion.

Pretrial diversion programs appear to have high completion rates, with NAPSA reporting a median of 85%.<sup>42</sup> However, beyond completion rates, there is limited research on the impact of pretrial diversion, largely because so few programs collect data on recidivism or other outcome measures.<sup>43</sup>

Some studies do show positive effects, including on treatment outcomes.<sup>44</sup> One recent study, which appears to be the first quasi-experimental empirical study of diversion, relied on natural experiments caused by legal changes in Texas to examine both criminal justice and labor market outcomes. The study found that “court deferrals substantially improve outcomes for drug offenders over a five-year follow-up period.”<sup>45</sup> The study also found that the program had the highest impact on high-risk individuals: “those who have the highest rate of predicted recidivism based on their observed covariates stand the most to gain from a second chance in the form of a court deferral. These individuals are typically young, African-American men with one or more misdemeanor convictions already on their record.”<sup>46</sup>

Diversion programs have also been criticized for the excessive fees participants incur. For example, a recent *New York Times*

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

<sup>41</sup> *Pretrial Diversion from the Criminal Justice Process*, *supra* note 23, at 843.

<sup>42</sup> NAPSA SURVEY, *supra* note 28, at 19.

<sup>43</sup> While 87% of programs responding to NAPSA’s survey collected some data on program performance, just 37% collected recidivism data. *Id.* at 12, 19.

<sup>44</sup> CATHERINE CAMILLETTI, BUREAU OF JUSTICE ASSISTANCE, PRETRIAL DIVERSION PROGRAMS: RESEARCH SUMMARY 3 (2010) (“Offenders who participate in pretrial diversion programs demonstrate positive outcomes compared with eligible offenders who go through the traditional criminal justice system.”). *See also* Shaila Dewan & Andrew W. Lehren, *After a Crime, the Price of a Second Chance*, N.Y. TIMES, Dec. 12, 2016, at A1 (describing Cook County, Illinois’s diversion programs and noting that according to the person who runs the programs, “[a] year after finishing felony diversion, 97 percent of graduates have no new felony arrests, and 86 percent have no new arrests of any kind”).

<sup>45</sup> Mueller-Smith & Schnepel, *supra* note 27, at 3.

<sup>46</sup> *Id.* at 25.

investigation concluded that “in many places, only people with money could afford a second chance.”<sup>47</sup> To prevent such abuses, the Model Penal Code draft recommends against the collection of fees “in excess of actual expenditures incurred by the prosecutor’s office in the case.”<sup>48</sup>

Noting the “explosion of diversionary programs in criminal justice systems . . . the primary model [for which] are . . . problem solving courts,” NAPSA, in 2008, expanded its definition of diversion to include programs that offer a sentence reduction or a reduced charge, but do not dismiss all charges.<sup>49</sup>

Specialized criminal courts are far more common than traditional pretrial diversion programs and thus, to some extent, this new expansive definition makes sense. However, the differences are significant between dismissal of the charges and a reduction of the charges or sentence, particularly for people with no prior criminal history. Criminal convictions carry severe direct consequences, including loss of liberty or restrictions on liberty, as well as an increasing number of fees and fines. There are also indirect consequences that diminish an individual’s rights and privileges.<sup>50</sup> These include denial of public housing and assistance benefits, restrictions on employment, difficulty obtaining employment, restrictions on access to student financial aid, and civic exclusion, including ineligibility for jury service and felon disenfranchisement. The immigration consequences, particularly deportation, of a criminal conviction are also significant.<sup>51</sup> Further, these consequences can also impact an individual’s ability to successfully complete their sentence of probation or to successfully reenter society after release from prison.<sup>52</sup>

Thus, although the benefit of a reduced sentence is significant, it is qualitatively different from a dismissal of all charges, particularly for

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<sup>47</sup> Dewan & Lehren, *supra* note 44 (presenting the findings of an investigation based on a review of 225 diversion programs in 37 states and interviews with more than 150 individuals).

<sup>48</sup> MODEL PENAL CODE, *supra* note 31, § 6.02A(8).

<sup>49</sup> NAPSA Standards, *supra* note 26, at 1.

<sup>50</sup> See generally Pinard, *supra* note **Error! Bookmark not defined.**; Uggen & Tewart, *supra* note **Error! Bookmark not defined.**

<sup>51</sup> Padilla v. Kentucky, 559 U.S. 356 (2010) (highlighting the close connection between deportation and the criminal process); Mary D. Fan, *The Case for Crimmigration Reform*, 92 N.C. L. REV. 75 (2013) (exploring the overlap between criminal and immigration law).

<sup>52</sup> JEREMY TRAVIS, BUT THEY ALL COME BACK: FACING THE CHALLENGES OF PRISONER REENTRY (2005).

defendants with no prior criminal history.<sup>53</sup> Therefore, this paper argues that specialized criminal courts, which infrequently result in a complete dismissal of charges, should be considered separately.

### B. Specialized Criminal Courts

Regardless of whether most specialized criminal courts should be considered true diversion, they are now the most common form of front-end alternative criminal case processing. There are now more than 3,000 courts around the country.<sup>54</sup> In addition to the different outcomes for successful completion, there are other key differences between traditional diversion programs and specialized criminal courts. First, unlike traditional diversion programs, most specialized criminal courts admit participants only after a guilty plea is entered.<sup>55</sup> Second, while prosecutors have primary decision-making authority in pretrial diversion programs, generally judges are the primary authority in specialized criminal courts.

Specialized criminal courts are designed to address the underlying causes of, or contributing factors to, criminal behavior. The first such court, the Miami-Dade Drug Court, was established in 1989, and the drug court movement quickly took off, helped by significant federal funding.<sup>56</sup> As Candace McCoy has observed, the drug court movement “was begun by a few hardworking and charismatic judges trying to find a way to provide valuable help to drug users, and, incidentally, to mitigate the severity of mandatory sentencing in drug cases.”<sup>57</sup> Although the most common kind of specialized court remains a drug court, others, including mental health, domestic violence, and veterans courts, have since been established.<sup>58</sup> Today, there are “legal and conceptual” differences amongst the various problem-solving

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<sup>53</sup> However, it is important to note that even when charges are dismissed, not all cases are sealed or expunged, which means that a defendant can still have a criminal record. See JAMES B. JACOBS, *THE ETERNAL CRIMINAL RECORD* (2015). Dewan & Lehen, *supra* note 44, described defendants who had difficulty finding employment because of this, noting: “Employers, they said, did not differentiate between a dismissal and a conviction.”

<sup>54</sup> SUZANNE M. STRONG, ET AL., U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, *CENSUS OF PROBLEM-SOLVING COURTS, 2012* 1 (2016), <https://www.bjs.gov/content/pub/pdf/cpsc12.pdf>.

<sup>55</sup> *Id.* at 6 (reporting that 64% of courts accepted a case after a plea was entered).

<sup>56</sup> Today, most courts are funded by the state. *Id.* at 12.

<sup>57</sup> McCoy, *supra* note **Error! Bookmark not defined.**, at 1526.

<sup>58</sup> See generally, STRONG, ET AL., *supra* note 54, at 2–3.

courts.<sup>59</sup>

The Miami-Dade drug court and drug courts modeled on it operate on a therapeutic or treatment model. These courts are organized around the idea that “a specific problem with the defendant or the defendant’s circumstances contribute to criminal behavior.”<sup>60</sup> They generally aim to treat the addiction or illness, but some also address specific external problems, such as homelessness.<sup>61</sup> Many operate on a model of therapeutic jurisprudence and “conven[e] courts to therapeutically treat offenders”<sup>62</sup> and “improve . . . people’s psychological well-being.”<sup>63</sup> To do so, the judge and other members of the court use “routine proceedings, intermediate sanctions, and, in some instances, jail- or prison-based sentencing.”<sup>64</sup> Although courts differ in how they operate, they tend to be collaborative rather than adversarial and generally involve regular court hearings to review participants’ progress.<sup>65</sup>

Therapeutic specialized criminal courts still dominate but scholars argue that other models have also developed. For example, Erin Collins, who looks to the claims made by the different topical courts operating “on the level of rhetoric” rather than “practice,”<sup>66</sup> argues that there are three overlapping generations of courts. After the treatment model, the second generation of specialized criminal courts focuses on holding the defendant responsible in accountability courts. These courts are organized on the principle that “some offenses—such as domestic violence and low-level quality-of-life crimes—have slipped through the cracks of the criminal justice system, allowing offenders to escape justice and leaving certain victims insufficiently protected.”<sup>67</sup> Domestic

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<sup>59</sup> McLeod, *supra* note **Error! Bookmark not defined.**, at 1606–07.

<sup>60</sup> Collins, *supra* note **Error! Bookmark not defined.**, at 1488.

<sup>61</sup> *Id.* at 1488–89.

<sup>62</sup> McLeod, *supra* note **Error! Bookmark not defined.**, at 1595.

<sup>63</sup> *Id.* at 1612 (citing Bruce J. Winick, *The Jurisprudence of Therapeutic Jurisprudence*, in *LAW IN A THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE* 645, 648 (David B. Wexler & Bruce J. Winick eds., 1996)).

<sup>64</sup> *Id.* at 1595.

<sup>65</sup> STRONG, ET AL., *supra* note 54, at 8.

<sup>66</sup> Collins, *supra* note **Error! Bookmark not defined.**, at 1487.

<sup>67</sup> *Id.* at 1490 (internal quotations omitted). *See also* McLeod, *supra* note **Error! ookmark not defined.**, at 1595 (describing a) the “judicial monitoring model,” which focuses on “deterrence, defendant accountability, and expanded judicial surveillance as an alternative or adjunct to incarceration,” and b) the “order maintenance model,” which focuses on low level quality of life offenses and “do not necessarily embrace either therapeutic or judicially surveillant features”).

violence and community courts are the most common types of courts organized around accountability; while treatment may be part of these courts, it is not the primary concern. Finally, Collins argues that there is a third generation of specialized criminal court, what she terms the “status court.” Status courts are based on the principle that people “who belong to certain status groups have unique needs that the conventional justice system does not, but should, meet.”<sup>68</sup> These are primarily veterans courts.

Given the different models under which these courts operate, it is difficult to generalize too much about their features. However, some comparison with traditional diversion programs is necessary. First, as explained earlier, most specialized criminal courts operate after a guilty plea has been entered.<sup>69</sup> Most courts, just like traditional pretrial diversion programs, exclude certain individuals, notably people with a history of violent or sex offenses.<sup>70</sup> Courts tend to be relatively small, with the Bureau of Justice Assistance (BJA) reporting that almost three-quarters of courts admitted fewer than 50 participants in 2012.<sup>71</sup> Fewer participants in specialized criminal courts successfully complete their court programs than do participants in traditional diversion: BJA reports that just 57% of all courts reported that more than half of their exits were successful completions.<sup>72</sup> Beyond completion rates, the impact of specialized criminal courts is complicated and will be discussed in more detail in Part III below. For those who do successfully complete their program, a range of outcomes is possible, including case dismissal, a suspended sentence, and expungement.<sup>73</sup>

## II. TRENDS IN FEDERAL DIVERSION AND ALTERNATIVES TO INCARCERATION

Both traditional pretrial diversion and specialized criminal courts exist in the federal system. The shift from traditional diversion toward front-end specialized criminal courts can be attributed to trends in pretrial diversion and alternatives to incarceration. These trends show: 1) a decrease in the number of defendants released pretrial; 2) a dramatic

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<sup>68</sup> Collins, *supra* note **Error! Bookmark not defined.**, at 1492.

<sup>69</sup> STRONG, ET AL., *supra* note 54, at 6 (“64% accepted a case after a plea was entered.”).

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

<sup>71</sup> *Id.* at 7.

<sup>72</sup> *Id.* at 12.

<sup>73</sup> *Id.* at 13.

reduction in the use of traditional prosecutorial diversion; and 3) a steady drop in the number of non-incarceration sentences handed down by judges. The drop in non-incarceration sentences began after the Sentencing Guidelines were implemented and has continued even after the Guidelines were rendered advisory by the decision in *United States v. Booker*.<sup>74</sup> Perhaps as a partial response to these trends, the development and rapid proliferation of front-end specialized criminal courts has occurred. It is also important to note that, while not technically “diversion,” another option available to prosecutors is to divert defendants to state courts, i.e. to decline to prosecute them in federal court.<sup>75</sup> Indeed, the Judicial Conference of the United States favors prosecuting in state courts, cases that do not involve a sufficient federal interest.<sup>76</sup>

#### A. The Increase in Federal Pretrial Detention

Generally, the first decision to be made in a federal criminal case is whether to detain a defendant pending trial. This decision is made by a judge with input from the United States Pretrial Services Agency. This decision is important because usually only defendants who have been released pending trial are eligible for pretrial diversion and

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<sup>74</sup> 543 U.S. 220 (2005).

<sup>75</sup> See, e.g., U.S. DEP’T OF JUSTICE, U.S. ATTORNEYS’ MANUAL, 9-27-230 (2017), <https://www.justice.gov/usam/usam-9-27000-principles-federal-prosecution#9-27.230> (describing the factors to be considered when declining to prosecute a case because there is “no substantial federal interest”). When the DOJ recommended against the use of drug courts in the federal system, it noted that in the “relatively infrequent” case where a potentially drug court-eligible defendant ends up in federal court, it is an option to transfer that defendant’s case to the state system, where participation in a state drug court might be an option. U.S. DEP’T OF JUSTICE, *supra* note 8, at 18–19. Given the lack of data on prosecutorial decision-making, the extent to which this occurs is unclear. A 1980 study found that in approximately one-quarter of declined cases in the Northern District of Illinois, the possibility of state prosecution was listed as a reason for declining to prosecute. Richard Frase, *The Decision to File Federal Criminal Charges: A Quantitative Study of Prosecutorial Discretion*, 47 U. CHI. L. REV. 240, 263 (1980). This study also raised questions as to how many of these cases were actually prosecuted in state court. *Id.* at 277–78.

<sup>76</sup> JUDICIAL CONFERENCE OF THE UNITED STATES, LONG RANGE PLAN FOR THE FEDERAL COURTS 24 (1995), [http://www.uscourts.gov/sites/default/files/federalcourtslongrangeplan\\_0.pdf](http://www.uscourts.gov/sites/default/files/federalcourtslongrangeplan_0.pdf) (recommending that “criminal activity should be prosecuted in a federal court only in those instances in which state court prosecution is not appropriate or where federal interests are paramount”).



other alternative court programs.<sup>77</sup> A steady decline in the number of defendants receiving pretrial release means there is a smaller pool of eligible defendants.

Since 1982, all districts have had a pretrial services agency that make recommendations to judges as to whether the defendant should be released pending trial with conditions or be detained. Under 18 U.S.C. § 3142(b), judges, usually magistrate judges, are required to release the defendant on their own recognizance or on an unsecured surety bond, “unless the judicial officer determines that such release will not reasonable assure the appearance of the person as required or will endanger the safety of any other person or the community.” If the judge makes this decision, they are required to order the least restrictive conditions that will reasonably assure community safety and appearance at trial. Pretrial detention is only authorized if no such conditions exist.

However, despite the apparent difficulty of detaining defendants pretrial, in reality a majority of defendants are detained. This number has increased over time, even when immigration cases, which often involve non-citizens who are unlikely to be released, are excluded: In 2006, over 47% of defendants were released pretrial,<sup>78</sup> while in 2015, the most recent year for which data are available, fewer than 43% of defendants were released pretrial.<sup>79</sup> Although the increase in the detention rate is slight, the raw numbers are striking. In 2006, more than 30,000 defendants were released pending trial, while in 2015, that number had dropped to less than 24,000.<sup>80</sup> As James Oleson and colleagues note, today “pretrial detention for federal defendants is not the exception but the rule.”<sup>81</sup>

The negative consequences of pretrial detention on defendants,

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<sup>77</sup> See, e.g., Statement Submitted by Judge Leo T. Sorokin, District of Massachusetts, to United States Sentencing Commission in Advance of Testimony on March 15, 2017, p.9 [hereinafter Sorokin Statement] (“Only defendants on pretrial release may apply for participation in RISE.”).

<sup>78</sup> Table H-14A US District Courts – Pretrial Services Release and Detention, Excluding Immigration Cases, for the 12-Month Period Ending September 30, 2006.

<sup>79</sup> Table H-14A US District Courts – Pretrial Services Release and Detention, Excluding Immigration Cases, for the 12-Month Period Ending September 30, 2015. See also, James C. Oleson, et al., *Pretrial Detention Choices and Federal Sentencing*, 78(1) FED. PROB. 12, 14 (2014).

<sup>80</sup> Source Table H-14A, 2006 & 2015.

<sup>81</sup> Oleson, et al., *supra* note 79, at 14. See also James L. Johnson & Laura M. Baber, *State of the System: Federal Probation and Pretrial Services*, 79(2) FED. PROB. 34 (2015) (describing the increase in pretrial detention rates).

their families, and society more broadly, are numerous. At the outset, detaining someone costs significantly more than pretrial supervision. Studies have shown that pretrial detention limits the degree to which a defendant can contribute to their own defense by hindering their ability to produce evidence and identify witnesses and limiting the amount of time they can spend with their attorney.<sup>82</sup> Not surprisingly, defendants who are detained pretrial are more likely to plead guilty and, upon conviction, are more likely to be sentenced to incarceration. They also face longer sentences than defendants who are released pending trial,<sup>83</sup> an increased likelihood of receiving a mandatory minimum sentence,<sup>84</sup> and, for low-risk defendants, an increase in recidivism.<sup>85</sup> A recent study of the consequences of federal pretrial detention found that in addition to these legal consequences, defendants detained pretrial suffer personal consequences such as job loss.<sup>86</sup>

Two court programs, often incorrectly included in lists of diversion or alternative to incarceration courts, exist that have the potential to increase the number of defendants released from detention pending trial. Both the Eastern District of California's Better Choices Court<sup>87</sup> and the District of Oregon's Court Assisted Pretrial Supervision Program<sup>88</sup> provide specialized pretrial supervision to certain high-risk defendants who would otherwise be remanded pretrial. These court programs should be examined in more detail to ascertain whether they

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<sup>82</sup> See, e.g., Alfred Allan, et al., *An Observational Study of Bail Decision-Making*, 12(2) PSYCHIATRY, PSYCHOL. AND LAW 319 (2005); Meghan Sacks, et al., *Sentenced to Pretrial Detention: A Study of Bail Decisions and Outcomes*, 40 AM. J. OF CRIM. JUST., 661 (2014).

<sup>83</sup> Oleson, et al., *supra* note 79, at 14; Meghan Sacks & Alissa R. Ackerman, *Bail and Sentencing: Does Pretrial Detention Lead to Harsher Punishment?*, 25(1) CRIM. JUST. POL'Y REV. 59 (2014); LAURA AND JOHN ARNOLD FOUNDATION, PRETRIAL CRIMINAL JUSTICE RESEARCH (2013), [http://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF-Pretrial-CJ-Research-brief\\_FNL.pdf](http://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF-Pretrial-CJ-Research-brief_FNL.pdf); Stephanie Holmes Didwania, *The Immediate Consequences of Pretrial Release: Evidence from Federal Criminal Cases*, Mar. 7, 2017 (unpublished paper) (on file with the author).

<sup>84</sup> Holmes Didwania, *supra* note 83.

<sup>85</sup> ARNOLD FOUNDATION, *supra* note 83, at 4 (noting that controlling for other known variables, "when held 2-3 days, low-risk defendants were almost 40 percent more likely to commit new crimes before trial than equivalent defendants held not more than 24 hours." The longer the defendant was held, the greater the increase in criminal activity after release.).

<sup>86</sup> *Id.*

<sup>87</sup> EDNY 2015 REPORT, *supra* note 16, at 42-43. This report presents limited completion data showing a 50% success rate.

<sup>88</sup> *Id.* at 47.

result in more defendants being released pending trial, without a negative impact on court appearance rates or public safety.

### **B. The Declining Use of Federal Pretrial Diversion**

Pretrial diversion originated in the federal system as a program for juveniles and became more widely used among adults in the 1970s.<sup>89</sup> It is operated by the U.S. Attorney's Office in each district and, like most traditional pretrial diversion programs, diverts certain defendants from formal processing through a program of supervision and services, generally administered by Pretrial Services. It is governed by the U.S. Attorneys' Manual, and its objectives are threefold: First, "to prevent future criminal activity among certain offenders by diverting them from traditional processing into community supervision and services;" second, "to save prosecutive and judicial resources for concentration on major cases;" and third, "to provide, where appropriate, a vehicle for restitution to communities and victims of crime."<sup>90</sup>

The use of diversion is at the discretion of the U.S. Attorneys, but there are limitations. For example, national Guidelines do not recommend diversion for people with two or more prior felony convictions, those accused of offenses that should be diverted to the State for prosecution, those accused of offenses related to national security or foreign affairs, and public officials accused of offenses relating to violations of the public trust.<sup>91</sup> Until 2011, individuals with substance use problems were also prevented from participating in pretrial diversion.<sup>92</sup> While there are no direct prohibitions on diverting people charged with violent or other serious offenses, not surprisingly, in practice many U.S. Attorneys do not allow these individuals to participate in their diversion programs.<sup>93</sup> According to the DOJ's Office

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<sup>89</sup> Thomas E. Ulrich, *Pretrial Diversion in the Federal Court System*, 66 FED. PROB. 30, 30 (2002). In addition to pretrial diversion, some U.S. Attorneys also rely on deferred prosecution agreements, usually with corporations facing criminal prosecution. For a discussion of the issues raised by those agreements, see Joan McPhee, *Deferred Prosecution Agreements: Ray of Hope or Guilty Plea by Another Name?* 30 CHAMPION 12 (Oct. 2006).

<sup>90</sup> U.S. DEP'T OF JUSTICE, U.S. ATTORNEYS' MANUAL, 9-22-010 (2017), <https://www.justice.gov/usam/usam-9-22000-pretrial-diversion-program>.

<sup>91</sup> *Id.*

<sup>92</sup> OIG Audit, *supra* note 16, at 6. According to the OIG, this occurred as a result of a 2009 AG Working Group subcommittee focused on alternatives to prosecution and incarceration.

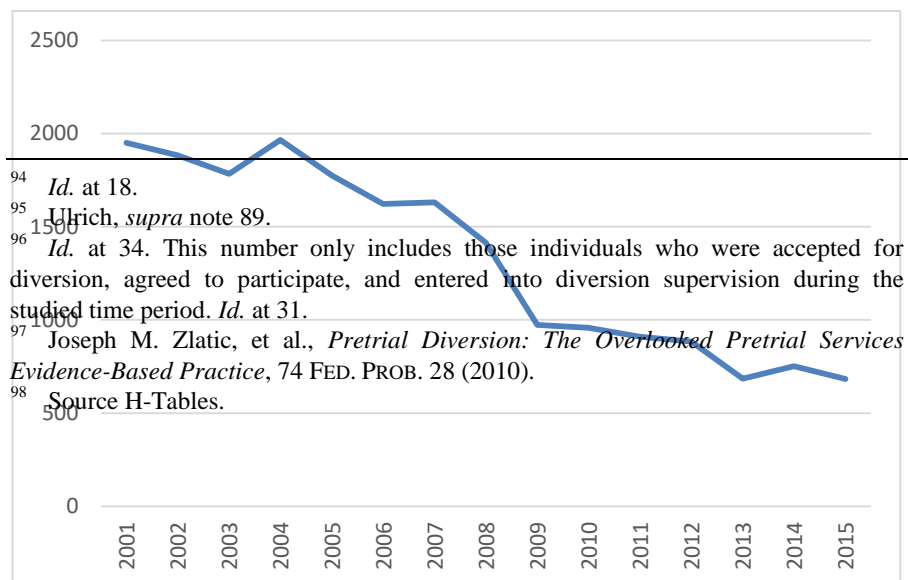
<sup>93</sup> *Id.* at 2.

of the Inspector General (OIG), some districts have narrowed their criteria further to exclude violent offenses or drug trafficking, which are often perceived to be too serious to merit diversion. The most common type of offense for which defendants are offered diversion is a low-level financial crime (fraud, theft, embezzlement). Further, as a matter of practice, diversion is generally only offered to first-time defendants.<sup>94</sup>

Once the decision has been made to offer diversion and Pretrial Services agrees, the defendant enters into a voluntary agreement with the U.S. Attorney's Office, which sets out the conditions with which the defendant must comply, including refraining from new criminal activity. At that point, Pretrial Services takes over the case and supervises the defendant to ensure compliance. If the defendant successfully completes the diversion program, all charges will be dismissed. If the defendant fails to complete the program, the prosecutor may continue with the criminal process.

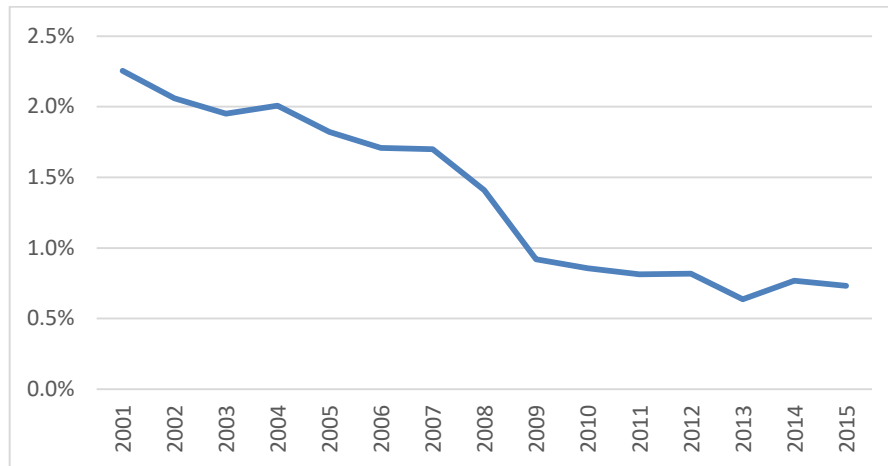
Studies of pretrial diversion are limited and demonstrate that the use of diversion has varied significantly over time and by district but that there has been little change in the types of offenses for which it is used. The most comprehensive study of the use of federal pretrial diversion dates from 2002 and includes data from 1995 through 1999.<sup>95</sup> During that time period, the annual number of individuals received for supervision averaged 2,376.<sup>96</sup> A more recent article examining pretrial diversion in the Eastern District of Missouri demonstrates a sharp reduction in the overall number of pretrial diversion cases—just 1,426 in Fiscal Year 2008.<sup>97</sup> Since then, the numbers have dropped even further. As shown in Figure 1 below, in 2015, just 683 diversion cases were activated nationwide.<sup>98</sup>

**Figure 1: Number of Pretrial Diversion Cases Activated, 2001-2015**



As a proportion of all pretrial cases, there has been a similar drop. Figure 2 shows that in 2001, pretrial diversion accounted for 2.3% of all pretrial cases. Since 2009, diversion cases have been less than 1% of all pretrial cases.

**Figure 2: Pretrial Diversion Cases as a Percentage of all Pretrial Cases Activated, 2001-2015**



Given these small numbers, as then-chair of the Criminal Law Committee of the Judicial Conference of the United States Judge Irene M. Keeley noted in 2016, “pretrial diversion is a potentially underutilized program in the federal criminal justice system.”<sup>99</sup>

Districts vary in how much they rely on pretrial diversion. In his 2002 study, Thomas Ulrich found significant differences in practices across districts, noting that “eighteen districts averaged fewer than five diversion cases per year . . . while “five districts accounted for 28% of diversion supervision cases nationally.”<sup>100</sup> These differences still exist today: in 2016, OIG found that during fiscal years 2012 to 2014, just three districts accounted for approximately one-third of all individuals who completed a federal pretrial diversion program.<sup>101</sup> These districts

<sup>99</sup> *Testimony of Hon. Irene M. Keeley: Hearing Before the Charles Colson Task Force on Federal Corrections*, Jan. 27, 2015, p.6, <https://cybercemetery.unt.edu/archive/colson/taskforce/20161026192556/http://colson.taskforce.org/wp-content/uploads/2015/10/KeeleyStatement-1-27-15.pdf>.

<sup>100</sup> Ulrich, *supra* note 89, at 34.

<sup>101</sup> OIG Audit, *supra* note 16, at 16. The total number of defendants who completed

were the Southern District of California (326 individuals), the Eastern District of Virginia (132 individuals), and the Eastern District of Missouri (102 individuals).<sup>102</sup> Further, twelve districts had no record of a single successful diversion case.

The reasons for the overall decline and the district variation are unclear. The district variation at least, might be attributable both to policies of local U.S. Attorneys' Offices and to the caseloads of their districts. First, although central DOJ policies favor the use of diversion, local district policies do not always support it. For example, OIG's Audit cites one unnamed district with a written policy stating: "pretrial diversion is discouraged, and will be permitted only in exceptional circumstances." In that district, just six individuals successfully completed a diversion program between 2012 and 2014.<sup>103</sup> It is possible that in other districts, prosecutors simply decline to prosecute low-level cases that might be appropriate for diversion.

Second, it is possible that the overall decline and the district variation can be explained partially by caseload type and seriousness, as Ulrich argues. Ulrich cites three districts with very low proportions of diversion cases and suggests that this is because of the high number of drug and immigration cases in those districts, which do not tend to be candidates for pretrial diversion.<sup>104</sup> However, the lack of up to date research in this area prevents confirmation of these or other plausible explanations. And while DOJ guidance to United States Attorneys has emphasized prosecution of serious offenses since 2013,<sup>105</sup> the decline in pretrial diversion cases began long before then.

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diversion during those three years was 1,520. However, this report is based on different data than that relied on by both Ulrich and Zlatic, et al. Those studies rely on PACTS, the case management system of the Office of Probation and Pretrial Services, while the OIG Audit uses data from the EOUSA's own case management system, LIONS. OIG expressed doubt about the "data's accuracy" based on its "review of system controls and interviews with EOUSA and USAO staff." *Id.* at 9–10. In part, this is because data are not consistently entered into LIONS. *Id.* at 21. Further, LIONS data only reflect defendants who completed diversion, and the database contains no information on defendants who were placed on diversion but did not successfully complete the program, defendants who were considered for but ultimately not offered diversion, or defendants who were offered diversion but declined to participate. *Id.* Concerns about LIONS data were also expressed by the GAO in its report. *See* GAO REPORT, *supra* note 15, at 22–23.

<sup>102</sup> OIG Audit, *supra* note 16, at 16, 37.

<sup>103</sup> *Id.* at 17.

<sup>104</sup> Ulrich, *supra* note 89, at 34.

<sup>105</sup> *See, e.g.*, Memorandum from Attorney Gen. Eric Holder to Heads of Department of Justice Components and United States Attorneys, Federal Prosecution Priorities (Aug. 12, 2013),

The types of cases receiving diversion have not varied over time. In the 1990s, the vast majority of pretrial diversion cases were white-collar offenses: fraud, larceny/theft, and embezzlement together constituted over 60% of diversion cases (but less than 20% of the non-diversion pretrial cases).<sup>106</sup> Drug cases accounted for just over 5% of diversion cases (but almost 40% of the non-diversion pretrial cases).<sup>107</sup> In 2010, Joseph Zlatic and colleagues found a similar pattern in the Eastern District of Missouri: 83% of diversion cases were categorized as white collar offenses and just over 3% were drug-related.<sup>108</sup>

Like all pretrial diversion programs, it is difficult to ascertain the effectiveness of federal diversion. According to Ulrich, reported success rates among the 1990s cohorts were high, with 88% completing the period of supervision successfully and no prosecution in the case.<sup>109</sup> There are no publicly available statistics on more recent years. In addition, no long-term recidivism data are available. Finally, there are no reliable data on the costs saved by utilizing pretrial diversion.<sup>110</sup>

In addition to USAO diversion, some defendants can be formally diverted through Section 3607 Diversion. The Federal First Offender Act provides an opportunity for people found guilty of simple possession of drugs under 21 U.S.C. § 844 and who have no prior drug convictions to avoid a conviction.<sup>111</sup> In such cases, if the defendant agrees, the court may place the defendant on probation for a term of up to one year, without entering judgment. If the defendant complies with the conditions of probation, the court may dismiss the proceedings and discharge the defendant from probation at any time before the end of the probation term.<sup>112</sup> All of this occurs without the entry of a judgment of conviction. Further, if the individual is under the age of 21 at the time of the offense, the court shall expunge the record.<sup>113</sup>

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<https://www.justice.gov/sites/default/files/ag/legacy/2014/04/11/ag-memo-substantial-federal-interest.pdf>.

<sup>106</sup> Ulrich, *supra* note 89, at 31 (reporting “the major offense charged”).

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

<sup>108</sup> Zlatic, et al., *supra* note 97.

<sup>109</sup> Ulrich, *supra* note 89, at 33.

<sup>110</sup> The OIG Audit attempted to ascertain the costs saved by pretrial diversion but found that the EOUSA did not collect any such data. OIG Audit, *supra* note 16, at 21–22. The OIG attempted to compute its own estimate of detention costs avoided, but this estimate is rudimentary at best and relies only on the costs of detention and not on the costs of diversion itself. *Id.*

<sup>111</sup> 18 U.S.C. § 3607(a) (1984).

<sup>112</sup> 18 U.S.C. § 3607(a)(2).

<sup>113</sup> 18 U.S.C. § 3607(c). The DOJ does retain a “nonpublic record” of the disposition to make sure that a person can only take advantage of this provision once, or to determine

Data are not available to determine how often this provision is used, but informal conversations with stakeholders suggest that the pool of eligible defendants is small and that its use is rare.<sup>114</sup> In 2011, Puerto Rico Delegate Pedro Pierluisi introduced a bill to expand its use to a larger group of defendants—an eligible individual would be one “who did not use violence or a weapon in the commission of his or her crime; was not a leader of a criminal organization; and has not previously been convicted of a crime of violence or any offense punishable by more than one year of prison.”<sup>115</sup> The bill died in committee.

### C. The Decline in Non-Incarceration Sentences

A third trend in this area is the consistent decline in the use of non-incarceration sentences in the federal system over the last 30 years. Prior to the enactment of the Sentencing Reform Act in 1984, (the SRA) (which established the Sentencing Commission and instructed it to increase sentences for certain white collar and drug offenses) a significant portion of federal defendants received non-incarceration sentences, generally probation but sometimes only a fine. As Brent Newton explains in his history of federal probation, “for several decades before the [G]uidelines went into effect, only around half of federal defendants received sentences of imprisonment.”<sup>116</sup> After the SRA Guidelines were implemented in 1987, the percentage of defendants receiving sentences of probation quickly declined. In 1990, just 22.5% of sentences were non-incarceration sentences. Between 1996 and 2005, when the U.S. Supreme Court rendered the Guidelines advisory, “the rate of probation sentences fell steadily from 19.2% to 12.1%.”<sup>117</sup>

There are several explanations for this decline. Newton highlights both the changing nature of the federal docket, which includes increasingly serious offenses for which probation is likely inappropriate, and the federal defendant population, which includes people with longer, more serious criminal histories and more non-

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whether a person qualifies for an expungement. 18 U.S.C. § 3607(b).

<sup>114</sup> See, e.g., Press Release, Pierluisi Introduces Legislation to Promote Sensible Sentencing Policy for Low-Level, Nonviolent Drug Offenders (July 18, 2011), <http://pierluisi.house.gov/>

[[https://web.archive.org/web/20110930122217/http://pierluisi.house.g70nglishish/news/2010/07.18.2011%20PRP%20introduces%20legislation%20to%20promote%20sensible%20sentencing%20policy%20for%20low%20level%20nonviolent%20drug%20offenders.html](https://web.archive.org/web/20110930122217/http://pierluisi.house.gov/englishish/news/2010/07.18.2011%20PRP%20introduces%20legislation%20to%20promote%20sensible%20sentencing%20policy%20for%20low%20level%20nonviolent%20drug%20offenders.html)]. (noting that the Act “has been used by judges in extremely few cases”).

<sup>115</sup> *Id.* (describing H.R. 2567, the Federal First Offender Improvement Act of 2011).

<sup>116</sup> Brent E. Newton, *The Story of Federal Probation*, 53 AM. CRIM. L. REV. 311, 315 (2016) (citing data from the Administrative Office of the U.S. Courts).

<sup>117</sup> *Id.* at 320 (citing data from the U.S. Sentencing Commission).



citizens who are generally ineligible for probation (usually due to the filing of immigration detainers). In addition, there are also some statutes, including the Anti-Drug Abuse Act of 1988,<sup>118</sup> that render certain people ineligible for probation. Finally, there is a small number of cases of individuals who receive time served followed by supervised release rather than probation.<sup>119</sup>

In 2005, the U.S. Supreme Court's decision in *Booker* held that mandatory sentencing guidelines were unconstitutional. Since then, the Guidelines have been advisory, and the number of within guideline sentences has dropped dramatically.<sup>120</sup> However, below guideline sentences have, for the most part, still been sentences of incarceration. Judges have not exercised their discretion to decline to impose supervised release,<sup>121</sup> and they have not exercised their discretion to impose non-incarceration sentences. A recent report from U.S. Sentencing Commission concludes that there has been a "continued decreasing trend in the imposition of alternative sentences."<sup>122</sup> This has occurred despite amendments to the Sentencing Guidelines in 2010 to increase the availability of alternative sentences.<sup>123</sup> In 2014, for example, just 13% of people sentenced in the federal system were given any type of alternative sentence, including probation, split sentences, or probation with conditions of confinement.<sup>124</sup> This number is slightly higher—17.5%—when people convicted of offenses carrying a mandatory minimum sentence are excluded.<sup>125</sup> Over time, between 2005 and 2014, the percentage of people who are eligible for an alternative sentence (excluding both non-citizens, and people convicted of offenses

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<sup>118</sup> Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (1988) (requiring expanded use of mandatory minimum prison sentences for certain drug offenses).

<sup>119</sup> *Id.* This is because the possible consequences of a revocation of supervised release are less serious than those of a probation revocation.

<sup>120</sup> See generally U.S. SENTENCING COMM'N, REPORT ON THE CONTINUING IMPACT OF UNITED STATES V. BOOKER ON FEDERAL SENTENCING (2012).

<sup>121</sup> See U.S. SENTENCING COMM'N, FEDERAL OFFENDERS SENTENCED TO SUPERVISED RELEASE (2010); Christine S. Scott-Hayward, *Shadow Sentencing: The Imposition of Federal Supervised Release*, 18 BERKELEY J. CRIM. L. 180 (2013).

<sup>122</sup> COURTNEY R. SEMISCH, ALTERNATIVE SENTENCING IN THE FEDERAL CRIMINAL SYSTEM 1 (2015), [http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/alternatives/20150617\\_Alternatives.pdf](http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/alternatives/20150617_Alternatives.pdf).

<sup>123</sup> In 2010, the Commission amended the Sentencing Table by expanding Zones B and C (in which split sentences are available) to include higher offense levels. U.S. SENTENCING GUIDELINES MANUAL app. C, amend. 738 (U.S. SENTENCING COMM'N, amended 2010).

<sup>124</sup> SEMISCH, *supra* note 122, at 4.

<sup>125</sup> *Id.* at 5.

carrying mandatory minimums) who receive one has dropped from 27.6% to 24.6%.

#### D. Development & Proliferation of Front-End Specialized Criminal Courts

Although judges may impose guideline probation sentences on a significant number of individuals, and non-guideline sentences on many more, they continue to decline to do so.<sup>126</sup> Instead, some have turned to new specialized court programs that afford them a greater role than traditional sentencing. These specialized courts are “programs where the USAO partners with the U.S. Courts to handle cases involving low-level, non-violent offenders through supervision, drug testing, treatment services, and immediate sanctions and incentives.”<sup>127</sup> Although these courts “remain empirically untested” and involve only a small sample of judges and probation officers, they allow for greater involvement and lend “a new sense of purpose” to federal judges.<sup>128</sup>

Much of the growth in this area has occurred in connection with the *Smart on Crime* Initiative, implemented in 2013 to “ensure federal laws are enforced more fairly and—in an era of reduced budgets—more efficiently.”<sup>129</sup> This effort built on successful reform efforts in a number of states that aimed to save money by reducing prison populations without compromising public safety.<sup>130</sup> The initiative proposed principles including prioritizing prosecution of the most serious cases, eliminating disparities in sentencing, and improving reentry.<sup>131</sup>

As part of the *Smart on Crime* initiative, the DOJ also specifically endorsed the use of specialized criminal courts: “In appropriate instances involving non-violent offenses, prosecutors ought

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<sup>126</sup> Guideline probation sentences are typically unavailable to defendants whose final Guidelines category is in Zone D. Certain other defendants are not eligible for probation by statute, based on the offense of conviction. The same restrictions apply whether a defendant is sentenced in the typical fashion or through a specialized criminal court.

<sup>127</sup> OIG Audit, *supra* note 16, at 4. Some programs, including CASA, are open to defendants who have committed more serious offenses.

<sup>128</sup> Nora V. Demleitner, *How to Change the Philosophy and Practice of Probation and Supervised Release: Data Analytics, Cost Control, Focus on Reentry, and a Clear Mission*, 28(4) FED. SENT’G REP. 231, 232 (2016).

<sup>129</sup> SMART ON CRIME, *supra* note 11.

<sup>130</sup> *Id.* See also HADAR AVIRAM, CHEAP ON CRIME: RECESSION-ERA POLITICS AND THE TRANSFORMATION OF AMERICAN PUNISHMENT (2015); CHRISTINE S. SCOTT-HAYWARD, VERA INST. OF JUSTICE, THE FISCAL CRISIS IN CORRECTIONS: RETHINKING POLICIES AND PRACTICES (2009).

<sup>131</sup> SMART ON CRIME, *supra* note 11, at 2–7.

to consider alternatives to incarceration, such as drug courts, specialty courts, or other diversion programs.”<sup>132</sup> On its *Smart on Crime* webpage, the DOJ highlights two specialized courts: the Central District of California’s CASA program and the Western District of Virginia’s veterans treatment court.<sup>133</sup> More recent reports from the General Accounting Office (GAO), the OIG, and the Eastern District of New York identify many more. There are now at least 21 districts with front-end specialized courts, and new front-end courts are established with some regularity.<sup>134</sup> U-ACT, described in this paper’s introduction, is the newest of these courts.

Discussions of specialized courts generally group disparate types together, but there are several key differences among the specialty courts. This paper groups these courts into four categories: veterans courts, criminal courts for juvenile defendants, drug courts, and alternative-to-incarceration courts. Some are modeled on specialized courts already operational in the states, while others are particular to the federal system and grounded in empirically untested principles.

### 1. Veterans Courts

Criminal courts offering intensive supervision and treatment to defendants who have served in the United States military, veterans courts are among the newer specialized courts in the states.<sup>135</sup> The first veterans court was established in 2008 in Buffalo, New York; by 2014, there were 200 such courts nationwide.<sup>136</sup> Veterans courts focus on the status and unique needs of veteran defendants, in particular their high rates of traumatic brain injury and post-traumatic stress disorder. Proponents of veterans courts argue this trauma likely plays a role in veterans’ criminal behavior.<sup>137</sup>

There are currently at least four front-end veterans courts in the federal system: the District of Arizona, the Western District of Texas, the District of Utah, and the Western District of Virginia, although there

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<sup>132</sup> *Id.* at 4. The DOJ does not define what it means by the term “diversion” in the context of *Smart on Crime*, but, based on the programs it highlights, it appears to define it broadly to include both true diversion and diversion from prison.

<sup>133</sup> *Id.* It also mentions the Federal/Tribal Pretrial Diversion program in the District of South Dakota, but this program appears to be a traditional diversion program.

<sup>134</sup> See Appendix A for a complete list of the programs identified for this paper.

<sup>135</sup> Collins, *supra* note **Error! Bookmark not defined.**, at 1492; *see generally* About us, JUSTICE FOR VETS, [justiceforvets.org/about-us/](http://justiceforvets.org/about-us/) (last visited Mar. 21, 2017) (stating the mission of the division of the NADCP is focused on veterans and members of the military).

<sup>136</sup> Collins, *supra* note **Error! Bookmark not defined.**, at 1492, 1496.

<sup>137</sup> *Id.* at 1500–01.

is limited publicly available information about these courts.<sup>138</sup> The Western District of Virginia's Veterans' Treatment Court is open to veterans charged with certain low-level offenses, typically misdemeanors; participants who successfully complete the program generally have their charges dismissed.<sup>139</sup> Similarly, successful participation in Arizona's Veterans Program (which is also open to people on supervised release) may result in a dismissal of charges.<sup>140</sup> The District of Utah's Veterans Court is open to people on pretrial release, but the possible outcomes for successful participants are unclear.<sup>141</sup>

Launched in January 2016, the Western District of Texas's VETS Court Program, which operates at Fort Hood, is a true diversion program, and is open to veterans who have committed "low-level criminal offenses" and who have a "mental health issue that relates both to the veteran's military service and to the charged criminal offense."<sup>142</sup>

## 2. *Specialized Criminal Courts for Youthful Defendants*

The federal criminal justice system has often had difficulty determining how to treat juveniles (those under age 18) and other youthful defendants.<sup>143</sup> Unlike state systems, there is no separate federal juvenile court. And under the Federal Juvenile Delinquency Act of 1938, there are strictly limited circumstances under which juveniles can be prosecuted in the federal system. However, "youthful" defendants, defendants age 25 and under, make up a significant portion of the

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<sup>138</sup> A number of other districts also operate veterans courts, but those courts are back-end, reentry style courts. *See, e.g., Veterans' Program*, UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI, <http://www.moed.uscourts.gov/veterans-program> (last visited Mar. 1, 2017).

<sup>139</sup> EDNY 2015 REPORT, *supra* note 16, at 45.

<sup>140</sup> *Arizona Veterans Program*, UNITED STATES DISTRICT COURT, DISTRICT OF ARIZONA, <http://www-test.azd.uscourts.gov/sites/default/files/Vets%20Court%20Brochure%20-%20Final.pdf> (last visited Mar. 1, 2017).

<sup>141</sup> *Veterans Court*, UNITED STATES PROBATION AND PRETRIAL SERVICES, DISTRICT OF UTAH, <http://www.utp.uscourts.gov/veterans-court> (last visited Mar. 24, 2017).

<sup>142</sup> *Fort Hood Diversion Program*, UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF TEXAS, <http://www.txwd.uscourts.gov/ProgServ/SitePages/DiversionFH.aspx> (last visited June 27, 2017). *See also* Fort Hood VETS Court, <http://www.hood.army.mil/vetscourt.aspx> (last visited June 27, 2017) (explaining that only defendants charged with federal Class A or Class B misdemeanors are eligible to participate).

<sup>143</sup> *See generally* Note, *Mending the Federal Sentencing Guidelines Approach to Consideration of Juvenile Status*, 130 HARV. L. REV. 994 (2017).

federal system: 3.2% of all people sentenced in Fiscal Year 2015 were under the age of 21, while a further 13.6% were aged 21 to 25.<sup>144</sup>

Between 1950 and 1984, federal courts retained discretion under the Federal Youth Corrections Act (FYCA) to impose alternative sentences on defendants aged 21 and younger at the time of conviction.<sup>145</sup> Aiming to promote rehabilitation among this population, sentencing options available to judges included those ordinarily imposed on adults but also added probation alone and other rehabilitative prison sentences.<sup>146</sup> The FYCA was repealed in 1984 when Congress passed the Comprehensive Crime Control Act.<sup>147</sup> Under current law, the small number of juveniles, disproportionately tribal youth who are prosecuted in the federal system, are essentially treated as adults.<sup>148</sup>

Currently, the advisory Sentencing Guidelines instruct judges not to consider a defendant's youth as a basis for departure from the applicable guideline range except in "unusual" cases.<sup>149</sup> Despite this advice, four districts operate specialized courts for younger defendants, generally ages 18 to 25, which result in sentences substantially below the federal Guidelines. One such program is the Eastern District of New York's Special Options Service Program (SOS).<sup>150</sup> Established in 2000 as an intensive supervision program with education, job training, and counseling for youthful defendants, the program is primarily designed for non-violent defendants, although exceptions can be made.<sup>151</sup> There is no set duration for the program, which aims to keep youthful defendants out of pretrial detention and to reward successful participants at sentencing.

After successful completion of the program, the defense attorney and the prosecutor negotiate how to dispose of the case—thus a guilty plea is not required to participate. Dismissal of charges or a lower, non-

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<sup>144</sup> U.S. Sentencing Comm'n, Sourcebook, Table 6 (2015), <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2015/Table06.pdf>.

<sup>145</sup> See generally Cynthia A. Kelly, *Sentencing Under the Federal Youth Corrections Act; When May a Youth Be Treated as an Adult?* 13 LOY. U. CHI. L.J. 849 (1982).

<sup>146</sup> *Id.* at 852–53.

<sup>147</sup> Note, *supra* note 143, at 1002.

<sup>148</sup> *Id.* at 1003 n.75.

<sup>149</sup> Unusual cases are those that "distinguish the case from the typical cases covered by the guidelines." U.S.S.G. § 5H1.1 (2015).

<sup>150</sup> *Special Options Services*, UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF NEW YORK, <http://www.nyep.uscourts.gov/special-options-services> (last visited Mar. 1, 2017).

<sup>151</sup> *Id.* at 32 (describing the case of J.R., who was charged with Hobbs Act Robbery). EDNY 2015 REPORT, *supra* note 16, at 11–12.

incarceration sentence are two possible outcomes.<sup>152</sup> Limited data are available on participants in this program. Between March 2013 and August 2015, SOS had thirty-three participants, all but one of whom was charged with a drug offense. Of the ten individuals who had left the program by August 2015, six completed the program successfully: two had their charges dismissed subject to a deferred prosecution agreement; three were sentenced to a non-incarceration sentence; and one received a prison sentence.<sup>153</sup>

The Southern District of New York recently began piloting a similar program, the Young Adult Opportunity Program.<sup>154</sup> It operates in a similar fashion to SOS and generally requires that candidates “have a limited criminal history.”<sup>155</sup> In some circumstances a guilty plea may be required. As with SOS, possible outcomes include both dismissal and a lesser sentence. A third district, the Southern District of Ohio, has operated its similar Special Options Addressing Rehabilitation program since 2012.<sup>156</sup> Finally, the Southern District of California has long implemented its Alternative to Prison Sentence Program, focused on youthful defendants charged with drug trafficking or immigration offenses.<sup>157</sup> This program requires a guilty plea and waiver of a presentence investigation report. Although there is little publicly available information about the program, its reported completion rate is higher than 90%.<sup>158</sup>

### 3. Drug Courts

The most common type of specialized criminal court in the federal system is the drug court. As in state systems, federal drug courts (present in at least nine districts) accept certain defendants whose offense was motivated by addiction or substance abuse. The first federal front-end drug court was established in the Central District of Illinois: The Pretrial Alternatives to Detention Initiative (PADI) was created in 2002<sup>159</sup> and is the only program that predates *Booker*. Front-end drug

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<sup>152</sup> EDNY 2015 REPORT, *supra* note 16, at 13.

<sup>153</sup> *Id.* at 19–20.

<sup>154</sup> *SDNY Young Adult Opportunity Program*, UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK, Aug. 17, 2015, <http://www.nysd.uscourts.gov/docs/SDNY%20Young%20Adult%20Opportunity%20Program.pdf>.

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

<sup>156</sup> EDNY 2015 REPORT, *supra* note 16, at 42.

<sup>157</sup> *Id.* at 39.

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

<sup>159</sup> Matt Buedel, *Drug sentencing initiative is retiring judge's legacy*, JOURNAL STAR, Feb. 24, 2014, <http://www.pjstar.com/article/20140224/NEWS/140229521> (describing

courts currently operate in the District of Connecticut,<sup>160</sup> the District of Vermont,<sup>161</sup> the District of New Hampshire,<sup>162</sup> the Eastern District of New York,<sup>163</sup> the District of South Carolina,<sup>164</sup> the Western District of Washington,<sup>165</sup> the District of New Jersey,<sup>166</sup> and the Western District of Texas.<sup>167</sup>

Although detailed information is not publicly available, these federal courts appear similar to state drug courts. At least two districts, the District of Vermont and the District of South Carolina, refer to the National Association for Drug Court Professionals' (NADCP) key principals for successful drug court programs. Most courts are restricted to non-violent defendants and some specifically exclude certain defendants; for example, the District of South Carolina's BRIDGE program is not available to defendants with a history of violent crime, sex offenses, or severe mental health conditions.<sup>168</sup>

Most, but not all, require a guilty plea as a condition of participation, and possible outcomes for successful completion range from dismissal of charges to a reduced sentence. Drug court participants do not always know at the outset what the outcome of their case will be. For example, dismissal of charges is the only possible outcome for successfully completing the Western District of Washington's Drug

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the origins of the program in 2002).

<sup>160</sup> *Support Court*, UNITED STATES DISTRICT COURT, DISTRICT OF CONNECTICUT, <http://www.ctd.uscourts.gov/support-court> (last visited Mar. 1, 2017).

<sup>161</sup> *Rutland Drug Court*, UNITED STATES DISTRICT COURT, DISTRICT OF VERMONT, <http://www.vtd.uscourts.gov/rutland-drug-court> (last visited Mar. 1, 2017).

<sup>162</sup> *LASER Docket*, UNITED STATES DISTRICT COURT, DISTRICT OF NEW HAMPSHIRE, <http://www.nhd.uscourts.gov/laser-docket> (last visited Mar. 1, 2017).

<sup>163</sup> *Pretrial Opportunity Program*, UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF NEW YORK, <http://federaldefendersny.org/pdfs/POP.Description.Jan.11.2012.pdf> (last visited Mar. 1, 2017).

<sup>164</sup> *BRIDGE Program: Mission Statement & Policies*, UNITED STATES DISTRICT COURT, DISTRICT OF SOUTH CAROLINA, <http://www.scp.uscourts.gov/Downloads/BRIDGEProgramMissionPolicies.pdf>; see also HENDRICKS, *supra* note 20.

<sup>165</sup> *Drug Reentry Alternative Model (DREAM)*, UNITED STATES PROBATION AND PRETRIAL SERVICES, WESTERN DISTRICT OF WASHINGTON, <http://www.wawp.uscourts.gov/drug-reentry-alternative-model-dream> (last visited Mar. 1, 2017).

<sup>166</sup> Dokmeci & Jakab, *supra* note 14, at 17 (including New Jersey's "Pretrial Opportunity Program" in a list of "Alternative to Incarceration in the Federal Courts" and categorizing it as a drug court).

<sup>167</sup> EDNY 2015 REPORT, *supra* note 16, at 46–47 (describing the Western District of Texas's Adelante Program).

<sup>168</sup> *BRIDGE Program*, *supra* note 164, at IV. Program Eligibility.

Reentry Alternative Model (DREAM), while participants in the District of Connecticut's Support Court may have their successful completion taken into consideration at sentencing. The District of New Hampshire's LASER (Law Abiding. Sober. Employed. Responsible.) docket appears to be the only drug court in which dismissal of charges is not a possible outcome.

#### 4. *Alternative to Incarceration Courts*

The most novel type of specialized criminal court is a "two-track" court that deals with a variety of defendants. To this author's knowledge, this type of court does not appear in any state system. As explained earlier, most specialized courts deal with: a) defendants whose criminal activity was motivated by a particular cause, such as substance use or mental illness; b) defendants who are members of particular status groups, such as veterans; or c) defendants who are convicted of a specific type of crime, for example domestic violence or prostitution. These new courts fall into none of these discrete categories and instead accept a variety of defendants, as explained below.

The oldest such court is the Central District of California's CASA program, which was established in 2012 and has been cited as a model program by the *Smart on Crime* initiative.<sup>169</sup> CASA has two tracks, the first of which is for "candidates with minimal criminal histories whose criminal conduct appears to be *an aberration* that could be appropriately be addressed by supervision" with "restorative penalties" and treatment programs.<sup>170</sup> It is not clear what is meant by "an aberration," and currently there is no information available on how the Central District determined that there was a need for this option. The second track is for "defendants with either minimal or more serious criminal histories whose criminal conduct appears to be motivated primarily by substance abuse or similar issues."<sup>171</sup> Successful completion of the program results in dismissal of charges for track one participants and a lesser, non-incarceration sentence for track two participants.<sup>172</sup> Entry into the program is conditional on a Rule

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<sup>169</sup> SMART ON CRIME, *supra* note 11, at 4.

<sup>170</sup> The Central District of California's Conviction and Sentence Alternatives (CASA) Program 1, UNITED STATES DISTRICT COURT, CENTRAL DISTRICT OF CALIFORNIA, <https://cybercemetery.unt.edu/archive/colson/taskforce/20161026191757/http://colson/taskforce.org/wp-content/uploads/2015/10/4.-Cardona-Testimony.pdf> (emphasis added) [hereinafter CASA Program].

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

<sup>172</sup> *Id.* at 1–2.



11(c)(1)(C) plea agreement, as part of which the sentence is binding on the judge.

Explicitly modeled on CASA, the Northern District of California operates a “Diversion/Deferred Sentencing Court” as part of its Conviction Alternatives Program, which includes traditional pretrial diversion.<sup>173</sup> Unlike CASA, it has just one track and is focused on “individuals whose criminal conduct appears motivated by substance abuse issues or other underlying causes that may be amenable to treatment through available programs.”<sup>174</sup> Like CASA, the plea agreement specifies the result of successful completion, which can either be dismissal of all charges, or a specific sentence; if the latter, the plea is a binding 11(c)(1)(C) plea agreement.

The Eastern District of Missouri’s SAIL (Sentencing Alternatives Improving Lives) program<sup>175</sup> and the District of Utah’s U-ACT program, described in the Introduction<sup>176</sup> are similar to CASA. In addition, a recently established program in the Northern District of Illinois appears to operate in a similar fashion.<sup>177</sup> Finally, the District of Massachusetts operates the RISE (Repair, Invest, Succeed, Emerge) program, which accepts both individuals with a history of substance abuse or addiction, which “substantially contributed to the commission of the charged offense,” and those whose “history reflects significant deficiencies in full-time productive activity, decision making, or prosocial peer networks” and who would thus benefit from a structured program.<sup>178</sup> RISE is different from CASA and the other programs in that

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<sup>173</sup> See *Conviction Alternatives Program (CAP)*, UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF CALIFORNIA, <http://www.cand.uscourts.gov/CAP> (last visited Mar. 1, 2017) [hereinafter CAP Program].

<sup>174</sup> See *Conviction Alternative Program (CAP) For the Northern District of California Operating Agreement Among Agencies*, UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF CALIFORNIA, <http://www.cand.uscourts.gov/> (last visited Mar. 1, 2017) [hereinafter CAP Operating Agreement].

<sup>175</sup> 2015 Annual Report, *Serving the Public, the Bench, and the Bar*, UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF MISSOURI 14, [http://www.moed.uscourts.gov/sites/moed/files/documents/publications/2014\\_Annual\\_Report.pdf](http://www.moed.uscourts.gov/sites/moed/files/documents/publications/2014_Annual_Report.pdf) (last visited Nov. 29, 2017) [hereinafter 2015 Annual Report].

<sup>176</sup> See *supra* notes 1–4 and accompanying text.

<sup>177</sup> UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION, Court Information Release, *Northern District of Illinois launches historic Sentencing Options that Achieve Results (SOAR) program* (Oct. 14, 2016) (Little information is publicly available about this program, but it does not appear to be restricted to defendants with substance use problems.).

<sup>178</sup> The RISE Program, UNITED STATES PROBATION AND PRETRIAL SERVICES OFFICE, DISTRICT OF MASSACHUSETTS, <http://www.map.uscourts.gov/rise> (last visited Mar. 1, 2017).

the exact benefit for completing the program is not specified at the outset; instead, after completion of the program the judge “will consider all aspects of the defendant’s participation in the RISE Program at sentencing. In other words, successful completion may be considered favorably at sentencing.”<sup>179</sup>

While these courts are similar in their structures, there are some important differences. For example, the courts differ in how they handle the presentence investigation and report (PSR).<sup>180</sup> The CASA documents make no reference to the completion of a PSR either prior to the entry of the binding plea agreement or after program completion. While the Northern District of California’s Diversion/Deferred Sentencing Court does not provide for a PSR to be conducted prior to the plea negotiations, it does note that for successful participants whose charges are not dismissed, a PSR will be completed prior to sentencing.<sup>181</sup> The purpose of this PSR is not specified, but, given that the sentence is already agreed to and binding on the sentencing judge, it is likely that the findings of the PSR relate to conditions of probation supervision or supervised release.

Other programs start the PSR process earlier. While RISE requires a guilty plea, it is not a binding 11(c)(1)(C) plea. The PSR process is started as usual, but the draft PSR is not initially submitted to the parties for review until the defendant completes the RISE program. At that point, the PSR is disclosed and the sentencing process continues in the usual way.<sup>182</sup> Similarly, although U-ACT program participants are required to sign a binding 11(c)(1)(C) plea agreement, the PSR is conducted prior to the completion of the agreement.

These differences are important, particularly because programs that do not conduct a PSR and/or sentencing guideline calculations prior to sentencing may not meaningfully consider the United States Sentencing Guidelines, as required by the three-step process laid out in *Booker* and its progeny.

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

<sup>180</sup> The PSR is generally conducted by a probation officer prior to sentencing. This report includes information about the sentencing guideline calculation as well as about the defendant’s “history and characteristics.” FED. R. CRIM. P. 32(d).

<sup>181</sup> CAP Operating Agreement, *supra* note 174, at Attachment B, 9.

<sup>182</sup> The RISE Program, *supra* note 178.

### III. ASSESSING THE USE OF FRONT-END SPECIALIZED CRIMINAL COURTS

#### A. General Problems with Specialized Criminal Courts

##### 1. Theoretical Concern

Some state specialized criminal courts have demonstrated success in reducing recidivism and on other outcome measures. However, since their inception, they have been criticized by both scholars and criminal justice stakeholders. For example, Allegra McLeod recently argued that in their current forms, “specialized criminal courts threaten to produce a range of unintended and undesirable outcomes: unnecessarily expanding criminal surveillance, diminishing procedural protections, and potentially even increasing incarceration.”<sup>183</sup> Others have criticized the way these courts provide treatment in a legally coercive manner and the conflicts inherent in a system that tries to both treat and punish. Richard Boldt notes:

On the one hand, these actors are understood as suffering from a chronic, relapsing disorder that requires the intervention of therapeutic measures in order to interrupt a pathological pattern over which they are unable to exercise meaningful control. On the other hand, these same individuals are constructed as responsible moral agents who are capable of autonomous decision making and who are to be held responsible for their choices.<sup>184</sup>

Boldt and others have expressed concern about the increased authority and discretion given to judges in these type of courts, as well as the different role that they play.<sup>185</sup> One judge has described judges in treatment courts as “a bizarre amalgam of untrained psychiatrists, parental figures, storytellers, and confessors.”<sup>186</sup>

Of course these concerns apply to all specialized criminal courts, not just those in the federal system, and two concerns are particularly

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<sup>183</sup> McLeod, *supra* note **Error! Bookmark not defined.**, at 1591.

<sup>184</sup> Richard C. Boldt, *A Circumspect Look at Problem-Solving Courts*, in *PROBLEM-SOLVING COURTS: JUSTICE FOR THE TWENTY-FIRST CENTURY?* 13, 14 (PAUL HIGGINS & MITCHELL B. MACKINEM EDS., 2009).

<sup>185</sup> *Id.* (highlighting the appearance and risk of bias).

<sup>186</sup> Morris B. Hoffman, *Therapeutic Jurisprudence, Neo-Rehabilitationism, and Judicial Collectivism: The Least Dangerous Branch Becomes Most Dangerous*, 29 *FORDHAM URB. L.J.* 2063, 2066 (2002).

salient: unequal access to justice and the merging of treatment and punishment, which can lead to diminished procedural protections.

*a. Unequal Access to Justice*

Despite the rhetoric of retributivism and individual responsibility that still dominates in American sentencing, specialized criminal courts show an understanding that the causes of crime are complex, and have the potential move “toward an acknowledgment that external forces shape criminal behavior.”<sup>187</sup> However, it is arguable that these courts offer “unequal access to a different, and purportedly better, kind of justice.”<sup>188</sup> For example, veterans courts recognize that many veterans experienced trauma, which in some cases led to PTSD, which in turn might explain some criminal activity. And while it may be the case that veterans may be more morally deserving or less morally culpable than other defendants,<sup>189</sup> it remains the case that other individuals whose criminal behavior can at least in part be attributed to PTSD, for example, youth living in inner cities are not deemed deserving of this special treatment.<sup>190</sup>

Collins notes that this “moral sorting” is usually justified on two bases: first, selection for programs is supposed to be based on evidence-based practices—“data—not value judgments;” and second, the courts are supposed to offer great benefits to the system, in terms of public safety and cost-savings that result from recidivism reduction.<sup>191</sup> However, at least in the federal system, it is not clear whether these justifications are founded. Because none of the front-end specialized criminal courts has been evaluated, it is not clear exactly how admission decisions are made. Eligibility criteria for these courts tend to be very general and validated risk-needs assessment tools do not appear to be part of the admission decisions. With respect to the second basis, that the benefits to public safety and cost savings justify some of the “distributive equity” issues, it is too early to tell whether these courts reduce recidivism and save money.

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<sup>187</sup> Collins, *supra* note **Error! Bookmark not defined.**, at 1513.

<sup>188</sup> *Id.* at 1498.

<sup>189</sup> See, e.g., Craig Lodson & Michelle Keogh, *Uncommon Criminals: Why Veterans Need Their Own Court*, 14 ARIZ. ATT’Y 24 (Nov. 2010). See also Youngjae Lee, *Military Veterans, Culpability, and Blame*, 7 CRIM. L. & PHIL. 285 (2013) (examining the grounds to believe that defendants who are veterans are less culpable than non-veteran defendants and concluding that “a military veteran who commits a crime should not be blamed to the full extent of his blameworthiness . . . because the State’s hand in producing his criminality undermines its standing to blame him.”).

<sup>190</sup> Collins, *supra* note **Error! Bookmark not defined.**, at 1501–02.

<sup>191</sup> *Id.* at 1499.

*b. The Merging of Treatment and Punishment*

Most specialized criminal courts provide a mechanism through which treatment, usually drug treatment, can be given to participants. However, this treatment is given in a legally coercive manner and it is not clear whether it benefits participants. While some studies demonstrate that those who are coerced into treatment stay longer, others find that coercion may result in diminished chances of success in treatment.<sup>192</sup> Further, not all defendants participate in specialized courts with the goal of getting clean. A 2004 study found that most participants in a Minnesota drug court had the major goal of avoiding prison or getting their charges dismissed. Just over 10% of study participants listed securing treatment as their major incentive for participating.<sup>193</sup>

Although motivated to provide treatment, specialized criminal courts often diminish the procedural rights of defendants. From the defense perspective, there is a fear of “the potential for coercion, loss of liberty, and diminution of due process rights of defendants.”<sup>194</sup> Most courts require participants to sign forms, waiving certain rights and agreeing to comply with conditions. Some of these are quite long. For example, the BRIDGE program’s participant agreement runs nine pages long and includes a lengthy list of conditions, including a statement that says, “I understand that information provided during BRIDGE program hearings may not be protected by any privilege, and could be used against me in future court proceedings,” and a three-page Drug Testing Participant Contract.<sup>195</sup> And while it is certainly the case that no statements made during a court proceeding are privileged, unlike in typical proceedings, participants in specialized criminal courts are encouraged to be open and honest during proceedings that are generally non-adversarial.

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<sup>192</sup> *Id.* at 1494–95 (citing studies). See also DRUG POLICY ALLIANCE, DRUG COURTS ARE NOT THE ANSWER: TOWARD A HEALTH-CENTERED APPROACH TO DRUG USE (2011),

[http://www.drugpolicy.org/sites/default/files/Drug%20Courts%20Are%20Not%20the%20Answer\\_Final2.pdf](http://www.drugpolicy.org/sites/default/files/Drug%20Courts%20Are%20Not%20the%20Answer_Final2.pdf) (arguing that “the issue is not whether drug courts do some good—they undoubtedly do—but whether the proliferation of drug courts is good social policy as compared with other available approaches to addressing drug use.”).

<sup>193</sup> MARCY R. PODKOPACZ, ET AL., DRUG COURT DEFENDANT EXPERIENCE AND FAIRNESS STUDY (2004),

[http://www.mncourts.gov/mncourtsgov/media/assets/documents/4/reports/Drug\\_Court\\_Fairness\\_Report\(2004\).pdf](http://www.mncourts.gov/mncourtsgov/media/assets/documents/4/reports/Drug_Court_Fairness_Report(2004).pdf).

<sup>194</sup> Tamar M. Meekins, *Risky Business: Criminal Specialty Courts and the Ethical Obligations of the Zealous Criminal Defender*, 12 BERKELEY J. CRIM. L. 75, 85 (2007).

<sup>195</sup> BRIDGE Program, *supra* note 164, Appendix 1.

Participation in specialized criminal courts is voluntary and participants usually receive significant benefits if they successfully complete the program—both criminal justice and treatment benefits;<sup>196</sup> perhaps this voluntary participation mitigates any concerns about diminished procedural protections. However, while all program participants have access to counsel, either their own counsel (whether privately retained or a public defender) or a defense attorney assigned to the program, it is not clear whether those attorneys fully explain the risks of participating. For example, a recent study of a drug court in Missouri found that although all study participants found that they were “adequately cautioned” of the rigorous nature and requirements of the drug court program, most did not feel that they were “sufficiently advised by their attorney.”<sup>197</sup>

In addition, while the benefits to participants who *complete* a specialized criminal court program are great, not all participants complete the program and those who fail may end up being punished more severely than if they had simply gone through the traditional criminal justice process. For example, in the federal system, virtually all participants in specialized criminal courts are on pretrial supervision but have additional conditions with which to comply. A violation of one of those additional conditions could lead to termination from the program and a revocation of pretrial release. Further, if one of the violations is for drug use, that could also lead to a defendant losing the benefit of the “acceptance of responsibility” adjustment under the Sentencing Guidelines, which could result in a lower sentence.<sup>198</sup>

## 2. Effectiveness of Specialized Criminal Courts

Proponents of drug courts cite their effectiveness as well-established. The NADCP asserts that drug courts reduce crime, save money, and ensure compliance.<sup>199</sup> To an extent, this is true. As the

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<sup>196</sup> *But see* E. Lea Johnston and Conor P. Flynn, *Mental Health Courts and Sentencing Disparities*, 62 VILL. L. REV. 685 (2017) (copy on file with the author) (analyzing sentencing practices in one jurisdiction and finding that “anticipated treatment court sentences—for all grades of offense—typically exceed county criminal court sentences by more than a year”).

<sup>197</sup> Andrew Fulkerson, et al., *In or Out: The Drug Court Dilemma*, 17(2) CRIMINOLOGY, CRIM. JUST. L. & SOC’Y 34, 40 (2016).

<sup>198</sup> U.S.S.G. § 3E1.1. *See, e.g.*, *United States v. Mackey*, 395 Fed. App’x 625, 626 (11th Cir. 2010) (upholding a district court’s denial of the acceptance of responsibility reduction “because she had failed to abstain from illicit drug use while on pretrial release”).

<sup>199</sup> Drug Courts Work, NATIONAL ASSOCIATION OF DRUG COURT PROFESSIONALS, <http://www.nadcp.org/learn/do-drug-courts-work> (last visited Mar. 1, 2017). *See also*

Center for Court Innovation noted in its 2013 report on drug courts in New York state, “well-implemented adult drug courts reduce recidivism, with average differences in drug court and comparison group re-offending rates falling between eight and 12 percentage points.”<sup>200</sup> The most recent rigorous meta-analysis of adult drug court evaluations, conducted in 2012 by Mitchell and colleagues, found “a reduction in general recidivism from 50% to approximately 38%.”<sup>201</sup> However, the evidence on cost-effectiveness is more mixed. While NADCP highlights the 221% return on investment provided by drug courts, (\$2.21 in direct benefits for every \$1 investment)<sup>202</sup> the Drug Policy Alliance points out that drug treatment in the community produced \$21 in benefits for every \$1 invested.<sup>203</sup>

The overall data on effectiveness present a more complex picture. First, although drug courts are among the most evaluated court programs, BJA reported recently that fewer than half of all courts tracked participants after program completion.<sup>204</sup> In addition, drug court evaluations that do measure recidivism often rely on short recidivism tracking periods.<sup>205</sup> Second and relatedly, not all evaluations follow rigorous social science methods. For example, in their 2012 meta-analysis of adult drug courts, Mitchell and colleagues concluded that only 25 of 92 evaluations were “relatively rigorous.”<sup>206</sup> Their analysis identified just three evaluations that relied on randomized, controlled designs, and those evaluations failed to show that “drug courts are

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DOUGLAS B. MARLOWE, RESEARCH UPDATE ON ADULT DRUG COURTS (2010), [http://www.nadcp.org/sites/default/files/nadcp/Research%20Update%20on%20Adult%20Drug%20Courts%20-%20NADCP\\_1.pdf](http://www.nadcp.org/sites/default/files/nadcp/Research%20Update%20on%20Adult%20Drug%20Courts%20-%20NADCP_1.pdf).

<sup>200</sup> AMANDA B. CISSNER, ET AL., A STATEWIDE EVALUATION OF NEW YORK’S ADULT DRUG COURTS: IDENTIFYING WHICH POLICIES WORK BEST (2013), [http://www.courtinnovation.org/sites/default/files/documents/NYS\\_Adult\\_DC\\_Evaluation\\_Effective\\_Policies.pdf](http://www.courtinnovation.org/sites/default/files/documents/NYS_Adult_DC_Evaluation_Effective_Policies.pdf) (citations omitted) (using re-arrest as a measure of recidivism).

<sup>201</sup> Ojmarrh Mitchell, et al., *Assessing the effectiveness of drug courts on recidivism: A meta analytic review of traditional and non-traditional drug courts*, 20 J. CRIM. JUST. 60, 69 (2012) (recidivism not defined).

<sup>202</sup> MARLOWE, *supra* note 199, at 3.

<sup>203</sup> DRUG POLICY ALLIANCE, *supra* note 192, at 15.

<sup>204</sup> STRONG, ET AL., *supra* note 54, at 13.

<sup>205</sup> Mitchell, et al., *supra* note 201, at 63.

<sup>206</sup> *Id.* See also DRUG POLICY ALLIANCE, *supra* note 192, at 10 (discussing the poor design of many drug court evaluations and criticizing the practice of some drug courts of “cherry-picking” participants that are most likely to succeed); CELINDA FRANCO, BACKGROUND, EFFECTIVENESS, AND POLICY ISSUES FOR CONGRESS 12 (2010) (describing criticisms of drug court evaluations).

typically effective in practice.”<sup>207</sup> Third, “few evaluations assessed the effect of drug court participation on measures of actual drug use,”<sup>208</sup> and most drug courts rely on an “abstinence-only ideology” despite evidence supporting the use of other methods, such as methadone maintenance.<sup>209</sup>

There is also conflict among scholars about what elements of drug courts are correlated with effectiveness. Some researchers have concluded that drug courts work just as well for people charged with violent offenses as for non-violent defendants, while others find a larger reduction in recidivism for courts that only serve non-violent defendants.<sup>210</sup> There is some evidence that pre-plea drug courts are more effective than post-plea drug courts in reducing recidivism.<sup>211</sup>

Finally, most evaluations of specialized criminal courts are of drug courts. There are far fewer evaluations of other types of specialized criminal courts. For example, although veterans courts are growing around the country and there is a growing body of descriptive information about the courts,<sup>212</sup> it does not appear that any impact or outcome evaluations have been completed.<sup>213</sup>

In addition, all the research described above applies to state courts. Neither the court programs for youthful defendants nor the alternative to incarceration courts that exist in the federal system have equivalents in the state systems. However, one type of federal specialized criminal court has been subject to numerous evaluations—reentry courts—and the results are illustrative. Federal reentry courts have been in existence since 2005 and are typically drug courts. Despite

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<sup>207</sup> DRUG POLICY ALLIANCE, *supra* note 192, at 10.

<sup>208</sup> Mitchell, et al., *supra* note 201, at 64.

<sup>209</sup> DRUG POLICY ALLIANCE, *supra* note 192, at 12.

<sup>210</sup> Compare SHELLI B. ROSSMAN, ET AL., URBAN INSTITUTE, THE MULTI-SITE ADULT DRUG COURT EVALUATION: THE IMPACT OF DRUG COURTS 80 (2011), <https://www.ncjrs.gov/pdffiles1/nij/grants/237112.pdf> with Mitchell, et al., with *supra* note 201.

<sup>211</sup> Deborah Koetzle Shaffer, *Looking Inside the Black Box of Drug Courts: A Meta-Analytic Review*, 28 JUST. Q. 493, 513 (2011); see also Mitchell, et al., *supra* note 201, at 68, Table 6.

<sup>212</sup> See, e.g., AMERICAN UNIVERSITY, SCHOOL OF PUBLIC AFFAIRS, JUSTICE PROGRAMS OFFICE, VETERANS TREATMENT COURTS: 2015 SURVEY RESULTS (2016).

<sup>213</sup> A multi-site evaluation is currently underway. See Jessica Blue-Howells, et al., Veterans Administration: Veterans Court Inventory and Veterans Justice Programs Evaluation (2015), <http://justiceforvets.org/sites/default/files/vcc-2015/Handouts/VCC%20CG3/VCC-CG-3.pdf>. See also FRED L. CHEESMAN, II, COMMONWEALTH OF PENNSYLVANIA VETERANS TREATMENT COURT PERFORMANCE MEASURES 115 (2015) (describing performance measures designed for Veterans Treatment Courts).



initial “positive anecdotal assessments,” subsequent impact evaluations have demonstrated mixed results.<sup>214</sup>

In 2011, Stephen Vance reviewed the first phase of evaluations of federal reentry courts and concluded that they “provide mixed results on whether the programs effectively reduce recidivism.”<sup>215</sup> In one study, the comparison group performed better than the treatment group, but in two other studies, the reverse was true. However, Vance cautions that due to the small number of participants in the reentry court programs, “these findings should be interpreted cautiously.”<sup>216</sup> To address “the lack of clarity” from these evaluations, at the behest of the Criminal Law Committee of the Judicial Conference of the United States, the Federal Judicial Center designed a multi-site, random-assignment, experimental impact evaluation.<sup>217</sup> By combining the results of the multiple sites, the evaluation would be able to address the issue of small program size.

The Office of Probation and Pretrial Services at the Administrative Office of the U.S. Courts developed a reentry court program model based on best practices for both state drug courts and post-conviction supervision and implemented the model in five districts.<sup>218</sup> In 2016, the Federal Judicial Center released the results of its evaluation, and concluded that despite the higher costs of implementation, participants in the reentry court had similar or worse outcomes than those under traditional supervision and concluded that “the PPSO reentry program model cannot be said to be a cost-effective method for reducing revocation and recidivism.”<sup>219</sup> It also concluded “[t]hat the control group and those who refused to participate fared about as well as the reentry groups on our measures of revocation and

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<sup>214</sup> Rowland, *supra* note 10, at 7.

<sup>215</sup> See, e.g., Stephen E. Vance, *Federal Reentry Court Programs: A Summary of Recent Evaluations*, 75(2) FED. PROB. 108 (2011).

<sup>216</sup> *Id.*; see also Patricia A. Sullivan, et al., *H.O.P.E. Court, Rhode Island’s Federal Reentry Court: The First Year*, 21 ROGER WILLIAMS U. L. REV. 521 (2016); MEIERHOEFER & BREEN, *supra* note 7 (presenting the results of a retrospective study of 20 programs); Barbara Meierhoefer, *Judge-Involved Supervision Programs in the Federal Courts: Summary of Findings from the Survey of Chief United States Probation Officers*, 75(2) FED. PROB. 60, 61 (2011) (describing 45 judge-involved programs).

<sup>217</sup> Rowland, *supra* note 10, at 7.

<sup>218</sup> RAUMA, *supra* note 10, at 4.

<sup>219</sup> *Id.* at 2–3. There were some issues with the evaluation, including the fact that the model was never fully implemented. However, the evaluator expressed doubt that a full implementation would have produced better outcomes, in part because full implementation would have led to greater supervision with potentially more rule violations and revocations. *Id.* at 49–50.

recidivism could indicate the efforts of federal probation are a baseline upon which it is difficult to improve.”<sup>220</sup> Matt Rowland, the Chief of the Probation and Pretrial Services Office, concurs with this assessment, highlighting the “evidence-based approach taken by the federal probation and pretrial services system.”<sup>221</sup>

### B. The Pros and Cons of Front-End Federal Specialized Criminal Courts

Candace McCoy argues that “it is ill-advised to take on expensive and politically portentous projects unless supporters are sure that the programs they are building will indeed be devoted to the purposes they prefer.”<sup>222</sup> Thus the question to be asked is “precisely what problem is meant to be solved in a [front-end specialized criminal court], and with what methods?”<sup>223</sup> Addressing this question would be the first step in a formal evaluation of a specialized criminal court. However, because none of the courts described in this paper have been evaluated, there is no clear answer. Public statements from judges and others involved in these criminal courts do provide some information and for some, the main goal does appear to be a desire to reduce the number of people sentenced to terms of imprisonment. In a 2016 opinion, former United States District Judge John Gleeson, a proponent of front-end specialized criminal courts in the federal system, noted: “we sentence too many people to prison in the first place” and claimed that “alternatives to incarceration are . . . a critical part of the answer to our over-incarceration crisis.”<sup>224</sup> Similarly, in describing the impetus for the BRIDGE program in the District of South Carolina, District Judge Bruce Howe Hendricks explained: “Judges felt that they had inadequate options for sentencing certain non-violent drug offenders, particularly where they believed a non-incarceratory sentence would best satisfy the purposes of punishment itemized in 18 U.S.C. § 3553(a).”<sup>225</sup>

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<sup>220</sup> *Id.* at 50.

<sup>221</sup> Rowland, *supra* note 10, at 10.

<sup>222</sup> McCoy, *supra* note **Error! Bookmark not defined.**, at 1513.

<sup>223</sup> *Id.* at 1515.

<sup>224</sup> Dokmeci & Jakab, *supra* note 14, at 5–6. *See also Pretrial Alternatives to Detention Initiative . . . Save Money, Save Lives*, UNITED STATES DISTRICT COURT, CENTRAL DISTRICT OF ILLINOIS (N.D.) (copy on file with the author) (listing as its first goal “reducing detention rates through the use of a multi-dimensional approach to pretrial supervision including substance abuse treatment”).

<sup>225</sup> HENDRICKS, *supra* note 164, at 1–2. *See also Sorokin Statement*, *supra* note 77, at 7 (RISE was created “to provide an alternative sentencing tool and promote public safety through parsimonious use of scarce public funds.”).

Indeed, there is growing agreement among many judges and other stakeholders that the current sentencing system is too harsh and that judges lack discretion. In his widely discussed speech to the American Bar Association's House of Delegates in 2013, Attorney General Eric Holder argued that "too many Americans go to too many prisons for far too long."<sup>226</sup> More recently, former United States District Judge Shira Schindlin wrote an essay for *The Washington Post* in which she criticized excessive mandatory minimum sentences and bemoaned the fact that she "could not exercise [her] judgment."<sup>227</sup> In a sense, these commentators suggest that the Just Deserts rationale for punishment, which seeks to punish people in proportion to their culpability, requires shorter sentences for some portion of the federal defendant population.<sup>228</sup>

Program documents also highlight other motivations, including rehabilitation and recidivism reduction. For example, the Northern District of California's Conviction Alternatives Program notes the potential of its program "to improve participants' compliance with conditions of supervision and decrease recidivism."<sup>229</sup> U-ACT is aimed at "promoting rehabilitation, reducing recidivism, and promoting the safety of our community."<sup>230</sup> SAIL in the District of Missouri "is theorized to prove more effective than incarceration in decreasing the likelihood of recidivism for participants."<sup>231</sup> The District of South Carolina's BRIDGE program's purpose is "to promote community safety, reduce recidivism, and assist with offender rehabilitation by implementing a blend of treatment and sanction alternatives."<sup>232</sup> The District of Arizona's veterans program is designed "to honor past commitment and service, address the veteran's unique circumstances

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<sup>226</sup> Attorney General Eric Holder Delivers Remarks at the Annual Meeting of the American Bar Association's House of Delegates (Aug. 12, 2013), <https://www.justice.gov/opa/speech/attorney-general-eric-holder-delivers-remarks-annual-meeting-american-bar-associations>.

<sup>227</sup> Shira Schindlin, *I sentenced criminals to hundreds more years than I wanted to. I had no choice*, THE WASHINGTON POST (Feb. 17, 2017), [https://www.washingtonpost.com/posteverything/wp/2017/02/17/i-sentenced-criminals-to-hundreds-more-years-than-i-wanted-to-i-had-no-choice/?utm\\_term=.9c3af456ab2d](https://www.washingtonpost.com/posteverything/wp/2017/02/17/i-sentenced-criminals-to-hundreds-more-years-than-i-wanted-to-i-had-no-choice/?utm_term=.9c3af456ab2d).

<sup>228</sup> See Brent E. Newton & Dawinder S. Sidhu, *The History of the Original United States Sentencing Commission 1985-1987*, HOFSTRA L. REV. 55-56 (2017) (describing the various philosophies of punishment considered by the original Sentencing Commission).

<sup>229</sup> CAP Operating Agreement, *supra* note 174, Attachment B, 1.

<sup>230</sup> *Utah Alternatives to Conviction Track*, *supra* note **Error! Bookmark not defined.**

<sup>231</sup> 2015 Annual Report, *supra* note 175, at 18.

<sup>232</sup> *BRIDGE Program*, *supra* note 164, at 1.

and issues, and reduce the likelihood of reoffending.”<sup>233</sup> Treatment is the focus of the District of Connecticut’s Support Court, which aims to “provide support and structure to participants who struggle with drug and alcohol addiction to assist them in achieving lifelong sobriety.”<sup>234</sup>

Thus, while there is significant variation in the stated goals and objectives of these courts, all appear to be laudable. The negative impact of current sentencing policy on defendants and communities has been widely studied, and there is no doubt that innovative approaches to criminal justice issues are necessary. In this area, the federal system has lagged behind the states, which have instituted a variety of diversion programs, specialized criminal courts, and alternatives to incarceration, such as day reporting centers.<sup>235</sup> Neither Congress nor the U.S. Sentencing Commission have expanded the range of sentencing options available to courts and experiments like front-end specialized criminal courts should be encouraged. However, “while experimentation and piloting of new programs is absolutely necessary, it is unwise and maybe unethical to do so without a plan to assess their effectiveness and cost.”<sup>236</sup> The remainder of this section discusses what is known about the successes of front-end specialized criminal courts in the federal system as well as some potential problems with how they are currently constituted.

### 1. *The Successes of Front-End Specialized Criminal Courts*

Despite the lack of evaluations of these courts, there is some publicly available information about their effectiveness. First, some courts report high successful completion rates. PADI cites a successful completion rate of 94% (87 of 93 participants).<sup>237</sup> In his testimony to the Colson Taskforce in May 2015, Chief Assistant U.S. Attorney for the Central District of California, George Cardona, provided data showing an 89% graduation rate for CASA (75 of 84).<sup>238</sup> The Eastern District of

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<sup>233</sup> *Arizona Veterans Program*, *supra* note 140. **Error! Reference source not found. Error! Reference source not found. Error! Reference source not found.**

<sup>234</sup> *Support Court*, *supra* note 160.

<sup>235</sup> See generally UNITED STATES SENTENCING COMMISSION, SYMPOSIUM ON ALTERNATIVES TO INCARCERATION (2008), <http://www.ussc.gov/research/research-reports/proceedings-symposium-alternatives-incarceration-july-14-15-2008>.

<sup>236</sup> Rowland, *supra* note 10, at 13.

<sup>237</sup> *Pretrial Alternatives to Detention Initiative*, *supra* note 2244.

<sup>238</sup> CASA Program, *supra* note 170, at 2.

New York's Pretrial Opportunity Program (POP) cites a 76% success rate.<sup>239</sup> However, other programs have slightly lower completion rates. Excluding participants who remain in the program, as of March 2017, 54% of BRIDGE participants had successfully completed the program (43 of 79).<sup>240</sup>

Second, there is no doubt that graduates often receive lower sentences than the Guidelines would otherwise dictate, and some do have their charges dismissed. For example, one of the earliest participants in the CASA program pleaded guilty to possession with intent to distribute heroin in October 2012.<sup>241</sup> His plea agreement stated that, under the Guidelines, his base offense level would be 14, which would require an advisory Guideline sentence of at least 15 months in prison.<sup>242</sup> However, the Court approved a binding plea agreement under which, after successful completion of the CASA program, the defendant would receive a sentence of five years on probation.<sup>243</sup> He successfully completed CASA and ultimately was sentenced to a probation term of three years.<sup>244</sup> Similarly, R.P., a successful participant in the Eastern District of New York's POP program, received a sentence of diversion, which should result in the ultimate dismissal of her charges; her Guideline sentence could have been 97 months.<sup>245</sup>

Third, and perhaps most importantly for those involved with specialized criminal courts, these courts have made a difference in some individuals' lives. For example, the first graduate of the Central District of Illinois's PADI program, Patti Oest, has stayed clean and out of contact with the criminal justice system since she graduated in 2004,<sup>246</sup> and she now works as a counselor.<sup>247</sup> The Eastern District of New York cites many success stories of participants in both the POP and SOS

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<sup>239</sup> HENDRICKS, *supra* note 20, at 9.

<sup>240</sup> *Id.* at 37.

<sup>241</sup> Plea Agreement for Defendant Sam Samudio, *United States v. Samudio*, No. 11-CR-00492 (C.D. Cal. Oct. 23, 2012); see Jill Cowan, *Alternative program gives federal defendants a second chance*, L.A. TIMES (Oct. 22, 2013), <http://articles.latimes.com/2013/oct/22/local/la-me-casa-20131022>.

<sup>242</sup> *Id.* at 7. The Guideline range would depend on his criminal history score, which is not provided in the plea agreement.

<sup>243</sup> *Id.*

<sup>244</sup> Judgment and Commitment, *United States v. Samudio*, No. 11-CR-00492 (C.D. Cal. July 7, 2012).

<sup>245</sup> EDNY 2015 REPORT, *supra* note 16, at 21, 23. Information is not available on her base offense level or Guideline range, but this report uses 97 months in its calculation of prison costs avoided.

<sup>246</sup> Buedel, *supra* note 159.

<sup>247</sup> *Id.*

programs, including C.J., who was charged with distributing oxycodone and had a long history of drug abuse.<sup>248</sup> Although she relapsed a number of times while in the POP program, she eventually completed treatment and found a full-time job. She graduated from POP in June 2015, at which point she had been drug-free for 14 months.<sup>249</sup>

## 2. *The Problems with Front-End Federal Specialized Criminal Courts*

Despite the positive impact of these courts in some individual cases, there is no independent evidence that the courts are effective at achieving their rehabilitation or recidivism reduction goals in either the short- or long-term. Further, there are potential problems with the way many programs are currently structured, particularly in how participants are selected and legal concerns with the extent to which courts comport with sentencing law.

### a. *Lack of Data or Evaluations*

One of the biggest problems with the proliferation of front-end specialized criminal courts in the federal system is the fact that none have yet been evaluated, meaning that there are no systematic assessments of their design, curriculum, and short- and long-term outcomes. To this author's knowledge, just one evaluation is currently in progress: at the time of writing, the Federal Judicial Center is conducting a process-descriptive study of the CASA program.<sup>250</sup> In its review of these courts, the OIG noted that Executive Office of the U.S. Attorney has not conducted any evaluations or assessments of diversion programs, and, more worryingly, it "did not keep sufficient data to permit a comprehensive evaluation of the effectiveness of the USAOs' uses of pretrial diversion programs and their participation in diversion-based court programs."<sup>251</sup> This is concerning because, without data, only process evaluations are possible; while this type of evaluation is important, it cannot provide any information on the impact of the courts in terms of recidivism reduction, cost savings, or any treatment

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<sup>248</sup> EDNY 2015 REPORT, *supra* note 16, at 25.

<sup>249</sup> *Id.* at 26.

<sup>250</sup> FED. JUDICIAL CTR., *supra* note 20, at 10. In addition, the BRIDGE program has recently begun a recent partnership with Clemson University and Greenville Hospital System which will begin with "an independent, third-party, retrospective evaluation of the BRIDGE program's basic metrics in recidivism and cost savings." HENDRICKS, *supra* note 20, at 12.

<sup>251</sup> OIG Audit, *supra* note 16, at 16.

measures. Both the OIG and the GAO have emphasized the need to measure recidivism rates of participants in the programs.<sup>252</sup>

This lack of data collection and evaluation is concerning given the DOJ's focus on "Evidence-Based Practices,"<sup>253</sup> and the fact that grants awarded to states through the Bureau of Justice Assistance to set up drug courts and other programs require an evaluation plan. One program refers to a future evaluation and notes that they collect data on a "control group" but there is little information about how this control groups is created and to what extent it matches program participants.<sup>254</sup> Despite the lack of evaluations, some courts have made claims about the effectiveness of their programs based on high completion rates and cost savings. However, there are problems with both claims.

First, program completion rates presented by programs are not always valid or reliable. Without a proper evaluation, including a comparison group, it is not clear whether success either in the program or after the program can be attributed to the program itself. For example, many of the POP participants described in reports to that District's Board of Judges did not join POP until well after their arrest and after their rehabilitation had begun. Take participant S.D., who was arrested on July 2, 2013 and spent time in custody before being released to a residential drug treatment program. This program discharged her for drug use and engaging in sexual relations.<sup>255</sup> According to POP: "Rather than seek an order remanding S.D., Pretrial Services arranged for her transfer to a different residential program. Her attitude improved . . . . After a period of sobriety and compliance with program rules, S.D. was invited to join POP on January 30, 2014."<sup>256</sup> Given that she had made significant progress prior to joining POP, it is difficult to attribute her

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<sup>252</sup> As part of its 2016 Audit, the OIG attempted to calculate the recidivism rates of participants in the Central District of Illinois's PADI program. *Id.* at 30. It selected 39 people who successfully completed the program between 2002 and 2011 and reviewed their criminal histories using the FBI's National Crime Information Center database. It found that 9 of them (23%) had either been reconvicted, rearrested, or had their supervision revoked within two years of graduation from the program. However, this is not a reliable measure of recidivism. It conflates different categories of recidivism. It also does not explain how the 39 individuals were selected. As will be discussed in PART IV.A below, more rigorous measures of recidivism are necessary to be able to ascertain if the program has any long-term impact.

<sup>253</sup> See generally Office of Justice Programs, CrimeSolutions.gov (last visited Mar. 2, 2017) (presenting research on the effectiveness of programs and practices).

<sup>254</sup> See CAP Operating Agreement, *supra* note 174, at 3 (noting that the program will "work with a trained researcher to identify similarly situated supervisees to serve as a control group . . . [and] will evaluate the program").

<sup>255</sup> EDNY 2015 REPORT, *supra* note 16, at 23.

<sup>256</sup> *Id.* at 24.

success to the program specifically rather than to the work of Pretrial Services.<sup>257</sup>

A second argument made by proponents of these courts is that they save money. However, there are numerous problems with how cost savings are estimated. First, most only look at the cost of prison that is avoided with an alternative to incarceration sentence. This neither considers the costs of the program to the system for those who successfully complete it, nor the costs incurred for people who fail to complete the program. These costs are significant. Although the budgets for these courts are not clear, it appears that none receives additional funding beyond the typical funds assigned to Pretrial Services for pretrial supervision. However, significant personnel hours are devoted to these programs by judges, supervision officers, and attorneys; these real costs come at the expense of hours spent on other activities.

Second, most cost estimates assume that the costs avoided are those of a mid-Guidelines sentence or an average Guideline sentence, based on the ranges of the relevant defendants.<sup>258</sup> However, most sentences imposed in federal courts are below Guidelines sentences. For example, in the Eastern District of New York, home to two front-end specialized criminal courts, just 22% of individuals were given sentences within the Guideline range in 2015, and more than three-quarters were given below Guidelines sentences.<sup>259</sup> Nonetheless, in estimating the costs saved by the POP and SOS, the Report to the Board of Judges relied on guideline sentence costs. In addition, given current funding structures, any cost savings resulting from reduced prison costs go to the Bureau of Prisons rather than to the Judicial Branch, which expends the costs of running the specialized courts. Clearly, there are potential cost savings to alternative to incarceration programs, but a far more nuanced cost-benefit study is necessary.

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<sup>257</sup> Reports about POP contain other examples like this one. *See, e.g., id.* at 26–27 (describing the case of V.P., who completed residential treatment in May 2014 but did not join POP until November 2014); EASTERN DISTRICT OF NEW YORK, REPORT TO THE BOARD OF JUDGES, ALTERNATIVES TO INCARCERATION IN THE EASTERN DISTRICT OF NEW YORK: THE PRETRIAL OPPORTUNITY PROGRAM AND THE SPECIAL OPTIONS SERVICES PROGRAM 23–25 (2014) (describing the case of E.L., who apparently joined POP approximately five months after beginning residential drug treatment).

<sup>258</sup> *See, e.g.,* EDNY 2015 REPORT, *supra* note 16; OIG Audit, *supra* note 16, at 25.

<sup>259</sup> United States Sentencing Commission, Source Book, Table 26: Sentences Relative to the Guideline Range by Circuit and District (2015), <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2015/Table26.pdf>.



*b. Selecting Participants*

Even though there are no evaluations, the structure of many courts raises some concerns about the extent to which they conform with best practices. One of the primary concerns is in how participants are selected. These processes have implications both for access to justice issues and for the impact the courts can have and their ability to measure that impact. The NADCP Adult Drug Court Best Practice Standards recommend using “objective eligibility and exclusion criteria” and targeting “high-risk and high-need participants.”<sup>260</sup> In addition, they recommend that candidates be “assessed for eligibility using validated risk-assessment and clinical-assessment tools.”

*i. Eligibility Criteria*

While most federal front-end specialized criminal courts do have some eligibility criteria in selecting participants, they are typically vague and do not rely on data. Generally, selection decisions are made by the team, and most programs’ teams do not utilize actuarial risk-needs assessment tools. Instead, eligibility criteria operate more like exclusion criteria. For example, the Western District of Washington’s DREAM program lists the following eligibility criteria:

- Currently charged with an offense in the Western District of Washington for any offense except possession of a firearm during the commission of the alleged offense, felon in possession, sexual offenses or history thereof, or a serious violent offense or history thereof.
- The criminal conduct appears motivated by substance abuse issues.
- The person is a lawful resident or citizen of the United States and resides within the Western District of Washington.
- No more than two prior felony convictions, both of which also appear to have been motivated by substance abuse issues; and no other felony offenses.
- The person is willing to accept responsibility for the offense and willing to, prior to graduation, provide the government with all information and evidence the

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<sup>260</sup> ADULT DRUG COURT BEST PRACTICES STANDARDS 5 (Nat’l Ass’n of Drug Court Profs. ed., 2013), <http://www.allrise.org/sites/default/files/nadcp/AdultDrugCourtBestPracticeStandards.pdf>.

defendant has concerning the offense or offenses that were part of the charges alleged.

- Any mental health conditions must be manageable.
- The participant may not work as an informant for the government during his/her participation in DREAM.<sup>261</sup>

However, it is highly unlikely that all defendants who meet these criteria will be admitted, given the small size of the program; according to one report, between December 2013 and August 2015, the program produced just four graduates.<sup>262</sup> Other courts have similarly general criteria that allow for subjectivity in admission. For example, U-ACT notes that it has “no fixed criteria for admission.”<sup>263</sup>

Open criteria like these have been cited as a positive feature of specialized criminal courts. CASA notes that its “selection criteria are deliberately flexible, providing the team with discretion to select candidates it determines best suited to the program.”<sup>264</sup> It is not clear how this discretion is exercised, and this is an open question for virtually all front-end specialized criminal courts. In the BRIDGE program, after referral, the supervising probation officer screens “the defendant’s criminal record, substance abuse and/or mental health history, willingness and ability to participate in the program, as well as other relevant factors to determine suitability for the program.”<sup>265</sup> However, how these factors are balanced and what ultimately determines admission is not specified.

Further, while determining whether a defendant has addiction issues is relatively straightforward, it seems much more difficult to determine what “aberrational” behavior is and whether it can be treated. None of the newer alternative to incarceration courts defines this, and it does not appear to be as simple as it being a first offense.<sup>266</sup> With such a vague, undefined term, selection is likely subjective. The NADCP Best Practice Standards express concern with courts that “screen candidates . . . based on the team’s subjective impressions of the offender’s motivation for change or readiness for treatment.” Such

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<sup>261</sup> *DREAM*, *supra* note 165.

<sup>262</sup> EDNY 2015 REPORT, *supra* note 16, at 38–39.

<sup>263</sup> *Utah Alternatives to Conviction Track*, *supra* note **Error! Bookmark not defined.**, t 2.

<sup>264</sup> CASA Program, *supra* note 170, at 1.

<sup>265</sup> *BRIDGE Program*, *supra* note 164, at 5.

<sup>266</sup> CASA Program, *supra* note 170, at 1.

determinations “should be avoided” because they can exclude individuals “for reasons that are empirically invalid.”<sup>267</sup>

While flexibility does give court actors more discretion, it can often lead to a lack of rigor in selecting participants and, ultimately, disparities in sentencing outcomes for similarly situated defendants. When programs are created with these standards, the problem of net widening may occur.<sup>268</sup> It is important to ensure that programs serve the people that they are designed to serve and not bring more individuals into the system. For courts like these that purport to divert people from prison, it is important that people who previously would have received traditional pretrial diversion are not referred to the more onerous specialized criminal court instead. In the absence of clear eligibility guidelines, the risk of net-widening is heightened. Just one program, the Northern District of California’s CAP program, appears to recognize this concern. CAP includes both pretrial diversion and deferred sentencing in its guidelines, thus minimizing the risk of net-widening.<sup>269</sup>

*ii. Focusing on and Identifying High-Risk and High-Needs Defendants*

As one scholar has noted, if courts truly were “driven primarily by data, not moral judgment, they would prioritize participation of those [people] with the highest need for rehabilitative intervention”<sup>270</sup> The research on drug courts described above tends to support this, and the NADCP recommends focusing on this group.<sup>271</sup> At least some courts are designed to serve “high-risk and high-need” defendants,<sup>272</sup> but others do not specify the populations they are designed to serve.<sup>273</sup> NADCP

<sup>267</sup> Nat’l Ass’n of Drug Court Profs., *supra* note 260, at 6.

<sup>268</sup> See generally L. Thomas Winfree, *Review Essay, Of Secrets and Visions: Stanley Cohen on Crime Control*, 78(2) J. CRIM. L. & CRIMINOLOGY 430 (1987) (reviewing STANLEY COHEN, *VISIONS OF SOCIAL CONTROL: CRIME, PUNISHMENT AND CLASSIFICATION* (1985)).

<sup>269</sup> CAP Program, *supra* note 221, at 2 (“The Post-Plea Diversion Program may be appropriate for more serious offenders than those involved in Pretrial Diversion.”).

<sup>270</sup> Collins, *supra* note 6. See also D.A. Andrews et al., *Classification for Effective Rehabilitation: Rediscovery Psychology*, 17 CRIM. JUST. & BEHAV. 19 (1990).

<sup>271</sup> Nat’l Ass’n of Drug Court Profs., *supra* note 260, at 5.

<sup>272</sup> See, e.g., U.S. DISTRICT COURT DISTRICT OF VERMONT, RUTLAND DRUG COURT INTERAGENCY AGREEMENT (2015), <http://www.vtd.uscourts.gov/sites/vtd/files/DrugCourt.FinalDocs.2015.pdf> (stating that consistent with best practices, the court “will target high-risk and high-need offenders—those who are addicted to illicit drugs and are at substantial risk of reoffending or failing to complete a less intensive disposition such as probation”).

<sup>273</sup> For example, although BRIDGE ensures the existence of “a documented substance

cautions that courts serving low-risk and low-need participants should “provide a lower intensity of supervision, substance abuse treatment, or both” to avoid “wasting resources or making outcomes worse for some of the participants.”<sup>274</sup>

According to the NADCP, the best way to assess risks and needs and match defendants to “appropriate treatment and supervision services” is to use validated assessment tools.<sup>275</sup> These tools have been shown in a variety of settings, including specialized courts, to be better than judgment alone.<sup>276</sup> Although a variety of such tools exist, two tools have been specifically created for and validated using the federal defendant population: the Pretrial Services Risk Assessment (PTRA) and the Post-Conviction Risk Assessment (PCRA). The PTRA predicts the risk of failure to appear, new criminal arrest, and revocations due to technical violations while on pretrial release.<sup>277</sup> The PCRA “is designed to target treatment interventions prioritized by risk, need, and responsivity.”<sup>278</sup> In addition, there are a variety of validated clinical diagnostic tools to assess substance abuse and other disorders.<sup>279</sup>

Virtually all federal defendants are assessed using PTRA to determine whether they should be released pretrial, and specialized criminal courts should have access to this risk score.<sup>280</sup> However, it is not clear whether courts utilize PTRA or any other assessment tools in determining whether potential participants are eligible or in making admission decisions. Just one specialized criminal court appears to follow the NADCP standards: the District of Massachusetts’s RISE program screens potential participants using both the PCRA and the

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abuse addiction problem,” it does not appear to restrict participation to high risk individuals. HENDRICKS, *supra* note 20, at 6.

<sup>274</sup> Nat’l Ass’n of Drug Court Profs., *supra* note 260, at 7.

<sup>275</sup> *Id.*

<sup>276</sup> See generally Faye S. Taxman & Amy Dezember, *The Value and Importance of Risk and Need Assessment (RNA) in Corrections and Sentencing: An Overview of the Handbook in HANDBOOK ON RISK AND NEED ASSESSMENT: THEORY AND PRACTICE* (Faye S. Taxman, ed.) (2017).

<sup>277</sup> Timothy P. Cadigan, et al., *The Re-validation of the Federal Pretrial Services Risk Assessment (PTRA)*, 76 FED. PROB. 3 (2012).

<sup>278</sup> James L. Johnson, et al., *The Construction and Validation of the Federal Post Conviction Risk Assessment (PCRA)*, 75 FED. PROB. 16, 18 (2011).

<sup>279</sup> Nat’l Ass’n of Drug Court Profs., *supra* note 260, at 7 & Appendix A.

<sup>280</sup> The Eastern District of New York has provided data on the PTRA scores of POP and SOS participants. See EDNY 2015 REPORT, *supra* note 16. Over 90% of SOS participants were in Categories 3–5 (the highest risk categories), while POP participants appeared to be lower risk, with 75% in categories 1–3.

Texas Christian University Drug Screen. The results of these assessments are considered in making admission decisions.<sup>281</sup>

However, even if court programs choose to rely on risk assessment tools in making admission decisions, there is the complicating concern that, traditionally, federal judges are limited in their sentencing options. Consideration of certain factors in sentencing—in particular, an individual’s home ownership (or lack thereof) and financial stability—appears inconsistent with provisions of the SRA.<sup>282</sup> The Guidelines also limit consideration of certain personal characteristics for sentencing purposes (as mitigating or aggravating factors related to a departure).<sup>283</sup> Moreover, the original Sentencing Commission made a specific policy decision to exclude consideration of personal factors, other than a defendant’s criminal history, to predict recidivism.<sup>284</sup> This includes age, which is explicitly considered by the four courts that serve youthful defendants. Notably, in reaching its original conclusion “to regulate sentencing discretion by strictly limiting judges’ consideration of offender characteristics,”<sup>285</sup> the Sentencing Commission relied on the existence of both racial and gender disparities in sentencing. The Commissioners were concerned that considering defendant characteristics “would potentially benefit white offenders and wealthy offenders more than minority offenders and poor offenders.”<sup>286</sup>

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<sup>281</sup> Sorokin, *supra* note 77, at 9.

<sup>282</sup> 28 U.S.C. § 994(d) (2006), *invalidated by* *In re Clayton*, 829 F.3d 1254 (2012) (“The Commission shall assure the guidelines and policy statements are entirely neutral as to the race, sex, national origin, creed, and socio-economic status of offenders.”); 28 U.S.C. § 994(e) (2006), *invalidated by* *In re Clayton*, 829 F.3d 1254 (2012) (“The Commission shall assure that the guidelines and policy statements, in recommending a term of imprisonment or length of term of imprisonment, reflect the general inappropriateness of considering the education, vocational skills, employment record, family ties and responsibilities, and community ties of the defendant.”).

<sup>283</sup> *See, e.g.*, U.S.S.G. §§ 5H1.1 (age), 5H1.2 (education and vocational skills), 5H1.5 (employment record), 5H1.6 (family ties and responsibilities) & 5H1.10 (socio-economic status).

<sup>284</sup> *See* U.S. SENTENCING GUIDELINES MANUAL ch. 4, pt. A, introductory cmt. (U.S. SENTENCING COMM’N 2016) (“While empirical research has shown other factors [than criminal history] are correlated highly with the likelihood of recidivism, *e.g.*, age and drug abuse, for policy reasons they were not included here at this time.”). In other words, the only risk assessment instrument used in the *Guidelines Manual* is Chapter Four’s criminal history calculation. *See generally* U.S. Sent. Comm’n, *Comparison of the Federal Sentencing Guidelines Criminal History Category and the U.S. Parole Commission Salient Factor Score; Research Series on the Recidivism of Federal Guideline Offenders* (Jan. 2005).

<sup>285</sup> Newton & Sidhu, *supra* note 228, at 70.

<sup>286</sup> *Id.* at 71.

This concern raises two issues. First, best practices call for the use of risk-needs assessment tools in admission decisions. However, most risk assessment tools, including the PTRAs and the PCRA, include the factors described above. Thus, there may be a conflict between the dictates of federal sentencing law and the dictates of evidence-based practices where risk assessment tools are used to determine admission to a court program in which successful participants can earn a lesser sentence. Second, the original Commission's concern about racial disparity has been echoed in criticism of some risk assessment tools for contributing to racial disparity in the justice system and consequentially their use (even in part) to determine certain defendants.<sup>287</sup> Although data on the demographic make-up of participants in front-end specialized criminal courts are not available, it is important to assess whether consideration of risk assessment tools exacerbate the demographic disparities in sentence length that currently exist. NADCP recognizes this concern and cautions drug courts to ensure that historically disadvantaged groups "receive the same opportunities as other citizens to participate and succeed in the Drug Court."<sup>288</sup>

*c. Compliance with the Sentencing Reform Act of 1984 and the United States Sentencing Guidelines*

The final issue is that, because of the way some of these front-end specialized criminal courts are designed and implemented, it is not clear whether they follow the requirements of the SRA or the Sentencing Guidelines, as interpreted by the Supreme Court in its post-*Booker* jurisprudence. While the potential problems described below may appear to be technical concerns, there is a larger philosophical issue here. The Sentencing Guidelines originally were developed using an empirical approach that relied on data on past sentencing practices, including sentences imposed and time served.<sup>289</sup> Indeed the Sentencing Commission continues to collect and analyze data to inform the

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<sup>287</sup> See, e.g., Bernard E. Harcourt, "Against Prediction: Sentencing, Policing, and Punishing in an Actuarial Age," University of Chicago Public Law & Legal Theory Working Paper, No. 94 (2005); Justin Breau, et al., *Could risk assessment contribute to racial disparity in the justice system?*, URBAN WIRE: CRIME AND JUSTICE (Aug. 11, 2014), <http://www.urban.org/urban-wire/could-risk-assessment-contribute-racial-disparity-justice-system>.

<sup>288</sup> Nat'l Ass'n of Drug Court Profs., *supra* note 260, at 11.

<sup>289</sup> Newton & Sidhu, *supra* note 228. The one exception was drug trafficking cases, which Congress decided should be punished more severely than they already were. *Id.*

development and amendment of the Guidelines.<sup>290</sup> Thus sentences imposed under the Guidelines have an empirical basis. As explained above, it is not clear that these new courts are grounded in empirical facts, and if some of them fail to give “respectful consideration” to the Guidelines,<sup>291</sup> it might be cause for concern.

Federal courts are required to impose a sentence “sufficient, but not greater than necessary,” to comply with the purposes of sentencing set forth in 18 U.S.C. § 3553(a)(2).<sup>292</sup> To do so, sentencing judges are required to: calculate the applicable guideline range and consider sentencing options in that range; consider possible departures based on departure provisions in the *Guidelines Manual*; and consider whether to “vary” from the Guidelines based on all of the sentencing factors in 18 U.S.C. § 3553(a) (including the guideline range and policy statements concerning departures).<sup>293</sup> Prior to sentencing, the court must consider a PSR “unless the court finds that the information in the record enables it to meaningfully exercise its sentencing authority under 18 U.S.C. § 3553, and the court explains its finding on the record.”<sup>294</sup>

While federal courts have the authority to diverge from the Guidelines based on their consideration of the section 3553(a) factors, “[a]s a matter of administration and to secure nationwide consistency, the Guidelines should be the starting point and initial benchmark” in sentencing.<sup>295</sup> Once a court has calculated the Guideline range,

the district judge should then consider all of the § 3553(a) factors to . . . make an *individualized assessment* based on the facts presented. If he decides that an outside-Guidelines sentence is warranted, he must consider the extent of the

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<sup>290</sup> United States Sentencing Commission, <http://www.ussc.gov/> (last visited Mar. 2, 2017).

<sup>291</sup> *Kimbrough v. United States*, 552 U.S. 85 (2007) (Even after *Booker*, the Sentencing Reform Act requires courts “to give respective consideration to the Guidelines” in deciding what sentence to impose.).

<sup>292</sup> See 18 U.S.C. § 3553(a).

<sup>293</sup> See U.S.S.G. § 1B1.1(a)-(c) & comment (describing the “three-step process”). See also *Doe v. United States*, 705 F.3d 1134, 1154 (9th Cir. 2013) (vacating defendant’s sentencing as procedurally unreasonable based on district court’s failure to calculate and properly consider the advisory range as the “starting point and initial benchmark”).

<sup>294</sup> FED. R. CRIM. PRO. 32(c)(A)(ii) (“The probation officer must conduct a presentence investigation and submit a report to the court before it imposes sentence unless the court finds that the information in the record enables it to meaningfully exercise its sentencing authority under 18 U.S.C. § 3553, and the court explains its finding on the record.”).

<sup>295</sup> *Gall v. United States*, 552 U.S. 38, 49 (2007).

deviation and ensure that the justification is sufficiently compelling to support the degree of the variance. We find it uncontroversial that a major departure should be supported by a more significant justification than a minor one. After settling on the appropriate sentence, he must adequately explain the chosen sentence to allow for meaningful appellate review and to promote the perception of fair sentencing.<sup>296</sup>

Since *Booker*, the Supreme Court has reinforced the importance of the role of the Guidelines, while also allowing for judges to exercise significant discretion in sentencing.

Front-end specialized criminal courts vary in the extent to which they follow this sentencing process. Some courts are true diversion courts, where a dismissal of charges appears as the only option for people who successfully complete the program, and thus there is no sentence imposed.<sup>297</sup> Other courts, like the District of Massachusetts's RISE program, require participants to enter a guilty plea without a written agreement and defer sentencing until participants have completed the program requirements. Once the defendant has met all program benchmarks, a full PSR is completed and considered at the sentencing hearing.

Potentially more problematic are specialized criminal courts that rely on what are often called "C pleas." Pursuant to the Federal Rule of Criminal Procedure 11(c)(1)(C), the parties may "agree that a specific sentence or sentencing range is appropriate or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply."<sup>298</sup> The court may then accept or reject the plea agreement, or defer its decision on whether to accept the plea agreement until it has viewed the defendant's PSR.<sup>299</sup> The Sentencing Commission "recommends that the court defer acceptance of the plea agreement until the court has reviewed the presentence report." This is typically prepared after the guilty plea hearing and often contains a more detailed

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<sup>296</sup> *Id.* at 49–50 (internal citations omitted) (emphasis added); *see also* *Pepper v. United States*, 562 U.S. 476, 490 (2011) ("Accordingly, although the 'Guidelines should be the starting point and the initial benchmark,' district courts may impose sentences within statutory limits based on appropriate consideration of all the factors listed in § 3553(a), subject to appellate review for 'reasonableness.'").

<sup>297</sup> Based on publicly available information, such courts appear to exist in the District of Arizona (Veterans Court), the Western District of Texas (Adelante Program), the Western District of Virginia (Veterans Court), and the Western District of Washington (Drug Reentry Alternative Model (DREAM)).

<sup>298</sup> FED. R. CRIM. P. 11(c)(1)(C).

<sup>299</sup> FED. R. CRIM. P. 11(c)(3)(A).



recitation of all of the facts relevant to the sentencing calculation and the § 3553(a) factors (including “relevant conduct”).<sup>300</sup> Once the court accepts the plea agreement, the court is bound by the agreement and must impose the agreed-upon sentence (subject to any conditions, such as the defendant’s successful completion of a program).<sup>301</sup>

Although the Guidelines generally allow for such “C” pleas, a district judge should not accept a plea agreement under Rule 11(c)(1)(C) “without first evaluating the recommended sentence in light of the defendant’s applicable sentencing range.”<sup>302</sup> Thus, the model of specialized criminal courts like CASA and CAP, which require that defendants enter a “C” plea and where a full PSR may not be prepared before sentencing, does not appear to follow the three-step process envisioned by *Booker* and its progeny.

First, in practice, it does not appear that the sentencing judge meaningfully considers a defendant’s Guideline range at the time of sentencing. Although the defendant’s Guideline range is calculated and included in the plea agreement, defendants are promised a non-incarceration sentence after completion of the program at the guilty-plea phase regardless of their Guideline ranges or sentencing characteristics (apart from their successful participation in the program). In addition, there may not be a complete calculation of a defendant’s criminal history, as was the case in the example of the CASA defendant.<sup>303</sup>

Second, below-range sentences that are the result of a “variance” pursuant to 18 U.S.C. § 3553(a) should be the result of *individualized* determinations of the relevant § 3553(a) factors, including a proper calculation of the Guidelines in an individual offender’s case.<sup>304</sup> Diverting an entire class of offenders from terms of imprisonment recommended by the Guidelines does not appear to be contemplated by *Booker* and its progeny, in as much as it may categorically discount potentially relevant factors within the scope of § 3553(a) and does not permit serious consideration of the advisory Guideline range throughout the sentencing process.<sup>305</sup> While it is clear that an individualized

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<sup>300</sup> U.S.S.G. § 6B1.1 (comment.).

<sup>301</sup> *Id.*

<sup>302</sup> *Freeman v. United States*, 564 U.S. 522, 529–30 (2011) (citing U.S.S.G. § 6B1.2).

<sup>303</sup> *See supra* notes 241–44 and accompanying text.

<sup>304</sup> *Gall v. United States*, 552 U.S. 38, 49–50 (2007); *see also* *Booker*, 543 U.S. 220, 264–65 (2005) (“[F]eatures of the remaining system, while not the system Congress enacted, nonetheless continue to move sentencing in Congress’ preferred direction, helping to avoid excessive sentencing disparities while maintaining flexibility sufficient to individualize sentences where necessary.”).

<sup>305</sup> *See Gall*, 552 U.S. at 49–50 (instructing sentencing courts to “consider *all* of the § 3553(a) factors”).

determination is made in deciding whether a defendant should be admitted into a specialized criminal court, it does not appear that that decision is made based on all of the information that would typically be in a full PSR, namely the circumstances of the offense, including non-charged conduct, defendant background, financial information, criminal history, education and employment information, and information about physical and mental health.<sup>306</sup>

#### IV. THE FUTURE OF FRONT-END SPECIALIZED CRIMINAL COURTS

There are admirable motivations behind the creation of federal front-end specialized criminal courts. These appear to be increasing the use of alternatives to incarceration and rehabilitation—both treatment, and recidivism reduction. As yet, it is not clear whether these courts are the solution. Districts are moving quickly to establish new courts without knowing whether the existing courts are achieving their goals and whether there are other ways to achieve the same goals. Thus, this paper suggests that, until more is known about which courts and what features of those courts are successful, districts considering establishing new courts exercise caution and work with external researchers to help develop their programs. While it is certainly true that innovation in the federal system is important, there already exist a variety of programs in which to test what works. This section begins by explaining the best practices in evaluation methodology and setting out what existing courts can do to evaluate whether they are meeting their goals and how to ensure that they can conduct impact and cost-benefit evaluations to see whether their programs reduce recidivism and improve treatment outcomes long-term as well as whether they save money. This section will suggest some ways in which programs can improve the extent to which they follow best practices in this area, and comport with federal sentencing law. Finally, the paper briefly explores some other ways in which federal judges can achieve their goals of increasing alternatives to incarceration, rehabilitating defendants, and reducing recidivism.

##### A. Program Evaluation

“One of the first tasks in gathering evidence about a program’s successes and limitations (or failures) is to initiate an evaluation, a systematic assessment of the program’s design, activities or outcomes . . . . Having a plan for the evaluation is critical, and having it

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<sup>306</sup> FED. R. CRIM. P. 32(d).

ready when the program launches is best.”<sup>307</sup> Ideally an evaluation plan should be created as part of the program development process and program staff should collect baseline data before the program is implemented so that later evaluations can assess whether changes are attributable to the program.<sup>308</sup> Districts considering setting up front-end specialized criminal courts should involve an external researcher at the design phase to help the program team create an evaluation plan.

While an impact or outcome evaluation might appear to provide the most useful information, that is usually a later step in the evaluation hierarchy.<sup>309</sup> Indeed, conducting an outcome evaluation “is difficult when a program is too new because program elements, strategies or procedures often are still being adjusted and finalized.”<sup>310</sup> For example, selection criteria for admission to the program might change. Instead, the first step in an evaluation should be to examine the need or impetus behind the program’s inception and discuss the relevant theoretical framework guiding the program’s goals. For example, a need/theory evaluation of one of the alternative to incarceration courts described in this paper might examine, among other things, whether the drug court model is suitable for defendants without addiction issues. The next step is generally to conduct a process or implementation evaluation to examine how the program is operating and whether it is operating as intended, including whether it is “delivering its proposed services to its target population as originally planned.”<sup>311</sup> For example, a front-end specialized criminal court designed to serve high-need defendants with substance use problems would want to know whether indeed that is the population it is serving.

After a process evaluation has begun, the next step is to conduct an impact or outcome evaluation, which generally measures whether the program has met its objectives, what impact it had on target outcomes, and whether there are long-term changes that can be attributed to the

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<sup>307</sup> Alison Brooks Martin, *Plan for Program Evaluation from the Start*, 275 NIJ J. 24, 1 (2015), <https://nij.gov/journals/275/pages/plan-for-program-evaluation.aspx>.

<sup>308</sup> *Id.* at 2. Evaluation planning involves five steps: “1. State the goals of the program in clear and measurable (quantifiable) terms. 2. Determine the relationship between goals and objectives. 3. Develop evaluation measures. 4. Determine the data to be collected on these measures. 5. Determine analysis methods.” GENNARO F. VITO & GEORGE E. HIGGINS, PRACTICAL PROGRAM EVALUATION FOR CRIMINAL JUSTICE 18 (2015).

<sup>309</sup> See generally DAN MEARS, AMERICAN CRIMINAL JUSTICE POLICY: AN EVALUATION APPROACH TO INCREASING ACCOUNTABILITY AND EFFECTIVENESS (2010).

<sup>310</sup> Martin, *supra* note 307, at 2.

<sup>311</sup> VITO & HIGGINS, *supra* note 308, at 63.

program.<sup>312</sup> It is not enough simply to measure the recidivism rates of participants. It is critical to make comparisons between “the program participants . . . and an ‘untreated’ group. This key baseline gives meaning to the outcomes generated by the program by providing a comparison to what would have happened if the program had not been implemented.”<sup>313</sup> Here, courts might want to compare outcomes for program participants with those receiving traditional pretrial diversion as well as those who are sentenced using the usual court process.

There are a number of potential methods for testing the effectiveness of a program, the most rigorous being classic experimental design using random assignment and quasi-experimental research design, for example, using propensity score matching to statistically construct an equivalent comparison group.<sup>314</sup> However, both of these methods can be difficult, and, given the small number of participants in most court programs, the results of an impact evaluation might lack enough statistical power to draw any conclusions about real effects.<sup>315</sup>

Finally, after an outcome evaluation has been completed, if that evaluation shows that the program is effective, a cost-benefit analysis may be conducted to “determine whether achieving those outcomes is worth the cost.”<sup>316</sup> This involves more than the cost-savings estimates provide by some courts. A rigorous cost-benefit analysis involves a series of steps including measuring the cost of the program, measuring the costs and benefits of the program’s impact on taxpayers, victims, participants, and other groups, and comparing the costs and benefits over the long-term.<sup>317</sup>

Based on the available information about the court programs described in this paper, none appear to have been designed with an evaluation plan in place and thus any evaluation might be difficult. However, court programs that are interested in being evaluated can begin with an evaluability assessment, which “analyzes a program’s goals, state of implementation, data capacity and measurable outcomes.”<sup>318</sup> In addition to being cheaper than an actual evaluation, it can “provide stakeholders with valuable information on how to alter the

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<sup>312</sup> Martin, *supra* note 307, at 2.

<sup>313</sup> VITO & HIGGINS, *supra* note 308, at 80.

<sup>314</sup> *Id.* at 80–90.

<sup>315</sup> MEARS, *supra* note 309, at 191–92.

<sup>316</sup> CHRISTIAN HENRICHSON, VERA INSTITUTE OF JUSTICE, USING COST-BENEFIT ANALYSIS FOR JUSTICE POLICYMAKING 2 (2014), <https://www.vera.org/publications/using-cost-benefit-analysis-for-justice-policy-making>.

<sup>317</sup> *Id.* at 4.

<sup>318</sup> Martin, *supra* note 307, at 4.

program structure to support future evaluations.”<sup>319</sup> An evaluability assessment for example, might conclude that an impact evaluation for a court program that serves just four participants is not advisable because the small sample size would not allow any meaningful effect to be detected. However, it might conclude that a court “has a sound theoretical basis” but raise questions about fidelity to that theoretical model and suggest a process evaluation.

### **B. Utilize Best Practices in Existing Courts**

Without knowing more about how the front-end specialized criminal courts described in this paper operate in practice and without knowing more about effectiveness of veterans courts, courts for youthful defendants, and alternative to incarceration courts, it is difficult to make specific recommendations on how to improve existing courts. Nevertheless, based on the results of drug court evaluations as well as national standards and best practices, two points are worth making:

First: “If we are to base programs and policies on data, we must be willing to lead where it follows, even if that means offering rehabilitative opportunities to individuals who are currently deemed too risky for such an investment.”<sup>320</sup> Courts should look at their eligibility criteria to ensure that participants are being selected in ways that reflect the purposes of the individual program, and avoid net-widening. Although the data are mixed, most scholars suggest that drug courts have the greatest impact amongst higher-risk defendants. This is supported by “risk-needs-responsivity” principle,<sup>321</sup> thus courts that don’t already do so should consider opening their courts to high risk/high need defendants. Further, admission criteria should be clearly stated. As argued earlier, the current flexibility that courts enjoy promotes discretion, but unlike existing discretion at sentencing, this discretion is almost unfettered. Sentencing judges are required to provide reasons for their sentences, but it does not appear that program staff provide clear reasons why certain individuals are admitted or rejected. Clear eligibility criteria would allow program staff to explain exactly why potential participants are admitted or rejected.

Second, in accordance with the NAPSA standards and data available on drug court effectiveness, courts that require a guilty plea as a condition of admission should reconsider that requirement. In addition, to ensure full compliance with the principles of the Sentencing Reform Act and the Sentencing Guidelines, courts should avoid the use of

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<sup>319</sup> *Id.* See also VITO & HIGGINS, *supra* note 308, at 49–50.

<sup>320</sup> Collins, *supra* note **Error! Bookmark not defined.**, at 1527.

<sup>321</sup> See Johnson, et al., *supra* note 278.

binding C pleas and ensure that a full PSR is conducted before sentencing. Doing so will allow the sentencing judge to make an informed decision about what the appropriate sentence is, that is “sufficient, but not greater than necessary, to comply with the purposes” of punishment.<sup>322</sup>

### C. Ways to Increase Non-Incarceration Sentences

One of the goals of these courts seems to be to increase the use of alternative to incarceration sentences. In addition to simply imposing sentences of probation when that option is available under the Guidelines (or departing or varying from the Guidelines where appropriate), there are at least two other avenues to increasing non-incarceration sentences. The first takes advantage of existing procedures, while the second would involve legislative change.

#### 1. Increase the Use of Pretrial Release and Pretrial Diversion

First, where possible, districts should increase the use of pretrial release. As explained earlier, defendants who are released pretrial have significantly better outcomes than those who are detained pretrial and, in the federal system, receive shorter sentences of incarceration. This is in part because pretrial detention likely “hamper[s] a defendant’s ability to provide mitigating information at sentencing.”<sup>323</sup> While there are risks inherent in pretrial release, programs like CAPS and Better Choices appear to have the potential to minimize those risks among high-risk defendants; those programs should be examined more closely to see if they could be a model for other districts.

In addition, courts considering the establishment of new courts should investigate whether they can achieve the same goals using pretrial diversion. Defendants can be provided drug and other treatment outside of a drug court setting and indeed many already are. One federal drug court judge noted that the requirements for participants in that drug court “are quite similar to those conditions commonly imposed by judges for pretrial supervision.”<sup>324</sup> For example, of the 26,578 defendants released pretrial between October 2014 and September 2015, almost 40% were subject to a treatment condition (10,070) and almost 20% were subject to a mental health treatment condition (4,522).<sup>325</sup>

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<sup>322</sup> 18 U.S.C. § 3553(a).

<sup>323</sup> Holmes Didwania, *supra* note 83.

<sup>324</sup> HENDRICKS, *supra* note 20, at 7.

<sup>325</sup> Table H-8.

Similarly, pretrial and probation officers have been trained to provide cognitive behavioral therapy, one of the most effective correctional interventions; this can be provided outside of the context of a specialized criminal court. As Judge Bruce Bowe Hendricks notes, “federal judges are already regulating defendants’ lives in the ways contemplated by a drug court, but, in drug court, intensive treatment and supervision are enforced through regular judicial accountability.”<sup>326</sup> Given that defendants already do well on pretrial supervision and diversion, it remains necessary to answer the question as to whether that additional judicial accountability is necessary.

## 2. *Explore Deferred Adjudication or Special Probation*

One alternative to specialized criminal courts than might potentially achieve the same goals is deferred adjudication, which is “any practice that conditionally disposes of a criminal case prior to the entry of a judgment of conviction.”<sup>327</sup> Unlike deferred prosecution, which is in the province of the prosecutor, deferred adjudication is administered by the court itself. The Model Penal Code suggests that it “be offered to hold the individual accountable for criminal conduct through a formal court process, but justice and public safety do not require that the individual be subjected to the stigma and collateral consequences associated with formal conviction.”<sup>328</sup> It also encourages Sentencing Commissions to “develop guidelines identifying the kinds of cases and offenders for which deferred adjudication is a recommended disposition.”<sup>329</sup> Similar provisions already exist in several states, including Connecticut, which provides for “accelerated pretrial rehabilitation,”<sup>330</sup> and Ohio, which provides for “intervention in lieu of conviction” for defendants whose drug or alcohol use or mental illness was “a factor leading to the criminal offense with which the offender is charged.”<sup>331</sup>

The federal criminal justice system already has a version of deferred adjudication in the Federal First Offender Act described in Part II.B above. That statute allows for a judge to place a defendant on a period of probation prior to the entry of judgment. Currently, only defendants found guilty of simple possession of drugs are eligible, but, as Delegate Pierluisi of Puerto Rico suggested back in 2010, the statute

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<sup>326</sup> HENDRICKS, *supra* note 20, at 7.

<sup>327</sup> MODEL PENAL CODE, *supra* note 31, Sentencing § 6.02(B)(1).

<sup>328</sup> MODEL PENAL CODE, *supra* note 31, Sentencing § 6.02(B)(2).

<sup>329</sup> MODEL PENAL CODE, *supra* note 31, Sentencing § 6.02(B)(10) & Comment k.

<sup>330</sup> CONN. GEN. STAT. § 54-56e(a).

<sup>331</sup> OHIO REV. CODE ANN. § 2951.041(A)(2).

could be amended to expand eligibility to the types of defendants served by many of the specialized criminal courts.

### CONCLUSION

Specialized criminal courts appear to be the focus of innovation at the front end of the federal criminal justice system. The main goals of these courts seem to be reducing reliance on incarceration and improving outcomes for certain defendants. These are important goals, and, given the limited range of sentencing options available to judges, these courts have the potential to make a difference both in individual lives and in the system. However, their impact has yet to be empirically validated, and in considering whether to establish new specialized criminal courts, districts should consider whether there are other ways to achieve those same goals.