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## REHABILITATIVE JUSTICE: THE EFFECTIVENESS OF HEALING TO WELLNESS, OPIOID INTERVENTION, AND DRUG COURTS

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# REHABILITATIVE JUSTICE: THE EFFECTIVENESS OF HEALING TO WELLNESS, OPIOID INTERVENTION, AND DRUG COURTS

*By Majidah M. Cochran & Christine L. Kettel<sup>1</sup>*

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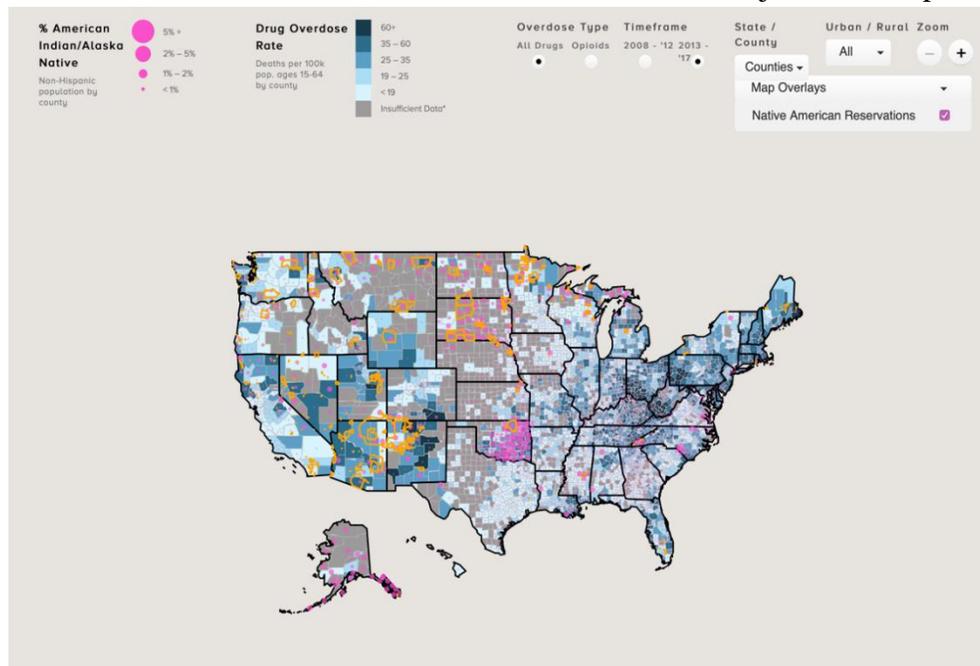
<sup>1</sup> Majidah M. Cochran and Christine L. Kettel are 3Ls at Seattle University School of Law. We wish to thank Jessica Roberts for bringing us together to co-author a piece on the opioid epidemic, which has only worsened since the start of the coronavirus pandemic. We would also like to extend our sincerest gratitude to Samantha Mintz-Gentz, Davis Leigh, Samantha Shaw, Christina Schnalzer, Jessica Park, Megan Fore, Onnaedo Nwankwo, and Heidi Brown for providing thoughtful comments and suggestions on this article. After critically analyzing drug courts from a race equity lens, we reconsidered our reformist recommendations and landed on abolition. We maintain the position that drug addiction and dependency have no place in the adjudicative process. However, while drug addiction and dependency continue to be policed, rehabilitation and medication-assisted treatment should be prioritized.

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## I. INTRODUCTION

“The western law way is to punish you, so that you don’t repeat the behavior. But the Navajo way is to focus on the individual. You separate the action from the person.”

-The Honorable Robert Yazzie, Chief Justice Emeritus of the Navajo Nation Supreme Court<sup>2</sup>



Taken from the United States Department of Agriculture’s interactive Opioid Misuse Community Assessment Tool.<sup>3</sup>

In October 2017, the World Health Organization declared a public emergency regarding the opioid crisis. At present, the opioid crisis is ravaging its way through poor white communities at an unprecedented rate.<sup>4</sup> This fact has been highly publicized. However, the opioid crisis has also been silently killing members of tribal nations at a rapid pace. According to the most recent Centers for Disease Control and Prevention data, Indigenous populations had the second highest overdose rates from all opioids in 2017 among racial and ethnic groups in the United States.<sup>5</sup> Besides opioid use, reservations already have higher than average levels of alcoholism, drug use, and alcohol-

<sup>2</sup> Laura Mirsky, *Restorative Justice Practices of Native American, First Nation and Other Indigenous People of North America: Part One*, INTERNATIONAL INSTITUTE FOR RESTORATIVE PRACTICES, <https://www.iirp.edu/news/restorative-justice-practices-of-native-american-first-nation-and-other-indigenous-people-of-north-america-part-one> [https://perma.cc/6GXP-XJF8] (last visited April 27, 2020).

<sup>3</sup> The data illustrate the percentage of opioid misuse by American Indian/Alaska Natives, which is represented by the pink dots. The orange lines represent a map overlay of Native American Reservations. The map reflects data collected from 2013-2017.

<sup>4</sup> David Reese, *New Medical Study Finds Racial Disparities in Opioid Crisis*, COURTHOUSE NEWS SERVICE (Dec. 18, 2020, 3:20 PM), <https://www.courthousenews.com/new-medical-study-finds-racial-disparities-in-opioid-crisis/> [https://perma.cc/N49U-L7UT].

<sup>5</sup> *Opioid Response Data*, INDIAN HEALTH SERVICE, <https://www.ihs.gov/opioids/data/> [https://perma.cc/MZ8K-25UK].

related crime. Data collected from the National Survey on Drug Use and Health suggests that Indigenous peoples' substance abuse issues are due to social isolation, poverty and lack of healthcare services.<sup>6</sup>

More generally, medical professionals and social scientists argue that the opioid crisis is a product of the United States healthcare system. Doctors now, as they did a century ago, are expanding the use of painkilling opioids due to high rates of chronic pain in the country. In addition to that, health insurance companies favor prescribing painkillers rather than more expansive solutions, such as physical therapy. In turn, this has increased the number of opioid users and prescribed painkillers available in the market.

Uniquely, there exists a stark contrast between the government and the justice system's response to the crack epidemic and the opioid crisis: empathy and rehabilitative justice. Court planners in Indian Country and the United States have established Healing to Wellness, Opioid Intervention, and Drug Courts geared toward more effective methods of handling opioid-related crime and addiction.

This article proposes that while the rehabilitative approach of Healing to Wellness and Opioid Intervention Courts is highly effective, drug courts should be altered in order to combat the current opioid crisis. To illustrate this, this article is broken into seven parts.

Part II provides a brief history of opioid use in the United States and how the government has responded to drug addiction in present times and in the past. Part III describes the causes of the current opioid crisis, including why Indian Country has been hardest hit by this issue. Part IV discusses opioid use among American Indians with narratives from people on the front lines of the opioid crisis in Indian Country. Part V describes the different types of courts in the United States: Drug Courts, Mental Health Courts, Healing to Wellness Courts, and Opioid Intervention Courts. Part VI considers the effectiveness of current drug court programs in place, with a particular analysis on Healing to Wellness Courts in Indian Country. This section contains narratives from those who have knowledge of and experience with the effect of Healing to Wellness Courts. Part VII compares Canada's approach to the United States' approach to refute the idea that universal health care would solve the problem. Finally, Part VIII provides the recommendation that the United States should reform drug courts and expand funding to communities with high rates of drug dependency.

## II. BRIEF HISTORY OF THE OPIOID CRISIS IN THE UNITED STATES AND THE GOVERNMENT'S RESPONSE

Drug addiction has been an issue since the founding of the United States.<sup>7</sup> During the American Revolution, the Continental and British armies used opium to treat sick and wounded soldiers.<sup>8</sup> David T. Courtwright cites that the physicians of Benjamin Franklin, Alexander

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<sup>6</sup> 2018 NSDUH Detailed Tables, SUBSTANCE ABUSE AND MENTAL HEALTH SERVICES ADMINISTRATION, <https://www.samhsa.gov/data/report/2018-nsduh-detailed-tables> [<https://perma.cc/9W9Z-W467>] (Aug. 20, 2019).

<sup>7</sup> DAVID T. COURTWRIGHT, DARK PARADISE: A HISTORY OF OPIATE ADDICTION IN AMERICA, 61-77 (2009) (ebook).

<sup>8</sup> *Id.*

Hamilton, and Aaron Burr prescribed them opium for any ailment resulting in pain.<sup>9</sup> Further, during the Civil War, the Union Army issued nearly ten million opium pills to its soldiers, plus 2.8 million ounces of opium powders and tinctures.<sup>10</sup> In 1856, the introduction of the hypodermic syringe and morphine led to the persistence of the issue.<sup>11</sup> By the late 1800s, upper-class or middle-class white women made up for more than sixty percent of opium addicts.<sup>12</sup>

Consequently, doctors began to warn the community about the dangers of over-the-counter use of opiates, the overuse of opiates, and its resultant impact on addiction.<sup>13</sup> They stated that doctors who resorted too quickly to prescribing an opiate were poorly trained and incompetent.<sup>14</sup> This resulted in the passage of new regulations, which worked to restrict the sale of opiates to patients with a valid prescription, and effectively ended availability of opiates over the counter.<sup>15</sup> Thereafter, a different kind of use emerged. Opium smoking, which was prevalent among indentured Chinese immigrant workers and lower-class white men.<sup>16</sup> The Federal Government quickly responded by regulating opium trade domestically and internationally.<sup>17</sup> The Harrison Narcotic Act of 1914, originally intended as a regulation of medical opium, became a near-prohibition.<sup>18</sup> The United States Supreme Court endorsed the law in 1919, and cities across the nation opened narcotic clinics for addicts.<sup>19</sup> However, the clinics did work in combatting addiction and opiate abuse.<sup>20</sup> However, by 1921, the Treasury Department's Narcotics Division closed nearly all the clinics.<sup>21</sup>

In the early 1980s and 1990s, the United States saw another drug crisis. The crack epidemic flooded inner cities. Countless Black lives were destroyed as crime rates surged and Black families separated. Starting with the Reagan administration, the American government implemented a plan to combat drug use and distribution.<sup>22</sup> Its effect established the carceral state in existence in the United States today. Nearly a century after the country's first opiate influx, the opioid crisis has re-emerged. As court systems have responded to the opioid crisis and drug use in the country, the federal government has started to follow suit by enacting legislation.

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

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

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

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

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

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

<sup>18</sup> *Id.*

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

<sup>20</sup> *Id.*

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

<sup>22</sup> REMARKS ON SIGNING AN EXECUTIVE ORDER AND A MESSAGE TO CONGRESS TRANSMITTING PROPOSED LEGISLATION TO COMBAT DRUG ABUSE AND TRAFFICKING, <https://www.reaganlibrary.gov/research/speeches/091586a> [<https://perma.cc/F6A6-NTZ6>] (last visited Dec. 18, 2020).

### III. CAUSES OF THE CURRENT OPIOID CRISIS

In 2016, sixty-five percent of drug overdoses that led to death in the United States were from opioids.<sup>23</sup> Specifically, this was a staggering 42,000 deaths, a record-breaking number.<sup>24</sup> The White House characterizes opioid use as the “worst drug crisis in United States history.”<sup>25</sup> What exactly led to this emergency throughout the nation and particularly in Indian Country? There are multiple, intersecting causes that are attributed to the current opioid epidemic, stemming from years of build-up and recent changes in the healthcare system.

#### A. Chronic Pain

Chronic pain in the United States can be argued to be a leading cause of the current opioid epidemic.<sup>26</sup> An extraordinary number of Americans deal with chronic pain on a daily basis. In 2016, twenty percent of adults in the United States, fifty million people, faced chronic pain.<sup>27</sup> Eight percent, approximately twenty million people, had high-impact chronic pain that limited at least one major life activity.<sup>28</sup> In fact, Americans reported experiencing more chronic pain than any other country in the world.<sup>29</sup>

Chronic pain can be caused by many different circumstances. One source of chronic pain is obesity, which is highly prevalent in the United States, especially when compared to other countries.<sup>30</sup> Obesity is a condition that can cause an increase in inflammation, stress on the joints, and disturbance of sleep, among other health-related issues.<sup>31</sup> These issues all cause and increase the chances of chronic pain.<sup>32</sup>

Chronic pain in the United States can be also be influenced by socioeconomic status.<sup>33</sup> One study concluded that populations of people facing poverty, lower education levels, and lack of access to healthcare were associated with higher levels of chronic pain.<sup>34</sup> Those with a lower socioeconomic status are more likely to be at risk for and face chronic pain.

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<sup>23</sup> ENDING AMERICA’S OPIOID CRISIS, <http://www.whitehouse.gov/opioids> [<https://perma.cc/CLZ2-KMP4>] (last visited Feb. 26, 2020).

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

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

<sup>26</sup> *Defining the Prevalence of Chronic Pain in the United States*, NATIONAL CENTER FOR COMPLEMENTARY AND INTEGRATIVE HEALTH, (Feb. 10, 2020), <https://www.nccih.nih.gov/research/research-results/defining-the-prevalence-of-chronic-pain-in-the-united-states> [<https://perma.cc/8ZKT-LXMT>].

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> Olga Khazan, *America Experiences More Pain Than Other Countries*, THE ATLANTIC (Dec. 20, 2017) <https://www.theatlantic.com/health/archive/2017/12/america-experiences-more-pain-than-other-countries/548822/> [<https://perma.cc/XA7Z-DUWR>].

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

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

<sup>32</sup> *Id.*

<sup>33</sup> Centers for Disease Control and Prevention, *Prevalence of Chronic Pain and High-Impact Chronic Pain Among Adults*, 67 MORBIDITY & MORTALITY WEEKLY REP. (2019).

<sup>34</sup> *Id.*

Opioid use itself can be a cause rather than a solution to chronic pain.<sup>35</sup> Paradoxically, a study found that opioids actually heighten the perception of pain.<sup>36</sup> This study concluded that opioids can actually cause people to become more sensitive to painful stimuli; therefore, this can actually increase their chronic pain.<sup>37</sup> While many different sources could be analyzed and concluded to cause chronic pain, these are just a few that paint a picture of this impactful issue that is strongly connected to the opioid epidemic in the United States.<sup>38</sup> Opioids are commonly prescribed to treat various degrees and types of chronic pain.<sup>39</sup> Therefore, a high amount of chronic pain may very likely correspond with a high amount of opioid use.

### *B. Over-Prescribing by Physicians*

Coincidentally, another prevalent cause of the opioid epidemic stems from the United States Health Care System. In the late 1990s, healthcare providers began to prescribe opioid pain relievers at a higher rate in order to treat chronic pain that was plaguing the United States.<sup>40</sup> This increase was due in large part to pharmaceutical companies' reassurance that opioids were not addictive.<sup>41</sup> However, this assertion was nothing but false, as opioids are addictive.<sup>42</sup> This increase in prescribing led to widespread misuse of opioids before it was clear that the medications were highly addictive.<sup>43</sup>

Opioids were a seemingly attractive option for doctors and patients. Opioid pills are a relatively cheaper and easier alternative to other pain management options.<sup>44</sup> Opioids were historically more covered by insurance policies than physical therapy and other pain management solutions.<sup>45</sup> Additionally, many pharmaceutical companies market to doctors and incentivize them to prescribe by essentially paying them to do so.<sup>46</sup> One study found that physician payments from

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<sup>35</sup> Khazan, *supra* note 26.

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

<sup>37</sup> Marion Lee, Sanford Silverman, Hans Hansen, Vikram Patel, Laxmaiah Manchikanti, *A comprehensive review of opioid-induced hyperalgesia*, 14 *Pain Physician* 145-61 (2011).

<sup>38</sup> Centers for Disease Control and Prevention, *supra* note 33.

<sup>39</sup> Centers for Disease Control and Prevention, *Prescription Opioids*, CENTERS FOR DISEASE CONTROL AND PREVENTION (Feb. 26, 2020), <https://www.cdc.gov/drugoverdose/opioids/prescribed.html> [<https://perma.cc/3PPW-M4DY>].

<sup>40</sup> Centers for Disease Control and Prevention, *Opioid Prescribing: Where you live matters*, VITAL SIGNS (July 2017), <https://www.cdc.gov/vitalsigns/opioids/index.html> [<https://perma.cc/SS95-7RG4>].

<sup>41</sup> U.S. DEP'T OF HEALTH AND HUMAN SERVICES, OPIOIDS: ABOUT THE EPIDEMIC (2019), *available at* <https://www.hhs.gov/opioids/about-the-epidemic/index.html> [<https://perma.cc/U2VR-C5T8>].

<sup>42</sup> NAT'L INSTITUTE OF HEALTH, U.S. NAT'L LIBRARY OF MEDICINE, OPIOID ADDICTION (2020), *available at* <https://medlineplus.gov/genetics/condition/opioid-addiction/> [<https://perma.cc/7ZBE-8N6V>].

<sup>43</sup> *Id.*

<sup>44</sup> *The Origin and Causes of the Opioid Epidemic*, GEORGETOWN BEHAVIORAL HEALTH INST. (Aug. 14, 2018), <https://www.georgetownbehavioral.com/blog/origin-and-causes-of-opioid-epidemic> [<https://perma.cc/3AFQ-DPQ3>].

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

<sup>46</sup> Scott E. Hadland, Magdalena Cerdá, Yu Li, et al., *Ass'n of Pharm. Indus. Mktg. of Opioid Products to Physicians with Subsequent Opioid Prescribing*, 178 *JAMA INTERN. MED.* (May 14, 2018), <https://jamanetwork.com/journals/jamainternalmedicine/article-abstract/2681059> [<https://perma.cc/BW5T-NN44>].

pharmaceutical companies was associated with greater opioid prescribing in 2015, where physicians received non-research payments related to opioid products.<sup>47</sup>

Examples of what over-prescribing consists of helps illustrate just how astonishing the problem is across the nation. In 2017, Kentucky providers wrote approximately 87 opioid prescriptions for every 100 persons.<sup>48</sup> In 2012, twelve states had more opioid prescriptions than people.<sup>49</sup> Providers in the highest prescribing counties in the nation prescribed six times more opioids per person than the lowest prescribing counties in 2015.<sup>50</sup>

The increase in opioid prescribing that began in the 1990s has increased the amount of prescription opioids available throughout the United States.<sup>51</sup> Certain locations have greater access to opioids than others.<sup>52</sup> Counties with higher opioid prescribing rates have been found to have the following characteristics: small cities and large towns, higher percentage of white residents, a high number of dentists and primary care physicians, more people who are uninsured or unemployed, and more people who have diabetes, arthritis, or disabilities.<sup>53</sup> Indian reservations are typically located in more rural areas with higher rates of unemployment and lifestyle-related diseases such as heart disease and diabetes, and they have a lower percentage of doctors.<sup>54</sup>

### *C. Causes of the Opioid Crisis in Indian Country*

In addition to nationwide causes of the opioid epidemic, Indian Country faces its own unique causes that have led it to be among the hardest hit by this crisis. American Indians face high rates of substance abuse in general due to a multitude of factors.<sup>55</sup> One source indicates that generational abuse, broken families, and a lack of traditional values all contribute to substance abuse problems within tribes.<sup>56</sup> Relatedly, mental health problems, early trauma and childhood abuse, cultural displacement, unemployment, and poverty within tribal communities all increase American Indians' odds for developing substance abuse disorders.<sup>57</sup> Prevailing rates of Post-

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

<sup>48</sup> NAT'L INST. ON DRUG ABUSE, KENTUCKY OPIOID SUMMARY (March 2019), *available at* <https://www.drugabuse.gov/opioid-summaries-by-state/kentucky-opioid-summary> [<https://perma.cc/E2E3-S7PM>].

<sup>49</sup> *Opioid Epidemic and the Courts*, NAT'L CTR. FOR STATE COURTS (last visited Feb. 28, 2020), <https://www.ncsc.org/~media/Microsites/Files/Trends%202016/opioid-infographic.ashx> [<https://perma.cc/4LRS-2UNK>].

<sup>50</sup> Centers for Disease Control and Prevention, *Opioid Prescribing: Where you live matters*, VITAL SIGNS (July 2017).

<sup>51</sup> *Opioid Overdose Crisis*, NAT'L INST. ON DRUG ABUSE (last updated February 2020), <https://www.drugabuse.gov/drugs-abuse/opioids/opioid-overdose-crisis> [<https://perma.cc/89E5-F2CA>].

<sup>52</sup> Centers for Disease Control and Prevention, *Opioid Prescribing: Where you live matters*, Vital Signs, July 2017.

<sup>53</sup> *Id.*

<sup>54</sup> *Indian Reservations*, A&E TELEVISION NETWORKS (March 18, 2019), [https://www.history.com/topics/native-american-history/indian-reservations#section\\_10](https://www.history.com/topics/native-american-history/indian-reservations#section_10) [<https://perma.cc/JSM6-UBK2>].

<sup>55</sup> *Alcohol & Substance Abuse*, NAT'L CONGRESS OF AM. INDIANS (last visited February 28, 2020), <http://www.ncai.org/policy-issues/education-health-human-services/alcohol-substance-abuse> [<https://perma.cc/NC6F-ZZST>].

<sup>56</sup> *Id.*

<sup>57</sup> Nat'l Ctr. for Biotechnology Info., U.S. Nat'l Library of Med., *American Indians with Substance Use Disorders: Treatment Needs and Comorbid Conditions*, 38 THE AM. JOURNAL OF DRUG AND ALCOHOL ABUSE 498-504, (Aug. 29, 2012), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3622709/> [<https://perma.cc/8FR6-DXVU>].

Traumatic Stress Disorder, domestic violence, loss, violence and racism coincide with and exacerbate substance abuse.<sup>58</sup>

Healthcare access has also had an effect on Indian Country. Tribal communities are targeted by non-Indian drug distributors because of their geographic isolation and persistent poverty.<sup>59</sup> Yet, access to primary care is limited and recovery treatment is largely unavailable.<sup>60</sup> Significant disparities in health status as compared with nonnative groups contributes to American Indians' likelihood of substance abuse.<sup>61</sup> All of these causes have been proven to have a concerning impact in Indian Country.

#### IV. AMERICAN INDIANS AND OPIOID USE

In 2017, American Indian populations had the second highest overdose rate, in the United States, from all opioids.<sup>62</sup> The National Congress of American Indians, an organization serving the broad interests of tribal governments and communities, attributes the opioid epidemic's impact on American Indians to supply and demand issues.<sup>63</sup> Opioids are made available for overuse and abuse through over-prescribing methods; overuse of opioids in pain management practices; community access through drug dealers, theft, prescribed opioids; illegal manufacturing; and pharmaceutical company distribution of large amounts of opioids in communities.<sup>64</sup> Opioids are in demand because of lack of access to appropriate care for pain management; use for relief of mental health issues, trauma, chronic stress; usage by impaired providers; poverty, unemployment and economic opportunity in drug trafficking, sales, and theft; lack of access to prevention, treatment, and recovery services; and lack of funding to address the opioid epidemic.<sup>65</sup>

##### A. Narratives

###### 1. Physician's Narrative:<sup>66</sup>

A physician who has worked in the tribal community for many years is able to speak to the reason why opioids are impacting Indian Country so greatly. He will be referred to as "the physician" throughout this article to honor his preference for anonymity.

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<sup>58</sup> *Id.*

<sup>59</sup> *Alcohol & Substance Abuse*, NAT'L CONGRESS OF AM. INDIANS (last visited February 28, 2020), <http://www.ncai.org/policy-issues/education-health-human-services/alcohol-substance-abuse> [<https://perma.cc/NB3Z-7GCE>].

<sup>60</sup> *Id.*

<sup>61</sup> Nat'l Ctr. for Biotechnology Info., U.S. Nat'l Library of Med., *American Indians with Substance Use Disorders: Treatment Needs and Comorbid Conditions*, 38 THE AM. JOURNAL OF DRUG AND ALCOHOL ABUSE 498-504, (Aug. 29, 2012), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3622709/> [<https://perma.cc/8FED-VKNR>].

<sup>62</sup> *Opioid Crisis Data: Understanding the Epidemic*, INDIAN HEALTH SERVICES (February 28, 2020), <https://www.ihs.gov/opioids/data/> [<https://perma.cc/4LF5-HXH5>].

<sup>63</sup> *NCAI Opioid Initiative*, NAT'L CONGRESS OF AM. INDIANS (last visited February 28, 2020), <http://www.ncai.org/initiatives/partnerships-initiatives/ncai-opioid-initiative> [<https://perma.cc/6K3K-89FN>].

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

<sup>65</sup> *Id.*

<sup>66</sup> Telephone Interview with Tribal Physician (Feb. 18, 2020), this person preferred to remain anonymous and not referenced to the specific tribe they work in. They speak to what is happening in Indian Country in general.

Firstly, the tribal community has already faced a historically disproportionate impact by substance abuse. In the past, this was skewed towards alcohol. In the last two decades, the physician claims this skew has moved towards opioids. This creates a potent situation: opioids mixed with a history of substance abuse. The physician attributes the opioid epidemic in Indian Country to the rise in physician to patient prescribing. Additionally, due to this increase in use and availability, more illegal drug dealers began to sell the drug as well.

The physician points out that illegal drug dealing creates other problems with even greater health risks. People turn towards injecting drugs, which leads to increased rates of HIV, Hepatitis A, Hepatitis B, and Hepatitis C. While some changes have been made in the rate at which physicians are prescribing opioids, this does not stop the shift to illicit markets.

In addition to the causes the physician described, there is also a reason as to why the opioid crisis remains a problem in Indian Country. The opioid treatment programs, to be discussed below, only have at most a fifty percent success rate. In addition to that, there are many other factors impacting people's chance for success in beating their substance abuse disorder, such as housing, employment, and family. The physician stated that we need to work on all of those things in order to have success overcoming this epidemic.

## 2. Tribal Member's Narrative:<sup>67</sup>

Dana Shorty, a Navajo Nation Tribal Member, describes opioid use in Indian Country as the same as anywhere else in the country. In Shorty's experience, because many tribal members cannot afford opioids, they often turn to cheaper options such as alcohol, mouthwash, or hair spray. Shorty noted the creative ploys that a person will devise in order to gain access to opioids. For example, Shorty explained that people have illegally obtained access to opioids by posing as nurses and going to houses on reservations to collect old prescription medications.

According to Shorty, cyclic drug use within families is one of the main causes of the current epidemic, particularly within Indian Country. Shorty explained that many young parents turn to drugs after being abused, often dying as the result of an overdose. Because of this, young children are left to live with their grandparents, further perpetuating the drug cycle. Furthermore, Shorty identified the recent increase in lack of respect towards elders as an element that exasperates drug use and familial hardships. Specifically, Shorty stated that rather than listen to elders' advice, many individuals turn to drugs and alcohol to fix their problems. In addition, Shorty has noticed that many people who recover from their addiction relapse in times of stress. Most profound, is that many of the people that Shorty knows who struggle with addiction do not want any help, and ultimately, die from a fatal overdose.

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<sup>67</sup> Telephone Interview with Dana Shorty, Navajo Nation Tribal Member (Feb. 23, 2020).

### 3. Former Tribal Judge's Narrative:<sup>68</sup>

Washington State Supreme Court Justice Raquel Montoya-Lewis is a member of the Pueblo Isleta tribe in New Mexico. In total, Justice Montoya-Lewis has twenty years of experience as a Judge. For fifteen of those years Justice Montoya-Lewis served as a Tribal Court Judge in New Mexico and Washington State. For the last five years, Justice Montoya-Lewis served as Superior Court Judge in Whatcom County, Washington. At the beginning of 2020, Justice Montoya-Lewis was appointed to the Washington State Supreme Court bench, making her the first American Indian to serve on that court's bench and the second for any state supreme court in the nation.<sup>69</sup> Throughout her career, Justice Montoya-Lewis has worked in Drug Courts, Healing to Wellness Courts, and on child welfare cases, which she emphasized intersect greatly with drug use and drug courts.

Justice Montoya-Lewis noticed a dramatic increase in opioid use over the past twenty years of her career, with two common occurrences introducing people to opioids. First, many people become addicted to opioids after receiving a prescription following a surgery or injury. Second, many young people begin experimenting with opioids for recreational use while in high school. Both occurrences often lead to addiction due to the addictive quality of opioids. Justice Montoya-Lewis further accredits the rapid increase in opioid use to the readily available access of the drug.

Justice Montoya-Lewis also attributes law enforcement issues to the increased prevalence of opioids on tribal land. Due to the complex jurisdictional issues on tribal land, non-tribal member drug dealers learned how to exploit the gaps in law enforcement authority to sell on tribal land. Law enforcements jurisdictional boundaries differ over Native, state, and federal land. This is an issue unique to Indian Country.

In addition, Justice Montoya-Lewis pointed out that over the past two years, she has seen a considerable increase in opioids concealed as prescription drugs. Justice Montoya-Lewis explained that people are using pill printers to make drugs look legitimate; yet, the counterfeit drugs are often laced with much more deadly drugs, such as fentanyl. The danger that counterfeit drugs pose on those who procure them creates a dangerous situation. Users no longer have assurance in what they are getting and are unknowingly taking high quantities of drugs that can be fatal in such doses. The result is an increase in overdoses, deaths, and other medical complications. Although Justice Montoya-Lewis has noticed the increase of this trend over the past couple of years, she states that it was unheard of just five years ago.

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<sup>68</sup> Telephone Interview with Raquel Montoya-Lewis, Washington State Supreme Court Justice (Feb. 27, 2020).

<sup>69</sup> Jim Camden, *Raquel Montoya-Lewis named as first Native American to Washington Supreme Court*, THE SPOKESMAN-REVIEW (Dec. 4, 2019), <https://www.spokesman.com/stories/2019/dec/04/inslee-appoints-raquel-montoya-lewis-a-former-trib/> [<https://perma.cc/A42Q-PKXD>].

#### 4. Healing to Wellness Drug Court Coordinator's Narrative:<sup>70</sup>

Ginger Phillips, a registered nurse and tribal member of the Cherokee Nation, has worked as a Chemical Dependency Professional for twenty-five years. Phillips has spent the majority of her career working with various American Indian tribes and is currently a Healing to Wellness Drug Court Coordinator.

Phillips has noticed a substantial rise in opioid use over the past ten years, explaining that prior to opioid use, marijuana and alcohol were the most prevalent drugs on tribal land. Phillips contributes the rise in opioid use to non-tribal communities overprescribing the drug. In Phillip's opinion people become addicted to the prescribed medication, resulting in them seeking out a drug that is easier to obtain, such as heroin. Phillips pointed out that, in her experience, heroin is much more prevalent on tribal land than prescription medication. Despite all the deaths and overdoses, Phillips stated that many people think they are invincible and have the "it won't happen to me" mentality when deciding to use drugs.

Further, Phillips contributed the rise in opioid use to drug dealers targeting tribal land, explaining that drug dealers enter tribal land, deal drugs, and then leave. Based on this analysis, outside drug dealers are effectively killing tribal members. Because the tribal police have no jurisdiction over outside drug dealers, it is hard to enforce penalties upon them. Like Justice Montoya-Lewis, Phillips has noted the rise in fake opioid pills containing fentanyl, resulting in an increase of fatal overdoses.

#### 5. State and Tribal Drug Court Participant's Narrative:<sup>71</sup>

Tribal Member Steffan Kinley has participated in both state and Healing to Wellness drug court programs and has lived on a reservation for most of his life. Boredom is what Kinley believes is the cause of opioid and other drug use in Indian Country. Kinley explained that many people cannot work due to a lack of education and jobs available on reservations. Although Kinley believes that the federal government's per capita payouts to American Indians supports them, he also believes that the payouts feed into the epidemic by not creating educational or career opportunities for American Indians. Kinley states that people often turn to drugs to get through their day, willing to face any consequence that may arise from using. Notably, like previous interviewees, Kinley stated that opioids are becoming cheaper and more dangerous, with a rise in fentanyl contamination.

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<sup>70</sup> Telephone Interview with Ginger Phillips, Healing to Wellness Drug Court Coordinator and Chemical Dependency Professional (Apr. 21, 2020).

<sup>71</sup> Telephone Interview with Steffan Kinley, State and Tribal Drug Court Participant (Apr. 29, 2020).

## V. DRUG COURTS, HEALING TO WELLNESS COURTS, AND OPIOID INTERVENTION COURTS

### A. Drug Courts

Drug courts are specialized courts that take a public health approach and employ the theory of therapeutic jurisprudence<sup>72</sup> (TJ). Under TJ, the judge does not ask that the state prove whether a crime has been committed, but rather whether the court can help heal a perceived pathology.<sup>73</sup> There are over 3,100 drug courts across the United States, half of which focus on adult treatment.<sup>74</sup> Miami's Dade County Felony Drug Court was the first drug court in the nation.<sup>75</sup> The court, created in 1989, was a response to the war on drugs, which resulted in a substantial increase in cases involving petty drug charges against defendants.<sup>76</sup> From a policy perspective, one scholar suggests that drug courts were necessary because the substantial increase in drug related indictments resulted in a backlog of cases that resulted in less efficient courts.<sup>77</sup>

Drug courts aim to keep non-violent, drug-addicted offenders in long-term treatment programs with strict supervision.<sup>78</sup> Judges hold eligible drug court participants accountable in the following ways: (1) they conduct random drug tests; (2) they require participants to appear in court for progress review; and (3) they reinforce behavior.<sup>79</sup>

On one hand, drug court proponents argue that drug courts are more effective than jail, prison, probation, and treatment alone.<sup>80</sup> More specifically, proponents argue that drug courts “significantly reduce drug use and crime” and do so in a more cost-effective manner “due, in part, to reduced prison costs, reduced revolving-door arrests and trials, and reduced victimization.”<sup>81</sup>

On the other hand, opponents to drug courts argue that although drug courts provide an alternative to immediate incarceration, they remain associated with the criminal justice system,

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<sup>72</sup> Morris B. Hoffman, *Therapeutic Jurisprudence, Neo-Rehabilitationism, and Judicial Collectivism: The Least Dangerous Branch Becomes the Most Dangerous*, 29 *FORDHAM URB. L. J.* 2063, 2063-98 (2002).

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

<sup>74</sup> U.S. Department of Justice, *Drug Courts*, OFFICE OF JUSTICE PROGRAMS (2009), available at <https://www.ncjrs.gov/pdffiles1/nij/238527.pdf> [<https://perma.cc/J3XB-9JM5>].

<sup>75</sup> Caroline Cooper, *Drug Treatment Courts and Their Progeny in the U.S.: Overcoming Their Winding Trajectory to Make the Concept Work for the Long-Term*, 8 *IJCA* 3, 3 (2017).

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

<sup>77</sup> J.J. Hennessy. Introduction: Drug Courts in Operation. *J. Offender Rehabilitation*, 33, 1-10 (2001).

<sup>78</sup> *The Facts on Drugs and Crime in America*, NATIONAL ASSOCIATION OF DRUG COURT PROFESSIONALS, available at <http://aja.nesc.dni.us/conferences/2009Annual/SpeakerMaterials/FactsonDrugCourts.pdf> [<https://perma.cc/93X6-3XJZ>].

<sup>79</sup> *Id.* (Judges reinforce behavior by rewarding good behavior through...and punish bad behavior by sanctioning lapses.)

<sup>80</sup> *Id.*

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

which further perpetuates the stigma surrounding drug use.<sup>82</sup> The system of rewards and punishments perpetuates this stigma.<sup>83</sup>

There is division amongst opponents of drug courts. For instance, in 2007, John A. Bozza critically analyzed the growth of drug treatment courts.<sup>84</sup> Bozza expressed concern that drug treatment courts eliminate the principle of neutrality otherwise accorded in the traditional adversarial system.<sup>85</sup> Further, Bozza noted that drug treatment courts transform judicial officers from neutral courtroom figures to therapists.<sup>86</sup> When judicial officers lose their neutrality, Bozza states, “the judge becomes a member of the treatment team” and is no longer interested in pursuing justice, but rather effectively helping the participant.<sup>87</sup> Ultimately, Bozza concluded that although drug treatment courts have reduced recidivism, a better-funded probation office would be a more effective solution because “after all, a probation officer can force people to treatment without obliterating the separation of powers.”<sup>88</sup>

Alternatively, Maya Schenwar and Victoria Law disagree with Bozza’s solution. Schenwar and Law contend that probation AND drug courts “widen [the criminal justice system’s] net of control and surveillance” because drug courts require regular drug tests, frequent court appearances, mandated participation in an intensive treatment program (inpatient or outpatient), classes, and support group attendance.<sup>89</sup> More specifically, Schenwar and Law posit that when “drug courts are painted as *the* alternative, their punitive and harmful aspects are eclipsed.”<sup>90</sup> The authors close by stating that mandated treatment generally does not take into account the underlying forces that drive drug dependency.<sup>91</sup> Citing Dr. Carl Hart, the authors suggest that the legal system must move away from the “disease model” of drug use.<sup>92</sup> Automatically labeling addiction as a disease allows the actors involved in mandated treatment to discount the social

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<sup>82</sup> Jordan Blair Woods, “A Decade after Drug Decriminalization: What can the United States learn from the Portuguese Model?” 15 UDC L. REV. 1, 29-30 (2011) (“Drug offenders are rewarded for continuing treatment, and if they complete treatment, then their criminal charges or convictions, or both, may be expunged...But if offenders do not complete treatment, then drug courts may punish offenders with graduated sanctions, which could ultimately lead to incarceration”).

<sup>83</sup> *Id.* (“These critics suggest that recreational drug users are the most likely participants to succeed in drug court programs, whereas drug-dependent users are the participants most likely to fail.189 By not meeting the conditions of drug courts, drug-dependent users regularly receive punitive sentences that are harsher than sentences that they would have received if they had accepted criminal plea bargains over drug court treatment.190 Offenders never escape the stigma of these punitive sentences, and risk being excluded from public benefit programs and employment opportunities because of their drug use convictions.191 Thus, drug courts may further harm drug-dependent users, which is the population that they are designed to help.”)

<sup>84</sup> John A. Bozza, *Benevolent Behavior Modification: Understanding the Nature and Limitations of Problem-Solving Courts*, 17 WIDENER L.J. 97, 113-4 (2007).

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

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

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

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

<sup>89</sup> MAYA SCHENWAR & VICTORIA LAW, *PRISON BY ANY OTHER NAME: THE HARMFUL CONSEQUENCES OF POPULAR REFORMS*, 57 (2020).

<sup>90</sup> *Id.* at 57.

<sup>91</sup> *Id.* at 59.

<sup>92</sup> *Id.*

factors such as racism and poverty, which drive drug dependency.<sup>93</sup> According to Dr. Hart’s study, the “vast majority of those who use illicit drugs such as heroin, crack cocaine, methamphetamine, and marijuana are not actually addicted to them.”<sup>94</sup>

### 1. Effectiveness

Regardless of one’s opinions regarding drug courts, most people who have studied drug courts are willing to concede that the creation of drug courts signified a significant paradigm shift from punitive to rehabilitative justice. However, the question remains as to whether the creation of these courts proffer positive outcomes. Retrospective data has found that when compared to those on probation, those who engaged in drug courts experienced reduced recidivism rates.<sup>95</sup> One study found that within a two-year period, the felony re-arrest rate decreased from forty percent to twelve percent after the drug court started in Escambia County (Pensacola, Florida), and the felony arrest rate decreased from fifty percent to thirty-five percent in Jackson County (Kansas City, Missouri).<sup>96</sup> Additionally, compared to the traditional criminal justice system processing system, drug courts save taxpayers an average cost savings range of \$4,000 to more than \$12,000.

In contrast, some drug courts have established procedures that have yielded higher costs with little change to recidivism rates. Such procedures include improper assessment and treatment, poor interactions with the judge, staff turnover, and resource allocation.<sup>97</sup> While drug courts were established to address the backlog of drug cases, their impact on the opioid crisis is abysmal. According to a nationwide survey published in 2013, nearly ninety-eight percent of drug courts reported that their programs included opioid-dependent individuals, with almost half estimating that more than twenty percent of participants were opioid-dependent.<sup>98</sup>

Where drug treatment courts fail opioid-addicted offenders is in the treatment process. Drug courts promote abstinence as opposed to medication-assisted treatment. A study published in 2010 found that only fifty-six percent of drug courts offered medical-assisted treatment. The use of medical-assisted treatment could explain the discrepancy in success rates of drug courts across the nation.<sup>99</sup>

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

<sup>94</sup> *Id.* Hart emphasizes that heavy drug use is often a reaction to social conditions such as racism and poverty, which are more likely to be the source of the problems attributed to drug use.

<sup>95</sup> *Do Drug Courts Work? Findings From Drug Court Research*, NAT’L INSTITUTE OF JUSTICE (last visited June 18, 2020), <https://nij.ojp.gov/topics/articles/do-drug-courts-work-findings-drug-court-research> [<https://perma.cc/6RKU-8QM9>].

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

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

<sup>98</sup> Samuel L. Dickman, Josiah D. Dora M. Dumont, et. al, *Medication Assisted Treatment in US Drug Courts: Results from a Nationwide Survey of Availability, Barriers and Attitudes*, U.S. DEPT. OF HEALTH AND HUMAN SERVICES (Dec. 3, 2012), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3602216/> [<https://perma.cc/3ERY-95C5>].

<sup>99</sup> See OFFICE OF THE ASSISTANT SEC’Y FOR PLANNING & EVALUATION, U.S. DEP’T OF HEALTH & HUMAN SERVS., EXECUTIVE SUMMARY: OPIOID ABUSE IN THE U.S. AND HHS ACTIONS TO ADDRESS OPIOID-DRUG RELATED OVERDOSES AND DEATHS (2015), [http://aspe.hhs.gov/sp/reports/2015/OpioidInitiative/es\\_OpioidI](http://aspe.hhs.gov/sp/reports/2015/OpioidInitiative/es_OpioidI) (Finding that medication-assisted treatment is indispensable in managing opiate dependence).

## B. Healing to Wellness Courts

Healing to Wellness courts (HWCs) are tribal versions of drug courts.<sup>100</sup> HWCs are guided by ten key components like state drug courts. HWCs integrate substance abuse treatment with the criminal justice system to provide substance-abusing offenders judicially supervised treatment and transitional services with intensive supervision, sanctions and incentives, and drug-testing in a non-punitive setting.<sup>101</sup> The main difference between HWCs and state drug courts is that HWCs are adapted for tribes to “better allow for diversity of cultures, languages, needs, governance structures, and laws.”<sup>102</sup>

Judges Flies-Away and Garrow suggest that the institutionalization of HWCs represents a spiritual revolution among Indigenous peoples and nations.<sup>103</sup> The concept of spirituality is “used to convey the relatedness and connectedness human beings share with all Creation and with each other by way of fundamental human and inherent rights and characteristics.”<sup>104</sup> For Indigenous people, the relatedness and connectedness with the world around them “helps depict and define who they are.”<sup>105</sup> However, tribal judges posit that “years of interaction with domineering cultures have caused many indigenous peoples to neglect or conceal” their awareness of the relatedness and connectedness with the world around them.<sup>106</sup>

Tribal judges argue that substance abuse, and for this paper’s intents and purposes, opioid abuse, is due to “lingering symptoms of conquest.”<sup>107</sup> The problem is that many defendants are not opposed to spending a short period of time in jail or having to pay a fine.<sup>108</sup> Furthermore, such forms of punishment achieve nothing because they do not address the problems that lead to addiction in the first place: the emotional, psychological, and social difficulties people face in their daily lives.<sup>109</sup>

HWCs replace the punitive approach to addressing addiction by bringing spirituality, rights, and the law in tandem. Indeed, the first key component of HWCs is centered on individual and community healing.<sup>110</sup> The tribal justice process in HWCs utilizes a collaborative approach to achieve the physical and spiritual healing of the individual participant and to promote Native nation-building as well as the well-being of the community.<sup>111</sup>

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<sup>100</sup> Joseph Thomas Flies-Away & Carrie E. Garrow, *Healing to Wellness Courts: Therapeutic Jurisprudence +*, 2013 MICH. ST. L. REV. 403, 410 (2013).

<sup>101</sup> *Tribal Healing to Wellness Courts: The Policies and Procedures Guide*, NATIONAL INSTITUTE OF CORRECTIONS (Nov. 2015), <https://nicic.gov/tribal-healing-wellness-courts-policies-and-procedures-guide> [<https://perma.cc/SL8V-MC67>].

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

<sup>103</sup> Joseph Thomas Flies-Away & Carrie E. Garrow, *Healing to Wellness Courts: Therapeutic Jurisprudence +*, 2013 MICH. ST. L. REV. 403, 410 (2013).

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

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

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

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

<sup>109</sup> *Id.*

<sup>110</sup> *Tribal Healing to Wellness Courts: The Key Components*, U.S. DEPT. OF JUSTICE (April 2003), <https://www.ncjrs.gov/pdffiles1/bja/188154.pdf> [<https://perma.cc/X7SR-GJ4E>].

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

However, among all problem-solving courts, HWCs have reported that their capacity caps at fifty individuals and, as a result, have the fewest active participants.<sup>112</sup>

### *C. Opioid Intervention Courts*

Debuting in Buffalo, New York in October 2017, Opioid Intervention Court (OIC) was created with the explicit goal of saving lives.<sup>113</sup> In a single week, three traditional drug court defendants fatally overdosed on opioids before their second court appearance. The city of Buffalo created OIC to prevent such tragedies from occurring by offering what over forty percent of drug courts do not offer: medication-assisted treatment.<sup>114</sup> OIC provides immediate intervention, treatment, and medication for defendants who screen positive for being at risk of an opioid overdose or addiction.<sup>115</sup>

The OIC model is uniquely designed to get nonviolent users into treatment within hours of their arrest instead of weeks.<sup>116</sup> The model requires daily check-ins with the judge.<sup>117</sup> Once a participant is stable, the OIC participant is transferred to a traditional weekly drug court.<sup>118</sup>

Due to the Buffalo OIC's recent inception, there is little data regarding how effective it is. Contained in the little data that does exist, a progress report shows that more than half of Buffalo participants who had been in the program past their target end date tested positive for a controlled substance between the beginning of April and end of June.<sup>119</sup> In that time period, twenty-three people failed to complete the program altogether. Further, ten participants exited unsuccessfully because of "criminal involvement," which included technical violations or arrests, and "lack of engagement," which judicial officers described as "no-shows" or "unresponsive."<sup>120</sup> However, as of October 2019, University of Buffalo researchers and the Erie County Opioid Epidemic Task Force are slated to begin a scientifically rigorous study to evaluate OIC's strategy and compare the outcomes of OIC participants with a group of participants enrolled in traditional drug treatment court.<sup>121</sup> The study will compare the following:

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<sup>112</sup> Suzanne M. Strong, Ph.D., Ramona R. Rantala, et.al, *Census of Problem-Solving Courts, 2012*, U.S. DEPT. OF JUSTICE (Revised Oct. 12, 2016), <https://www.bjs.gov/content/pub/pdf/cpsc12.pdf> [<https://perma.cc/RRL2-RXZ>] (reports that wellness courts have nine or fewer active participants in 2012).

<sup>113</sup> *The 10 Essential Elements of Opioid Intervention Courts*, CENTER FOR COURT INNOVATION (2019), available at [https://www.courtinnovation.org/sites/default/files/media/documents/2019-07/report\\_the10essentialelements\\_07092019.pdf](https://www.courtinnovation.org/sites/default/files/media/documents/2019-07/report_the10essentialelements_07092019.pdf) [<https://perma.cc/A4GT-KY9P>].

<sup>114</sup> Grace Lazzara, *Do Opioid Intervention Courts work? UB study will provide the answer*, U. OF BUFFALO (Oct. 30, 2019), <http://www.buffalo.edu/news/releases/2019/10/051.html> [<https://perma.cc/8UFD-S7BG>].

<sup>115</sup> Heitler, Sherry Klein, *New York Courts Respond to the Opioid Epidemic*, 90 NEW YORK STATE BAR JOURNAL 30, 30-31 (2018).

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

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

<sup>118</sup> *Id.*

<sup>119</sup> *BJA Report*, BUREAU OF JUSTICE ASSISTANCE (2018), <https://filtermag.org/wp-content/uploads/2019/03/BJA-report-Buffalo-Opiate-July-2018.pdf> [<https://perma.cc/4W9V-E58W>].

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

- (1) differences in the time needed to get people into treatment and changes in their use of substances over time;
- (2) changes over time in mental health, like symptoms of depression or role limitations to mental health, and physical health-like pain or role limitations due to physical health;
- (3) changes in social and environmental factors to recovery (housing stability, employment, social connectedness); and
- (4) impact on justice-related outcomes (people's adherence to court appointments, drug-related arrests, non-drug related arrests, incarceration).<sup>122</sup>

In evaluating the effectiveness of OIC, researchers are doing something revolutionary and are acknowledging the inextricable interrelatedness of opioid abuse, mental health, and community. As discussed below, this proposition and acknowledgment foreshadows the overarching recommendation of this article.

## VI. EFFECTIVENESS OF RESPONSES TO THE OPIOID EPIDEMIC IN INDIAN COUNTRY

### A. *Physician's Narrative Continued*.<sup>123</sup>

Before delving into the effectiveness of tribal-specific responses to opioid use among tribal members, the physician (the same as the one mentioned above) pointed out that there are barriers to treatment programs that affect treatment in Indian Country and nationwide. Opioid treatment programs provide medication-assisted treatment for those with opioid-use disorder.<sup>124</sup> The different opioid substitution drugs used under these programs are methadone, suboxone, and naltrexone.

Methadone has been shown to be the most successful substitution drug, according to the physician. However, the Substance Abuse and Mental Health Services Act (SAMHSA) requirements are very rigorous with complex, strict legal rules accompanying it. The physician argues the biggest structural barrier to the use of this drug is the fact that it can only be taken in a directly observed model: a licensed prescriber must watch the patient take the drug in-person at a facility. The required observed model creates a very high burden to treat those living on tribal land because it is extremely difficult to find a licensed prescriber to go out to the rural areas that reservations are typically in and observe people take the drug every single day. The physician

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<sup>122</sup> *Id.*

<sup>123</sup> Telephone Interview with anonymous physician (Feb. 18, 2020).

<sup>124</sup> *Certification of Opioid Treatment Programs (OTPs)*, SUBSTANCE ABUSE AND MENTAL HEALTH SERV. ADMIN. (Sept. 28, 2015), <https://www.samhsa.gov/medication-assisted-treatment/opioid-treatment-programs> [<https://perma.cc/U9PH-XJBY>].

explained that the prescriber would have to drive very long distances in order to do this, assuming they did not live near reservations.

Suboxone has a different barrier. In order to prescribe this substitution therapy drug, physicians need eight hours of extra training as well as an enhanced Drug Enforcement Agency (D.E.A.) License. After completing the training and obtaining the license, a physician may then prescribe the drug just like they would prescribe any other medication to patients. The number of doctors with the ability to prescribe suboxone is low, but it has been going up with the attention to the opioid epidemic in recent years. The other drug is naltrexone, which has similar barriers, but is used less than the others.

The physician describes drug courts as a good idea; however, they have limited impact because they are only available for high risk, high need people. The drug courts are not equipped for minor or first-time offenders, which the physician emphasizes misses a lot of people who could benefit from it. Essentially, drug courts are waiting too long to help many people. The physician argues that drug offenders should not enter the criminal justice system but should rather be immediately turned over to a healthcare provider, provided that the crime was a result of using drugs and was not an egregious offense.

The physician stated that tribes are better able to help those with opioid-use disorder. He noted that tribes are more responsible to the community they are serving, have more flexibility, and can assist in more rational ways. Particularly important is tribes' ability to use cultural settings as a different avenue to help those with addiction. In some areas, courts will send drug users straight to these cultural programs rather than to jail. In addition to this, the physician believes that a community-based and connected healthcare system helps tribal members. The physician believes that those outside Indian Country would benefit from this; however, the ability to do this may be limited due to the lack of cultural practices and community nationwide.

*B. Tribal Member's Narrative Continued:*<sup>125</sup>

When asked about the Navajo Nation's Healing to Wellness Courts, Tribal Member Dana Shorty stated that she has not noticed the court system helping with opioid use at all. While the Navajo Nation does have a Healing to Wellness Court, Shorty stated that the court system does not really check up on people, which she thinks would make their work more impactful. She stated, "They are supposed to be helping." In effect, they are not making an impact on opioid use.

Instead of utilizing the court system, Shorty believes there are other ways that would be more effective to fight the opioid epidemic in Indian Country. Referencing the drug use cycle within families described above, she asserted that the focus should be on the children. Shorty stated that Indian Country should have better educational and activity systems for their children, so that they do not fall into a way of living that involves drug use. Specifically, Shorty believes showing the children there is a bigger world out there and that they have the power to decide to live a better life would lead to positive changes and a decrease in opioid and other drug use. Shorty suggested

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<sup>125</sup> Telephone Interview with Navajo Nation Tribal Member Dana Shorty (Feb. 23, 2020).

that this could be accomplished through the engagement of family and community members, programs, and education.

*C. Former Tribal Court Judge's Narrative Continued:*<sup>126</sup>

Justice Montoya-Lewis offers valuable insight into the response to the opioid epidemic not only in Indian Country, but also in state courts. This paper will offer her descriptions and comments on Healing to Wellness Courts and other tribal therapeutic courts, and then contrast that with her thoughts and ideas about state courts' actions.

In Washington State, Lummi Nation has an official Healing to Wellness Court while Nooksack Tribe has a therapeutic court, which offer similar approaches. In Lummi, the Healing to Wellness Court is a fundamental part of the court system for people persistently charged with crimes where addiction was driving the crime to be committed. Notably, this court can be used by first-time offenders. Justice Montoya-Lewis pointed out that many people involved in these courts are parents who are also involved in child welfare cases.

To use these courts, people must apply to the program and then go through a drug and alcohol evaluation. From there, most people are admitted into inpatient treatment, while some have already completed it, as it may not be their first time being admitted. This treatment usually lasts for a month or longer, depending on the needs of the particular person. It takes one year at a minimum to complete a drug court program. Most people will relapse sometime after treatment ends given the difficulties to overcome addiction. However, there are multiple opportunities for programs and treatments, regardless if the person was successful in the past. Contrastingly, there is no support or skills related to addiction and recovery offered in jail, causing people to be released and go back to doing the same thing without having a program to utilize. Thus, there are very impactful difference between the tribal court programs and the traditional criminal justice system outside of Indian Country.

Justice Montoya-Lewis asserts that those who benefit the most from these courts are high-risk, high-need people. These are people who face not only addiction, but homelessness, medical issues, and welfare cases, among other struggles. She points out that there is greater success among low-risk, low-need people as long as they receive some social support. A less intensive program, such as probation, can serve these people adequately. Justice Montoya-Lewis points out that mixing high-risk and low-risk people in these programs can create issues. She stated that the low-risk people tend to do worse, as they can learn bad habits from the high-risk people who have been involved in this longer. All in all, it works better to be placed with people who have similar needs.

For long-term success, Justice Montoya-Lewis states there needs to be a comprehensive system of support that includes ongoing treatment support. This view is similar to the position of the physician discussed above. Justice Montoya-Lewis explained that many people with extremely high needs have no social support. What they really need to be successful is to have routine in their lives and people to help them figure out housing, employment, and education plans.

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<sup>126</sup> Telephone Interview with Raquel Montoya-Lewis, Washington State Supreme Court Justice (Feb. 27, 2020).

Justice Montoya-Lewis pointed out that there is a negative factor to the Healing to Wellness Courts. Once people graduate the program, they gain a lot of autonomy and no longer have the same level of supervision. Because of this, many people return to their old ways with the lack of supervision, which raises the issue as to how courts can continue to support people who no longer need the drug court but still need the supervision.

When asked if the Healing to Wellness Courts help maintain culture in tribes, Justice Montoya-Lewis said they absolutely do. These courts offer a perspective that the individual is always a part of the community and culture of their tribe. The key to successful healing is being a part of the cultural practices. No matter what happens or whether someone has no familial support, they always have community support. In other words, the community is responsible to the individual to ensure they stay connected. As explained below, this approach differs enormously than those used by state courts.

Justice Montoya-Lewis highlighted that a key piece of the Healing to Wellness Courts is the family tree project. Each person must develop a family tree and present it. This impactful project requires people to research and discuss their families and where they came from. It encourages people in recovery to look to natural support from people in their family who are still around. It also allows people to see the longevity of their family and that their family still being here is because of the strengths and survival of their family. It helps to encourage people to stay strong just as their family did. While this usually brings up a difficult story from the past, Justice Montoya-Lewis says it is always a positive experience. Projects and values such as the family tree project are not emphasized in state courts.

In state courts, recovery is focused on the individual; this is an institutional separation from the perspective tribal courts use. Justice Montoya-Lewis explains that in state courts, drug users are seen as “others” in the community, and their drug use and recovery is something that is solely focused on them as an individual. It is up to that individual to heal on their own. In Healing to Wellness and other tribal courts, family is fundamental to success and there is a community commitment to help that person.

Justice Montoya-Lewis states that without a family or community focus, the court system will never provide long-term change for drug-users. People need that support in order to be successful. Justice Montoya-Lewis explains that state courts should learn from tribal courts’ models, as it is adaptable. She also stated that the family history component (as discussed with the family tree project above) should be added to a person’s recovery through the state. This allows people to recognize that other family members have faced the same issues as them, which Justice Montoya-Lewis says can be incredibly freeing; it gives a perspective to people beyond their self.

From her time in tribal courts and then as a superior court Judge, Justice Montoya-Lewis witnessed many of the same clients coming through both the state and tribal court systems. Because each system is so fundamentally different with differing strategies, people are receiving two different messages from two different court systems about what they need to do. Justice Montoya-Lewis describes trying to satisfy both court’s requirements as a “recipe for disaster.” This issue

needs to be addressed by the courts. Both court systems have the same long-term goals to reduce recidivism, and communication between the two could be the key to uniformity and effectiveness.

Justice Montoya-Lewis believes state courts could improve and follow tribal courts' model through communication and collaboration. She explains that Healing to Wellness Courts have an interest in sharing their tools and success with state courts; however, it is unclear whether there is a reciprocal interest. The family and community aspects are integral to success and state courts could learn a lot from tribal courts to incorporate this into their system.

*D. Healing to Wellness Drug Court Coordinator's Narrative Continued:*<sup>127</sup>

Ginger Phillips states that Healing to Wellness Courts do make a noticeable difference on the opioid crisis among tribes, with the success of the program being highly dependent on the individual. Phillips stated that most places are doing as much as they can with drug court programs and medication-assisted treatment; however, these programs need a willing participant in order to be successful. Phillips describes the situation as a "good battle."

Phillips explained that Healing to Wellness Courts are effective because they focus on the whole person and are aimed at healing as many different aspects of the person as possible. Healing the whole person includes looking at the cause of each person's substance abuse, not just the problem of drug abuse itself. By focusing on the whole person, the chance at recidivism decreases while the chance for long-term recovery increases. Phillips stated that everyone deserves a chance and that these programs give people a glance at what life can be like, which can be very impactful on their recovery.

Phillips describes the effectiveness of the culture and community aspects of Healing to Wellness programs as dependent on the particular tribe. Ms. Phillips explained that each tribe has its own level of culture and community. She has worked in tribes where culture and community are very strong; families always show up to support their loved ones and carry on culture, which creates a very positive impact on participant's treatment. In other tribes, the culture has died— young people are not cultural and there is minimal family involvement. One tribe Phillips worked in did not like the Healing to Wellness Court. Tribal members thought it was too difficult and that jail was a better option. Additionally, families can be resistant to participate in these programs because they have their own addictions that they do not want to talk about. Phillips stated that drug use contributes to this lack of culture and minimal family involvement in some tribes.

The success of the Healing to Wellness Court also depends on the individual. Phillips states that internal motivation is the best success factor for individuals. The challenge with this is that drug courts can only provide external motivation. There are many contributing factors that make long-term recovery difficult for tribal members. There are not many jobs available on reservations, especially for those with convictions. There can be high rates of illiteracy. Phillips explains that it is hard for these individuals to stay motivated when there are not many opportunities available in the community.

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<sup>127</sup> Telephone Interview with Ginger Phillips, Healing to Wellness Drug Court Coordinator and Chemical Dependency Professional (Apr. 21, 2020).

Due to the substance abuse rates in Indian Country, there is an enormous amount of grief and loss caused by drug overdoses. Phillips explained that people are unable to work through their grief because tragedies, such as overdoses and deaths, keep occurring.

Phillips compared the Healing to Wellness Court to a healing forest—when you take a tree out of the healing forest, it will get sick again. Phillips noted that after completing the program and leaving the healing forest, many end up going back to drug use. Rather than staying on the reservation, Phillips noted that those who leave the reservation tend to be the most successful. People do not face the same influences and lack of opportunity that they did on the reservation.

Phillips describes state drugs courts as stricter and more punitive than Healing to Wellness Courts. In turn, people are successful out of fear of jail time, which they face for small incidents, such as diluting their urine for a drug test. State courts also have many different providers, and services are spread out all over, requiring transportation and travel.

Differently, Healing to Wellness Courts take a loving and nurturing approach that focuses on the concept of the whole person. Phillips explains that this is why state courts are not as healing as tribal courts. All of the services provided by the Healing to Wellness Court are in one place. This is better suited for tribal members because many live on the reservation and do not have transportation. Healing to Wellness Courts also give people more chances than state courts do, which may or may not be a positive aspect of the program.

Phillips explained state courts have higher success rates because Healing to Wellness Courts give people so many chances and hold onto them for too long. If the Healing to Wellness Court is not effective for a particular individual, after a certain amount of time, it is ineffective to keep them in the program. An example of this is one woman who was in the Healing to Wellness Court program for four years and eventually died from her drug use. Phillips believes more structure such as stricter rules may be better and could have possibly prevented this death from occurring. Contrastingly, state courts tend to kick people out of their drug court program easily, giving up on people too early.

Overall, Phillips believes Healing to Wellness Courts are more beneficial than state drug courts. State courts could focus more on healing the whole person and not taking a wholly punitive approach, while Healing to Wellness Courts could add more structure into their programs in order to be more effective. Phillips noted changes to the court programs in Indian Country can be done much easier because they are sovereign nations.

#### *E. State and Tribal Drug Court Participant's Narrative Continued:*<sup>128</sup>

Steffan Kinley offers a firsthand glimpse into the effectiveness of the current response to the opioid epidemic in both state and tribal drug court programs.

When he was younger, Kinley participated in a state juvenile drug court. This experience was eye-opening for him. He explained that the strict requirements kept him accountable. The program required community service hours, attending Alcoholics Anonymous and Narcotics

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<sup>128</sup> Telephone Interview with Steffan Kinley, state and tribal drug court participant (Apr. 29, 2020).

Anonymous meetings, and completing job applications on a weekly basis, among other requirements. Kinley explained that the program got him to do things he would not normally do, such as going to meetings and applying for jobs, and it ultimately led to him becoming more independent and attending school. The program showed Kinley how capable he was, which he said he would not have known otherwise. The juvenile drug court program really motivated him, and he used the opportunity to push himself.

While this experience was extremely helpful to Kinley, he does think that state courts could be nicer and not treat people as though they are just a statistic. He also noted they could offer more recognition to those excelling in the program, rather than being skeptical of their progress.

As an adult, Kinley participated in Healing to Wellness Court. Kinley states that the Healing to Wellness Court was much more healing than his experience in the state drug court. He describes Healing to Wellness Courts as very supportive and encouraging. While Kinley's tribe already has a close community, the program helps to bring families together and utilizes spirituality throughout the program. This helps to maintain community and culture within the tribe. Kinley further explained that the Healing to Wellness Court provides different ways of learning that emphasize an American Indian perspective. An example of this is relating the twelve-step program from Alcoholics Anonymous into an American Indian perspective. Finally, Kinley noted that another helpful aspect of the Healing to Wellness Court is the Moral Reconciliation Therapy (MRT) that is provided. This behavioral treatment aims to decrease recidivism by helping participants with moral reasoning and decision-making skills.

The Healing to Wellness Court is very healing, but Kinley says it could be more effective if certain changes were made. He explained that there needs to be more accountability. Some people participating in the program are simply taking advantage of the ability to avoid jail. It is frustrating for him to see people defying the program, while others, like himself, are working really hard towards their recovery and following the program closely and wholeheartedly. Because of this, he recommends that everyone should have a program tailored towards them specifically. Therefore, those who need a greater push should receive stricter treatment, and those who are doing well in the program should receive more encouragement. In addition to this, Kinley states that the Healing to Wellness program needs to help participants obtain a job and education. He explained that people need to be pushed and motivated to do something they think they cannot do in order to be successful.

Kinley provided a few other recommendations to help attack the opioid epidemic in Indian Country. He stated that tribes need a treatment and detox center. A lot of people die on the way to the hospital; something needs to be put into place to get people stable before then. In addition to this, he believes that tribal members should not receive free money from the government. Instead, the government should provide opportunities for American Indians in the way of jobs and education. Kinley noted one thing that would be helpful would be providing technical college offerings so that tribal members can specialize in different trades. Overall, the key is to provide more opportunities for American Indians. Both state and Healing to Wellness Courts need to improve their current systems to better address the opioid epidemic.

## VII. CANADIAN APPROACH

### A. Canada's Opioid Crisis

The opioid crisis is a global emergency and is growing in Canada. Akin to the United States, Canada's crisis is driven by both illegal and prescription opioids. Since the early 1980s, the volume of opioids in Canada sold to hospitals and pharmacies for prescriptions in Canada increased by more than 3,000 percent.<sup>129</sup> In 2016, eight people died each day from an apparent opioid-related death.<sup>130</sup> Moreover, sixteen Canadians were hospitalized each day due to opioid-related poisonings.<sup>131</sup> While the opioid crisis has affected every region of Canada, British Columbia, Alberta, Yukon, and Northwest territories have experienced the highest burden.<sup>132</sup>

While Canada and the United States share the same threat from opioids, their current situations are different in several ways. First, Canada already had legislation focused on its Indigenous communities that could immediately address the opioid crisis. Second, Canada, unlike the United States, has more empirical data regarding the impact of the opioid crisis on Canada's First Nations, making efforts to address the crisis easier. Lastly, Canada functions under a universal healthcare system; however, it is one of the few countries with a universal healthcare system that does not include coverage of prescription medication. But, in all Canadian provinces and territories, pharmaceutical medications are covered by public funds for the elderly and indigent.<sup>133</sup>

What follows is an expansion on these differences to highlight three assertions: (1) there needs to be a greater emphasis placed on data collection of the opioid crisis's impact on Indigenous peoples; (2) cultural competence should be embedded in every piece of legislation regarding the opioid crisis; and (3) a universal healthcare system does not mitigate the problem, so the solution lies in regulation.

#### 1. The Impact on Canada's First Nations

In 2017, following the declaration of emergency by the World Health Organization, seven Canadian Indigenous tribes declared a state of emergency due to a worsening drug crisis.<sup>134</sup> Manitoba's Dakota Ojibway Tribal Council asserted that "addiction to opioid, crack and methamphetamine is causing crime, suicide, and health problems."<sup>135</sup> Chiefs from the Birdtail Sioux, Dakota Tipi, Long Plain, Roseau River Anishinabe, Sandy Bay Ojibwaym Swan Lake, and

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<sup>129</sup> Lisa Belzak & Jessica Halverson, *Evidence Synthesis – The Opioid Crisis in Canada: a National Perspective*, HEALTH PROMOTION AND CHRONIC DISEASE PREVENTION IN CANADA (Jun. 2018), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6034966/> [<https://perma.cc/BSJ2-NBG5>].

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

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

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

<sup>133</sup> *Evolution of our Health Care System*, GOVERNMENT OF CANADA (last visited April 27, 2020), <https://www.canada.ca/en/health-canada/services/health-care-system/reports-publications/health-care-system/canada.html#a3> [<https://perma.cc/2G85-4JZ2>].

<sup>134</sup> *Canada First Nations Declare Drugs State of Emergency*, BBC NEWS (Sept. 7, 2017), <https://www.bbc.com/news/world-us-canada-41192817> [<https://perma.cc/RNX5-GRND>].

<sup>135</sup> *Id.*

Waywayseecappo First Nations held a press conference to raise awareness about the crisis, as they estimate that sixty percent of babies are born addicted to opioids.<sup>136</sup> Additionally, other sources cited that First Nations individuals were five times more likely than non-First Nations people to be hospitalized and six times more likely to appear in an emergency room due to opioid poisoning.<sup>137</sup> Consequently, Chief Kenneth Chalmers, Dakota Ojibway Tribal Council Chairperson, said, “When I see our grandmothers, who are on prescription drugs, handing them out, it is purveyed right through our communities.”<sup>138</sup> In response, the First Nations took matters into their own hands and began implementing drug intervention and education programs.

In contrast, the United States government has little insight as to how Indigenous communities fare as it pertains to the opioid epidemic.<sup>139</sup> According to the CDC, “whereas [Indigenous peoples] have experienced larger increases in drug overdose mortality than have other racial and ethnic groups in the United States, there is little known about regional impact of opioids in tribal and urban [Indigenous] communities.”<sup>140</sup>

## 2. Legislative Solutions

In 1979, the Canadian government enacted the Indian Health Policy.<sup>141</sup> The policy recognizes the circumstances under which many Indian communities exist as gravely disadvantageous compared to most Canadians in terms of health.<sup>142</sup> The goal of the policy is to achieve an increasing level of health in Indian communities—generated and maintained by the Indian communities themselves.<sup>143</sup> As such, the Canadian government embraces three pillars: community development; traditional relationship of the Indian people to the federal government; and the interrelated Canadian health system.<sup>144</sup>

Though this act was in existence before the declaration of emergency in 2017, it reinforces the notion that community development, the relationship between the federal government and Indian people, and the health system all must be present and functioning before the implementation of a drug court. Addiction, drug use, and drug distribution do not exist in a vacuum. History, addiction, community, and the legal system are not and cannot be mutually exclusive, as is seemingly the case in the United States.

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<sup>136</sup> *Id.*

<sup>137</sup> *Opioids and substances of misuse among First Nations people in Alberta: Alberta report, 2017*, ALBERTA HEALTH (Nov. 6, 2017), [open.alberta.ca/dataset/cb00bdd1-5d55-485a-9953-724832f373c3/resource/31c4f309-26d4-46cf-b8b2-3a990510077c/download/Opioids-Substances-Misuse-Report-FirstNations-2017.pdf](https://open.alberta.ca/dataset/cb00bdd1-5d55-485a-9953-724832f373c3/resource/31c4f309-26d4-46cf-b8b2-3a990510077c/download/Opioids-Substances-Misuse-Report-FirstNations-2017.pdf) [<https://perma.cc/F28U-MB2S>].

<sup>138</sup> *Supra* note 160.

<sup>139</sup> *Drug, Opioid-Involved, and Heroin-Involved Overdose Deaths Among American Indians and Alaska Native—Washington, 1999-2015*, CENTERS FOR DISEASE CONTROL AND PREVENTION (Dec. 21, 2018), <https://www.cdc.gov/mmwr/volumes/67/wr/mm6750a2.htm> [<https://perma.cc/U4E9-6RRS>].

<sup>140</sup> *Id.*

<sup>141</sup> *Indian Health Policy 1979*, HEALTH CANADA (modified Oct. 24, 2007), <http://caid.ca/IndHeaPol1979.pdf> [<https://perma.cc/65DF-7D4N>].

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

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

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

### 3. The Canadian Approach to Drug Courts

In 1998, Canada's first drug treatment court was established in Toronto. Similar to drug courts in the United States, Canadian drug treatment courts began as a response to large numbers of offenders being incarcerated for drug-related offenses and recidivism due to underlying drug dependency. The Drug Treatment Court Funding Program (DTCFP) was established in 2004 and is part of the Treatment Action Plan of National Anti-Drug Strategy.<sup>145</sup> The aim of this project is to reduce drug-related crimes through court-monitored treatment and community service support for non-violent offenders with drug addictions.<sup>146</sup> Canada's Department of Justice outlines the objectives of the program as follows: (1) to promote and strengthen the use of alternatives to incarceration; (2) to build knowledge and awareness among criminal justice, health and social services practitioners, and the general public about drug treatment courts; and (3) to collect information and data on the effectiveness of drug treatment courts in order to promote best practices and the continuing refinement of approaches.<sup>147</sup>

Based on data since 2007, over 1,000 individuals have participated in a federally funded Drug Treatment Court. Of these, thirty-five percent have either graduated or are still in the program.<sup>148</sup> Many of the remaining sixty-five percent had achieved some quality-of-life improvements (e.g., no longer homeless, received several months of addiction treatment, and were connected to social supports within the community).<sup>149</sup>

### 4. Canada's Universal Healthcare System

In 1984, the Canada Health Act was passed.<sup>150</sup> It created a system of publicly funded health care that is financed with general revenue raised through federal, provincial, and territorial taxation.<sup>151</sup> It grants latitude to provinces to charge a health premium on their residents to offset health care costs absorbed by the government, however, non-payment of a premium must not limit access to medically necessary health services.<sup>152</sup>

The act specifically outlines direct federal delivery of services to First Nations people and Inuit.<sup>153</sup> One important aspect to note is that the Canada Health Act does not cover prescription drugs for everyone, only for seniors, children, and low-income residents.<sup>154</sup> Under this Act, the

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<sup>145</sup> *Drug Treatment Court Funding Program*, GOVERNMENT OF CANADA: DEPARTMENT OF JUSTICE (modified Dec. 13, 2019), <https://www.justice.gc.ca/eng/fund-fina/gov-gouv/dtc-ttt.html> [<https://perma.cc/478Y-KD28>].

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

<sup>147</sup> *Id.*

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

<sup>149</sup> *Drug Treatment Court Funding Program*, GOVERNMENT OF CANADA: DEPARTMENT OF JUSTICE (modified Dec. 13, 2019), <https://www.justice.gc.ca/eng/fund-fina/gov-gouv/dtc-ttt.html> [<https://perma.cc/AT28-N32V>].

<sup>150</sup> *Evolution of our Health Care System*, GOVERNMENT OF CANADA (modified Sept. 17, 2019), <https://www.canada.ca/en/health-canada/services/health-care-system/reports-publications/health-care-system/canada.html#a3> [<https://perma.cc/T3K5-PS8H>].

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

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

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

<sup>154</sup> *Id.*

federal government remains responsible for health protection and regulation, most notably of pharmaceutical, food, and medical devices.<sup>155</sup>

In 2017, the Canadian government introduced opioid prescribing guidelines.<sup>156</sup> The guidelines set a standard by which medical and opioid prescribing is judged.<sup>157</sup> Under these guidelines, provincial regulators have investigated doctors who prescribe high doses.<sup>158</sup> The consequence of these investigations is that some primary care physicians practice in a climate of fear, concerned about complaints and potential investigations.<sup>159</sup> As a result, some physicians have dropped patients to whom they had previously prescribed opioids, while others have decided to stop prescribing opioids altogether.<sup>160</sup> Unfortunately, this leaves patients and the twenty percent of Canadians living in chronic pain with nowhere to turn.<sup>161</sup>

### VIII. RECOMMENDATIONS

To heal something or someone is to ‘make it whole.’ To heal, therefore, is to bring together the component parts of any system – be it human, animal, plant or ‘inanimate’ system – in an including rather than excluding way. When we do this, we bring about true healing rather than just the kind of ‘healing’ which is concerned with fixing pain, disguising discord, or in some way treating the symptom rather than the cause.<sup>162</sup>

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To more effectively address the opioid epidemic, changes must be made through drug court reformations, legislation, and programs that have the effect of preventing opioid use.

Drug Courts, Healing to Wellness Courts, and Opioid Intervention Courts do have a positive effect on the opioid epidemic. However, the effectiveness of these different courts could be improved by working together and each adopting effective aspects of the others, as Justice Raquel Montoya-Lewis suggested. While some courts show lower rates of recidivism and reduced public cost, the lack of uniformity and over-emphasis on recidivism is contrary to the holistic approach that they seek to employ and that would be the most effective approach to the opioid epidemic.

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

<sup>156</sup> James Bao, Hance Clarke, et. al, *Canada’s Hidden Opioid Crisis: the Health Care System’s Inability to Manage High-Dose Opioid Patients*, OFFICIAL PUBLICATION OF THE COLLEGE OF FAMILY PHYSICIANS OF CANADA (Sept. 2019), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6741787/> [https://perma.cc/WN48-3VRT].

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

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

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

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

<sup>162</sup> WILL PARFITT, *THE ELEMENTS OF THE QABALAH* 101 (1993).

Whereas Healing to Wellness Courts focus on the interconnectedness of the opioid-addicted offender and his, her, or their community, drug courts focus on reducing the burden a non-violent opioid-addicted offender has on the legal system. From a humanist perspective, there is a problem with institutionalizing the stigma of drug addiction while making the sole purpose of a problem-solving court that the person no longer costs the public money. The objective of obfuscating crime comes at the cost of only treating a symptom of addiction—committing crimes—as opposed to addressing the disease itself.

The United States can help combat the opioid epidemic through the legal system by reforming drug courts. To reform drug courts, courts should integrate more community-based goals that Healing to Wellness Courts utilize to provide support for participants. Medication-assisted treatment should be expanded to help those overcome opioid addictions and stay sober. The system of punishments and rewards should be scaled back but remain for the structure and accountability it provides, which participants need. The emphasis on punishment should be shifted to the holistic healing approach that focuses on addressing the cause of the drug use. This could include therapy and other reflection sessions. Further, long-term supervision, that lasts after the program ends, should be put into place to help participants stay on track and remain successful. All first-time offenders and low need users should have access to these programs to provide them help and assistance right away.

Beyond the legal system, there are other steps the United States can take to make an impact on the opioid epidemic. First, the United States must aid the communities that are experiencing the largest increase in opioid-related overdoses: American Indians and Alaskan Natives. The first step is gathering accurate and up-to-date data regarding the regional and urban impact of the opioid crisis on American Indian and Alaskan Native communities. The next step is to prioritize American Indian and Alaskan Native-specific government funding through culturally competent legislation. The government inadequately addressing the opioid crisis's impact on American Indians and Alaskan Natives is a public health failure.

Second, a consistent recommendation from the narratives of people on the frontlines of the opioid crisis in Indian Country is to provide more opportunities for American Indians during and after they complete their drug court program. Specific funding and the creation of schools and jobs should be put into place on all reservations. The education and career opportunities should be tailored to the culture and community specific to each tribe. These opportunities will give American Indians the tools to lead a life without substance abuse and motivation to overcome their hardships.

As tribal member Dana Shorty pointed out, a focus should be on earlier prevention in Indian Country. This should begin with children in Indian Country to bring a stop to the cyclical drug use and abuse that occurs within families. This kind of prevention could entail better education and extracurricular activities at school, which would require more funding, especially into rural and low-income areas. Where families cannot provide adequate encouragement or foster a positive future, community programs and schools should step in to fill this gap and educate children about their opportunities.

Third, as the physician interviewed above stated, access to opioid treatment programs and physicians who are licensed to administer them should be increased. This can be done by requiring doctors to get the training and license or by providing physicians with an incentive to do so. These programs should be continued to be funded across the nation so that all opioid users have the opportunity to participate in them. The process for methadone administration should be adjusted so that those in rural areas, in and outside of Indian Country, have better access. This could be created by hiring people specifically for reservations and rural communities or funding jobs for people to travel around to these rural communities on a daily basis.

Another alternative is to abolish drug courts. It is difficult for drug dependency and drug use to be addressed through the legal system. As indicated in the recommendations above, people on the frontlines of the opioid crisis need more community and health-based programs. Instead of widening the net of criminalization, control, and surveillance, the United States could redistribute funding used to run its 3,100 drugs courts to highly vulnerable communities, namely American Indian and Alaskan Native communities. This funding could go towards prevention, medication-assisted treatment, and medical facilities to help opioid users.

## IX. CONCLUSION

Opioid use in the United States is not a new phenomenon. The misuse of opioids has been in existence since the nation's founding; however, the response to misuse has drastically changed. The government's response went from stringent public health-oriented, distribution, and possession legislation to drug courts that specifically target opioid-addicted offenders within the criminal justice system. While drug courts have not existed without criticism, the resulting lower rates of recidivism combined with the reduced cost on the public has bolstered their legitimacy. However, this does not refute the fact that the legal system alone cannot fix an epidemic that has persisted since the late 1800s. As noted above, it does not matter if the society operates under a universal health care system; the opioid crisis still negatively impacts the greater population. True effectiveness lies in more prevention programs, accessible medication-assisted treatment, and a greater focus on a healing approach with supervision that expands beyond treatment.