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## When Voters' Intent Backfires: Interpreting Inconsistencies Created by Voter-Approved Criminal Justice Reforms within Oklahoma's Drug Court Statute

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# **WHEN VOTERS’ INTENT BACKFIRES: INTERPRETING INCONSISTENCIES CREATED BY VOTER-APPROVED CRIMINAL JUSTICE REFORMS WITHIN OKLAHOMA’S DRUG COURT STATUTE**

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Voters in Oklahoma are driving ambitious and unprecedented criminal justice reform, which is interesting because Oklahoma has long been a stalwart of the “Tough on Crime” era.<sup>1</sup> “Tough on Crime” policies include mandatory minimums for drug offenses and sentence enhancements for defendants with criminal histories. Oklahoma enacted both types of policies from the early 1970’s until 2016. These policies led to a boom in the prison population that has had catastrophic effects, including an unmanageable prison population and longer prison sentences than any other state in the US.<sup>2</sup>

While it is imperative for voters’ voices to be heard, altering longstanding legal systems through state ballot questions has caused inconsistencies in the law that could have dramatic effects. In one example, Oklahoma State Questions 780 and 781 (hereinafter SQ780 and SQ781)—passed in 2016—created inconsistencies in applying the current state drug court statute.<sup>3</sup> SQ780 reclassified the crime of drug possession from a felony to a misdemeanor, yet the current drug court statute requires a felony conviction for admission to drug court. This Comment lays out the background history that led to the passage of SQ780 and SQ781 in Part II.

These criminal justice reform initiatives—intended to lower prison populations—reduced the classifications of many low-level felonies, including drug possession, and diverted funds to evidence-based addiction treatments. Specifically, SQ780 declassified all low-level drug possession charges from felonies to misdemeanors with a maximum punishment of one year in jail and/or a one thousand dollar fine.<sup>4</sup> SQ781 was dependent on the passage of SQ780—this measure required funds saved from incarcerating non-violent felons to be redistributed into county drug addiction treatment and prevention programs. However, the Oklahoma drug court statute requires a felony charge before a defendant is eligible for admission to an alternative sentencing drug court.<sup>5</sup>

Since the middle of 2017, when SQ780 went into effect, county drug court admissions have dropped by eighteen percent compared to previous years.<sup>6</sup> See *Figure 1* below.

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1. Mark Obbie, *Oklahoma Struggles with Its Tough-on-Crime Past*, TAKEPART MAG., (Sept. 19, 2016), <http://www.takepart.com/feature/2016/09/19/violence-and-redemption-oklahoma>.

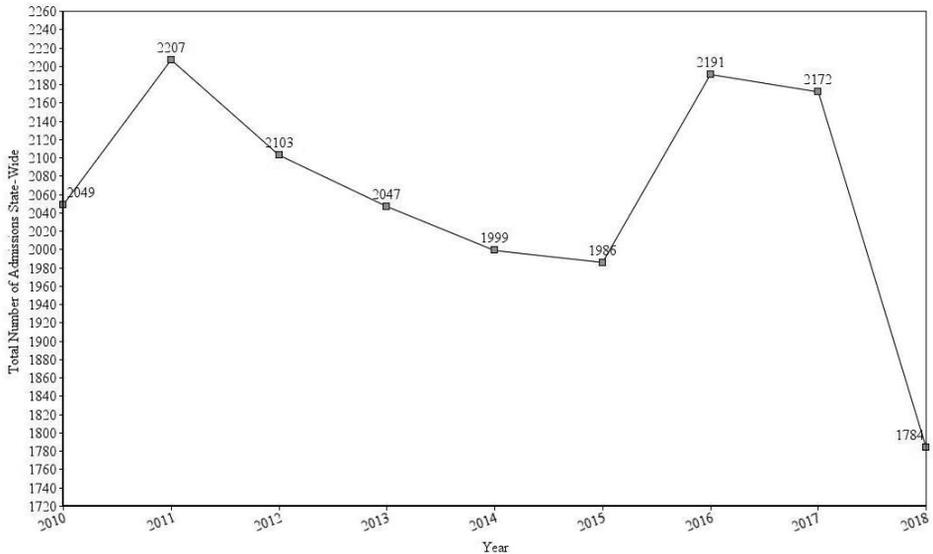
2. Peter Wagner & Wendy Sawyer, *States of Incarceration: The Global Context 2018*, PRISON POL’Y INITIATIVE, at fig.1 (June 2018), <https://www.prisonpolicy.org/global/2018.html>.

3. State Question No. 780, Initiative Petition No. 404 (as proposed by Okla. Sec’y of State, Jan. 27, 2016), <https://www.sos.ok.gov/documents/questions/780.pdf> [hereinafter SQ780]; OKLA. STAT. tit. 22, §§ 471.1–71.3.

4. SQ780, *supra* note 3.

5. OKLA. STAT. tit. 22, § 471.2(A)(4).

6. The author requested statewide drug court admissions information from 2010 through 2018 from the Oklahoma Department of Mental Health and Substance Abuse Services via a Freedom of Information Request (also called an Open Records Request in Oklahoma). E-mail from Jeffrey Dismukes, Dir. of Commc’ns, Okla. Dep’t of Mental Health & Substance Abuse Servs., to the author (Jan. 25, 2019, 4:43PM CST) (on file with author) [hereinafter Admissions Data].



*Figure 1*

Herein lies the conundrum: If interpreted plainly, the contrast between SQ780 and the Oklahoma drug court statute could cause county drug courts across the state to lose their funding, since funding is allocated to each program based on participation. If there are not enough people in the programs, the programs will eventually become financially unsustainable. It is too soon to tell how impactful the funds being redirected into alternative treatments via SQ781 will be in ameliorating this issue. Most likely, those funds will not be used to support compulsory county drug courts, but other types of drug abuse prevention programs. However, Oklahoma Management and Enterprise Services (OMES) has specified that any funding requests for money from the SQ781 fund must flow through district attorneys' offices,<sup>7</sup> so it is possible that SQ781 money could supplement the funding lost from county drug courts, and this Comment cannot discount that possible outcome. In the vacuum created by such sweeping criminal justice reforms, uncertainty is rampant. In the face of such uncertainty, it is important to examine alternative statutory interpretations that can remedy this possible funding shortage.

In Part III, the Comment examines and applies three models of ballot initiative interpretation. When looking at these models and the canons of statutory interpretation, the analysis concludes there are three ways to interpret the Drug Court/SQ780 discrepancy: (1) the State Questions and the drug court statute may remain as written, but result in a dramatically smaller number of eligible drug court defendants; (2) SQ780 and SQ781 implicitly repeal the drug court statute; or (3) the drug court statute is no longer functional as written and must be amended to reflect the voters' intent of reducing state spending on prisons and reducing incarceration.

7. 35 OKLA. REG. 1349 (2018).

Part IV lists recommendations for statutory amendments to the drug court statute, because amending the statute is the best available outcome. If the drug court statute and the State Questions remain un-reconciled, voters' voices are essentially rendered meaningless while county drug court programs continue the "business as usual" of placing increasingly smaller numbers of eligible defendants into the programs with little disruption to practitioners. This can go on until the overhead of the programs exceeds operating funds driven by defendant participation, at which point the drug court programs will no longer make financial sense. This also leaves drug court programs vulnerable to the whims of policy makers and elected leaders who can eliminate the programs with little fanfare by following the plain text of the statutes. Conversely, if the state questions implicitly repeal the drug court statute, very little structure exists to implement an entirely new scheme of treatment and treatment funding across the state being diverted by SQ781, and no compulsory court-ordered compliance to utilize such programs currently exists. In ballot initiatives, the voter is the lawmaker, thus the voter's intent should be infused into any current laws that contradict the state questions. Under this view, lawmakers must amend the drug court statute to reflect the will of the voters and create a statute that rehabilitates addicts and reduces Oklahoma's incarceration epidemic. How Oklahoma leaders choose to reconcile these laws will have longstanding effects on the treatment and adjudication of addict populations across the state.

## II. OKLAHOMA'S CRIMINAL JUSTICE HISTORY FORCED VOTERS TO TAKE MATTERS INTO THEIR OWN HANDS

In 2016, when SQ780 and 781 were passed, Oklahoma had the highest incarceration rate in the world.<sup>8</sup> SQ780 and SQ781 were passed after forty years of prison growth that the legislature repeatedly failed to address.<sup>9</sup> Although community sentencing legislation passed in 1999 was intended to address this high incarceration rate, compromises to that legislation added to continued prison population growth.<sup>10</sup> County drug courts can drive incarceration due to variant practice standards and high revocation rates,<sup>11</sup> but they remain a stalwart for treating addicts in the criminal justice system.<sup>12</sup> SQ780 and SQ781 declassified simple drug possession and low-level property crimes from felonies to misdemeanors in order to reverse the trend in prison population growth. While they may reduce admissions into prison, the changes do not reconcile with the state's drug court statute that requires a felony for admission.

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8. Wagner & Sawyer, *supra* note 2.

9. See Linda G. Morrissey & Vicki S. Brandt, *Community Sentencing in Oklahoma: Offenders Get a Second Chance to Make a First Impression*, 36 TULSA L. REV. 767, 768–72 (2001).

10. *Id.* at 770.

11. Morris B. Hoffman, *Commentary, The Drug Court Scandal*, 78 N.C. L. REV. 1437, 1462–63 nn.105–08, 1517–19 nn.310–13 (2000); Eric L. Sevigny, Brian K. Fuleihan & Frank V. Ferdik, *Do Drug Courts Reduce the Use of Incarceration?: A Meta-Analysis*, 41 J. CRIM. JUST. 416, 423 (2013).

12. MICHAEL W. FINIGAN, SHANNON M. CAREY & ANTON COX, *IMPACT OF A MATURE DRUG COURT OVER 10 YEARS OF OPERATION: RECIDIVISM AND COSTS* (Apr. 2007), <https://www.ncjrs.gov/pdffiles1/nij/grants/219225.pdf>.

Changes to criminal law in the 1970's began with amendments to federal statutes that introduced mandatory minimum sentences for drug crimes and sentence enhancements for repeat offenders.<sup>13</sup> At President Nixon's behest, law enforcement began battling a historic increase in drug use in America's major cities, particularly heroin.<sup>14</sup> As these changes to sentencing became law in federal courts, states followed suit. States across the nation began to amend criminal statutes to increase sentencing for drug-related crimes.<sup>15</sup>

Oklahoma was among the states that enacted highly punitive, long sentences for drug crimes beginning in the early 1970s.<sup>16</sup> For example, until SQ780 was passed in 2016, Possession with Intent to Distribute Illegal Drugs was punishable by a range of zero years to life in prison.<sup>17</sup> Drug Trafficking currently carries a sentence of ten years to life as well as a \$50,000 fine that can apply to each count.<sup>18</sup> SQ780 implemented changes to the law that had previously resulted in Oklahoma's prison population quadrupling over the 1980s and 1990s.<sup>19</sup> By the late 1990s, legislators realized they needed to curb prison growth, and a three-year legislative battle on this topic began in 1997. More liberal legislators—who called for community sentencing and more flexible parole parameters—clashed with more conservative legislators—who believed that Oklahoma's streets were safer due to the strong punishment and sentencing statutes in place.<sup>20</sup>

Legislators and criminal law experts correctly foresaw prison growth as a drain on resources and revenue for the state budget.<sup>21</sup> By 1999, the prison population was unmanageable: the cost of maintaining prisons was mounting while revenue from a low-taxed base was waning. Legislators needed to find a way to implement measures that would curb prison growth, but still play to a largely conservative base. In addition, they needed to appease district attorneys who feared community sentencing would be too “soft on crime.”<sup>22</sup>

Amid calls from the public and district attorneys to maintain the “tough on crime”

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13. HUMAN RIGHTS WATCH, *DECADES OF DISPARITY: DRUG ARRESTS AND RACE IN THE UNITED STATES*, 12 (2009), [https://www.hrw.org/sites/default/files/reports/us0309web\\_1.pdf](https://www.hrw.org/sites/default/files/reports/us0309web_1.pdf).

14. LISA N. SACCO, CONG. RESEARCH SERV., *DRUG ENFORCEMENT IN THE UNITED STATES: HISTORY, POLICY, AND TRENDS* 5 (Oct. 2, 2014), <https://fas.org/sgp/crs/misc/R43749.pdf>.

15. *Id.*

16. OKLA. STAT. tit. 63, § 2-401 (1971). This statute is the drug possession statute. It first went into effect in 1971. Most states codified large drug possession and distribution statutes with hefty penalties (known as Rockefeller drug laws) in response to public outcry about addiction and distribution of drugs. Criminal law experts pinpoint this moment as the beginning of an incarceration epidemic in the United States. Brian Mann, *The Drug Laws That Changed How We Punish*, NPR (Feb. 14, 2013), <https://www.npr.org/2013/02/14/171822608/the-drug-laws-that-changed-how-we-punish>.

17. § 2-401.

18. § 2-415 (2018); § 51.1 (2018).

19. SQ780, *supra* note 3.

20. Morrissey & Brandt, *supra* note 9, at 768–71.

21. Alfred Blumstein & Allen J. Beck, *Population Growth in U.S. Prisons, 1980–1996*, 26 *CRIME & JUST.* 17, 18–19 (1999).

22. John Greiner & Mick Hinton, *Lawmakers Rewrite Truth in Sentencing*, OKLAHOMAN (July 1, 1999), <https://newsok.com/article/2658928/lawmakers-rewrite-truth-in-sentencing>.

sentencing laws, the Oklahoma Legislature passed a criminal justice reform bill with three goals. First was community sentencing—the practice of “protect[ing] the public in a cost-effective . . . system that utilizes a broad spectrum of supervised sanctions to treat both the criminogenic and social needs of the eligible offender while they remain in the community.”<sup>23</sup> Across the state, courts were faced with a lack of options between the extremes of prison time and probation.<sup>24</sup> Community sentencing provided a bridge between the two extremes that allowed defendants a second chance to rehabilitate from drug addiction. Second, the law required defendants convicted of the “Eleven Deadly Sins”<sup>25</sup> to serve the first eighty-five percent of their prison sentences with no ability to earn additional days off their sentences—put plainly, eighty-five percent of the sentence was to be served as hard time.<sup>26</sup> Crimes in this category eventually became known as “eighty-five percent crimes.”<sup>27</sup> This part of the law was a compromise for the “tough on crime” proponents, but would ultimately be a fatal flaw that would continue to overfill prisons for the next nineteen years.<sup>28</sup> Third, the law enforced a prison capacity cap stating that when prisons were at ninety-five percent capacity, inmates with eligible time credits were provided early release.<sup>29</sup>

The Oklahoma Community Sentencing Act of 1999 authorized ten pilot programs for community sentencing and also passed the drug court statute.<sup>30</sup> This portion of the bill created drug courts in ten counties: Tulsa, Grady, Wagoner, Cherokee, Pontotoc, Hughes, Seminole, Rogers, Mayes, and Craig.<sup>31</sup> The drug court statute outlines how drug courts should be conducted, the parameters that must be applied to the defendants’ charges, and

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23. Morrissey & Brandt, *supra* note 9, at 767.

24. *Id.*

25. *Id.* at 763.

26. Oklahoma Community Sentencing Act, OKLA. STAT. tit. 22, §§ 988.1–88.23 (Supp. 2000); “Hard time” refers to time that inmates are serving day for day, as opposed to time that can earn them credits for time served and potentially lead to early release.

27. For example, an excerpt of the statute reads:

Persons convicted of: [f]irst degree murder as defined in Section 701.9 of [Title 21 of the Oklahoma Statutes]; . . . [r]obbery with a dangerous weapon as defined in Section 801 of [Title 21 of the Oklahoma Statutes]; . . . [f]irst degree rape as provided in Section . . . 1115 of [Title 21 of the Oklahoma Statutes]; . . . [f]irst degree arson as defined in Section 1401 of [Title 21 of the Oklahoma Statutes]; . . . [f]irst degree burglary as provided in Section 1436 of [Title 21 of the Oklahoma Statutes]; . . . [b]ombing as defined in Section 1767.1 of [Title 21 of the Oklahoma Statutes]; [a]ny crime against a child provided for in Section 843.5 of [Title 21 of the Oklahoma Statutes]; [f]orcible sodomy as defined in Section 888 of [Title 21 of the Oklahoma Statutes]; [c]hild pornography as defined in Section 1021.2 or 1021.3 of [Title 21 of the Oklahoma Statutes]; [c]hild prostitution as defined in Section 1030 of [Title 21 of the Oklahoma Statutes]; [l]ewd molestation of a child as defined in Section 1123 of [the Oklahoma Statutes] . . . shall be required to serve not less than eighty-five percent (85%) of any sentence of imprisonment imposed by the judicial system prior to becoming eligible for consideration for parole. Persons convicted of these offenses shall not be eligible for earned credits or any other type of credits which have the effect of reducing the length of the sentence to less than eighty-five percent (85%) of the sentence imposed.

OKLA. STAT. tit. 21, § 13.1 (1999).

28. Ryan Gentzler, *What’s Driving Oklahoma’s Prison Population Growth?*, OKLA. POL’Y INST. (Feb. 9, 2016), <https://okpolicy.org/whats-driving-prison-population-growth/>.

29. Morrissey & Brandt, *supra* note 9, at 770.

30. OKLA. STAT. tit. 22, §§ 471.1–471.3 (2014).

31. Morrissey & Brandt, *supra* note 9, at 771.

several restrictions that limit eligibility of defendants.<sup>32</sup> The law was intended to provide non-violent drug offenders an alternative that was more invasive than parole and less detrimental than prison.

The drug court statute, a piece of the Community Sentencing Act, was written not only to preclude any offender who had committed an eighty-five percent crime, but went a step further and screened out several more violent offenses that were not classified as eighty-five percent crimes at the time.<sup>33</sup> The district attorney could waive this restriction on admissibility, as long as the crime was not an eighty-five percent crime. The statute then required that the offender be assessed using a screening process to determine his/her probability of reoffending and overall criminality risk to the community. The assessment is used to determine the offender's customized plan and action steps.<sup>34</sup> The ideal criminality score for a drug court participant is moderate—research showed that those lower on the scale were likely to see an increase in criminality score if entered into the program. Those higher on the scale needed a stronger intervention like prison.<sup>35</sup>

The Community Sentencing Act requires offenders to plead guilty, be found guilty, or enter a *nolo contendere* plea in order to access an alternative community sentencing option. The Act gives the court discretion over which rehabilitative resources the offender may access. These resources largely depend on the area where the court is located—urban or rural. Once in a community-sentencing program, forty to seventy percent of the offender's time is occupied by complying with program guidelines. These can include meetings, drug tests, job training, therapy, or in-patient treatment. If an offender does not comply with the program guidelines, there is a wide range of sanctions available to the court including fines, reduction in program levels (effectively extending the time in the program), and jail time. If the offender completes the sentencing program successfully, their conviction is discharged or dismissed with prejudice.<sup>36</sup>

Over the next eighteen years, community sentencing took root in Oklahoma and became a large part of how the criminal justice system treats addiction, mental health, and domestic violence.<sup>37</sup> Tulsa County, for example, has mental health court, a domestic violence court, and a drug court in addition to a few privately-funded alternative sentencing programs.<sup>38</sup> However, some rural counties may only offer drug court as an alternative to incarceration and some may have a mix of the above alternative courts. Since

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32. OKLA. STAT. tit. 22, §§ 471.1–71.3 (2014).

33. § 471.1(c) (1997).

34. § 471.2 (1997).

35. 1 NAT'L ASSOC. OF DRUG COURT PROF'LS, ADULT DRUG COURT BEST PRACTICE STANDARDS 5 (2013), <https://www.nadcp.org/wp-content/uploads/2018/12/Adult-Drug-Court-Best-Practice-Standards-Volume-I-Text-Revision-December-2018-1.pdf>.

36. Morrissey & Brandt, *supra* note 9, at 774–80.

37. For the purposes of this note, the analysis focuses on county drug courts, permitted by OKLA. STAT. tit. 22, §§ 471.1–71.3 (2014), and thus largely does not discuss mental health courts, domestic violence courts, or privately funded alternative sentencing options.

38. Women in Recovery is a women's diversionary program that is privately funded by Family and Children's Services in Tulsa. It is a trauma-informed addiction treatment and job readiness program. *Women in Recovery*, FAMILY & CHILDREN'S SERV'S. OF OKLA., <https://www.fcsok.org/services/women-in-recovery/> (last visited Nov. 1, 2018). First Step is a Tulsa County men's diversionary program funded by grants and headed by former criminal judge, William Kellough. FIRST STEP MALE DIVERSION PROGRAM, <http://1ststepmdp.com/> (last visited Nov. 1, 2018).

1999, drug courts have spread from the ten pilot programs to seventy-three of the seventy-seven counties across Oklahoma. The drug court statute, a subset of the Community Sentencing Act, has been amended three times, once in 2008 to add misdemeanor drug courts, again in 2009 to allow for juvenile drug court programs, and finally in 2016 to allow for a new form of mental health and substance abuse evaluation.<sup>39</sup>

*B. Despite the Imposition of Community Sentencing, by 2016 Oklahoma Ranked Number One in the World for Incarceration*

Even after eighteen years of community sentencing, Oklahoma still struggles with over-capacity prisons and the voters have yet to see meaningful legislative action to reduce prison populations. Though they were intentionally limited to only eleven crimes at their inception, the eighty-five percent crimes have grown to twenty-two total crimes as part of an effort to increase punitive measures toward violent criminals.<sup>40</sup> This has led to an overpopulated prison system that will take years to correct.

In 2016, Oklahoma also topped the list of states for number of incarcerated women.<sup>41</sup> Per capita, there were more females serving prison time in Oklahoma than in any other state. This statistic is startling because of research that shows the impact incarcerating women has on families and communities as a whole. Incarcerating a parent leaves their children three times more likely to become criminal-justice-involved in their lifetime.<sup>42</sup> Further, Oklahoma incarcerated more citizens per capita than Cuba, China, and Russia.<sup>43</sup> Oklahoma was also number one for overall incarceration or criminal justice supervision, with over 36,900 individuals incarcerated and 28,000 on probation.<sup>44</sup> Oklahoma incarcerated 1,079 individuals per 100,000 citizens, overtaking Louisiana which previously held the number-one seat in incarceration at 1,057 per 100,000.<sup>45</sup>

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39. Oklahoma Drug Court Act, Laws 1997, SB 645, c. 359, § 2 (Amended by Laws 2008, HB 2522, c. 37, § 1, eff. November 1, 2008; Amended by Laws 2009, HB 2029, c. 234, § 131, emerg. eff. May 21, 2009; Amended by Laws 2016, HB 2753, c. 222, § 1, eff. November 1, 2016).

40. Today's eighty-five percent crimes in Oklahoma include: First degree murder as defined in OKLA. STAT. tit. 21, § 701.7; Second degree murder as defined by OKLA. STAT. tit. 21, § 701.8; Manslaughter in the first degree as defined by OKLA. STAT. tit. 21, § 711; Poisoning with intent to kill as defined by OKLA. STAT. tit. 21, § 651; Shooting with intent to kill, as provided for in OKLA. STAT. tit. 21, § 652; Assault with intent to kill as provided for in OKLA. STAT. tit. 21, § 653; Conjoint robbery as defined by OKLA. STAT. tit. 21, § 800; Robbery with a dangerous weapon as defined in Okla. Stat. tit. 21, § 801; First degree robbery as defined in OKLA. STAT. tit. 21, § 797; First degree rape as provided for in OKLA. STAT. tit. 21, §§ 1111, 1114, 1115; First degree arson as defined in OKLA. STAT. tit. 21, § 1401; First degree burglary as provided for in OKLA. STAT. tit. 21, § 1436; Bombing as defined in OKLA. STAT. tit. 21, § 1767.1; Any crime against a child provided for in OKLA. STAT. tit. 21, § 843.5; Forcible sodomy as defined in OKLA. STAT. tit. 21, § 888; Child pornography or aggravated child pornography as defined in OKLA. STAT. tit. 21, §§ 1021.2, 1021.3, 1024.1, 1024.2, 1040.12a; Child prostitution as defined in OKLA. STAT. tit. 21, § 1030; Lewd molestation of a child as defined in OKLA. STAT. tit. 21, § 1123; Abuse of a vulnerable adult, as defined in OKLA. STAT. tit. 43A, § 10-103; Aggravated trafficking as provided for in OKLA. STAT. tit. 63, § 2-41(C); and Human trafficking as provided for in OKLA. STAT. tit. 21, § 748.

41. Wagner & Sawyer, *supra* note 2, at fig. 1.

42. JAMES M. CONWAY & EDWARD T. JONES, SEVEN OUT OF TEN? NOT EVEN CLOSE: REVIEW OF RESEARCH ON THE LIKELIHOOD OF CHILDREN WITH INCARCERATED PARENTS BECOMING JUSTICE-INVOLVED, INST. FOR MUN. & REG'L POL'Y AT CENT. CONN. ST. U. 5 (2015), [https://www.ccsu.edu/imrp/Publicatons/Files/CIP\\_Seven\\_Out\\_of\\_Ten\\_Not\\_Even\\_Close.pdf](https://www.ccsu.edu/imrp/Publicatons/Files/CIP_Seven_Out_of_Ten_Not_Even_Close.pdf).

43. *Id.*

44. Wagner & Sawyer, *supra* note 2, at fig. 1.

45. SQ780, *supra* note 3.

In contrast to Oklahoma, Louisiana has undertaken meaningful criminal justice reform. In 2017, Louisiana passed the Justice Reinvestment Initiative. The bill focused on reducing the number of non-violent criminals in prison, strengthening community supervision and reinvesting savings into recidivism reduction and crime victim support. Since its passage, Louisiana reports a twenty-one percent reduction in drug offenders entering prison, and a twenty percent decrease in property crime offenders.<sup>46</sup> Unlike Louisiana, Oklahoma’s reform efforts (until 2016) have done little to impact the overall number of incarcerated individuals. In fact, after SQ780 and SQ781 went into effect, prison admissions rose.<sup>47</sup> This is surprising because SQ780 and SQ781 are modeled off of progressive and effective criminal justice reforms, like those taking place in Louisiana. As of the date of publication, Louisiana has returned to the number one incarcerator in the world, however the state has experienced a downturn in prison admissions since implementing reforms.<sup>48</sup>

One driver of incarceration in Oklahoma is the misuse of drug courts. Many defendants who plea into drug court are contra-indicated—their addiction behaviors and criminality indicators are not a fit with an alternative sentencing drug court.<sup>49</sup> Contra-indication most often leads to a revocation of a defendant’s drug court plea due to continued drug use or other infractions. In the end, after failing drug court, many of these defendants get longer prison sentences than a jury would have handed down at trial.<sup>50</sup> Further, the current drug court statute contains many restrictions precluding good candidates from admission into drug court programs.<sup>51</sup> The current drug court statute requires that the district attorney offer defendants drug court. Ultimately this restriction leads the district attorney to make moralistic decisions about who “deserves” drug court, even when the court-administered drug and alcohol assessment indicates a defendant may be a good fit.<sup>52</sup> In addition, any prior violent felony within the past ten years precludes a defendant from drug court.<sup>53</sup> All violent felonies as controlling charges<sup>54</sup> are precluded except domestic violence offenders who can be pled into statutory domestic violence courts.<sup>55</sup> Oklahoma has a broad definition of “violent,”<sup>56</sup> and this restriction is keeping

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46. LA. DEP’T OF PUB. SAFETY & CORRS. & LA. COMM’N ON L. ENF’T, LOUISIANA’S JUSTICE REINVESTMENT REFORMS FIRST ANNUAL PERFORMANCE REPORT 24 (June 2018), [http://gov.louisiana.gov/assets/docs/JRI/LA\\_JRI\\_Annual\\_Report\\_FINAL.PDF](http://gov.louisiana.gov/assets/docs/JRI/LA_JRI_Annual_Report_FINAL.PDF).

47. OKLAHOMANS FOR CRIMINAL JUSTICE REFORM & FWD.US, OKLAHOMA’S ONGOING IMPRISONMENT CRISIS (2018), [https://www.fwd.us/wp-content/uploads/2018/11/oklahoma\\_data\\_update\\_2018.pdf](https://www.fwd.us/wp-content/uploads/2018/11/oklahoma_data_update_2018.pdf).

48. Jake Horowitz & Elizabeth Compas, *Louisiana Continues Efforts to Protect Public Safety and Reform Justice System*, PEW (Nov. 19, 2019), <https://www.pewtrusts.org/en/research-and-analysis/articles/2019/11/19/louisiana-continues-efforts-to-protect-public-safety-and-reform-justice-system>.

49. Josh Bowers, *Contraindicated Drug Courts*, 55 UCLA L. REV. 783, 783 (2008).

50. *Id.*

51. OKLA. STAT. tit. 22, § 471.2 (A)(1)–(3) (2018).

52. Quinton Chandler, *Prosecutors and Court Officials Disagree on Reason for Downturn in Drug Court Participation*, ST. IMPACT OKLA. (Jan. 10, 2019), <https://stateimpact.npr.org/oklahoma/2019/01/10/prosecutors-and-court-officials-disagree-on-reason-for-downturn-in-drug-court-participation/>.

53. OKLA. STAT. tit. 21, § 471.2(A)(2).

54. Often defendants face numerous counts, some of which could be felonies and others of which could be misdemeanors. If the charge with the longest potential sentence is considered violent by Oklahoma statute, it is the controlling charge.

55. OKLA. STAT. tit. 21, § 471.2.

56. See sources cited *supra* note 40.

defendants out of drug court whose violent tendencies are a reflection of their addiction. Those defendants are not given the option to avoid prison, thus contributing to the growth of Oklahoma's prison population.

### III. INTERPRETING OKLAHOMA'S DRUG COURT STATUTE IN LIGHT OF SQ780

Statutory interpretation requires divining the intent of the lawmaker, but when interpreting ballot initiatives, the lawmaker is the voter.<sup>57</sup> Determining voter intent has long vexed courts and scholars.<sup>58</sup> This section provides an overview of three scholarly theories for interpreting ballot initiatives, which yield three potential statutory interpretations for the inconsistency created by SQ780: (1) SQ780 and the drug court statute can coexist but the number of eligible defendants will continue to shrink, (2) SQ780 implicitly repeals the drug court statute, and (3) the drug court statute must be amended to reflect the voters' intent to reduce the rate of incarceration.

#### *A. Courts and the Legislature Must Interpret the Voters' Intent When Reading SQ780 and Its Interplay with Other Statutes*

Typically, courts and legislators must employ many different methods, or canons, in order to interpret statutes.<sup>59</sup> Canons include bedrock principles such as: "A statute should be interpreted in a way that avoids placing its constitutionality in doubt."<sup>60</sup> Another frequently cited principle is: "The provisions of a text should be interpreted in a way that renders them compatible, not contradictory."<sup>61</sup> Yet, these canons of statutory construction offer little support in determining whether the Oklahoma Drug Court statute or SQ780 governs because the laws are not directly adverse to each other, and voters rather than legislators enacted SQ780. Each of these canons are intended to interpret *statutes*, not ballot initiatives. Legislators and legislative counsels, who have had legal or legislative training, write statutes. These canons do not necessarily apply to ballot initiatives, which are drafted by small special interest groups and passed into law by voters—lay people who often hold no understanding of how laws fit together.<sup>62</sup>

Since the lawmakers' intent is what drives statutory interpretation, the voter becomes the lawmaker when interpreting ballot initiatives.<sup>63</sup> In a study examining fifty-three cases where judges interpreted ballot initiatives, the majority of judges stated that "their task [was] to locate the controlling popular intent" behind the ballot initiative.<sup>64</sup> In general, ballot initiatives are disfavored among courts and legislators because the intent is difficult to discern. The public is often under- or misinformed, and ballot initiatives can

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57. Stephen H. Sutro, *Interpretation of Initiatives by Similar Statutes: Canons of Construction Do Not Adequately Measure Voter Intent*, 34 SANTA CLARA L. REV. 945, 946 (1994).

58. Jane S. Schacter, *The Pursuit of "Popular Intent": Interpretive Dilemmas in Direct Democracy*, 105 YALE L.J. 107, 127 (1995).

59. ANTONIN SCALIA & BRYAN GARDNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 247 (2012).

60. *Id.*

61. *Id.* at 180.

62. Sutro, *supra* note 57, at 945.

63. *Id.* at 946.

64. Schacter, *supra* note 58 at 117.

create inconsistencies in the law.<sup>65</sup> To remedy the issue created by SQ780, it is helpful to understand the three prominent models of scholarship that have analyzed methods for interpreting ballot initiatives: the Schacter Model, the Frickey Model, and the Gilbert Model.

### *B. Applying the Schacter Model of Ballot Initiative Interpretation*<sup>66</sup>

In 1995, Jane Schacter, a statutory interpretation scholar at Yale, was one of the first scholars to tackle the statutory interpretation of modern ballot initiatives. Her model is only narrowly applicable.<sup>67</sup> Schacter's model takes two things as gospel: (1) that state ballot initiatives are highly likely to create issues of federal constitutionality and (2) that these same ballot initiatives lend themselves to extensive problems with statutory interpretation. Since Schacter is a recognized authority in statutory interpretation, she focuses her analysis on interpreting ballot initiatives and reconciling them with current laws.<sup>68</sup>

Schacter urges courts to apply a specialized set of statutory interpretation guidelines specifically for ballot initiatives. She believes part of the problem with ballot initiatives is the lack of deliberation, which would allow the public to see both sides of any given initiative clearly. Additionally, lack of deliberation robs courts of information, which could be integral to determining the meaning of an ambiguous term in a ballot initiative.<sup>69</sup> Schacter's proposed solution asks courts to initiate interpretive litigation when there is a challenge to a ballot initiative, allowing applications for intervention and *amicus curiae* participation by interested and potentially unorganized parties. Interpretive litigation happens most often when a ballot initiative is passed, but opposition groups gather enough signatures on a petition to get an injunction against the initiative. A court intervening at the injunctive phase allows it to ferret out interpretive issues with the measure. Interpretive litigation allows the court to see potential problematic language and other issues that lawyers could bring forward should the initiative become law and later be litigated.<sup>70</sup>

Another issue Schacter highlights is the potential for abuse of the ballot initiative process by special interest groups who can play on the biases of the populous to create problematic and discriminatory laws.<sup>71</sup> Schacter advocates for a narrow construction to be applied to all initiative laws due to the "systemic problems in the direct lawmaking process."<sup>72</sup> She warns against ambiguous language, stating that many ballot initiatives are coded with racial language and can have disproportionate impacts on minorities.<sup>73</sup>

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65. *Id.* at 127.

66. *Id.*

67. Michael D. Gilbert, *Interpreting Initiatives*, 97 MINN. L. REV. 1621, 1629 (2013) (stating that Schacter's model only applies when initiative petitions are long, confusing, full of jargon, and potentially harmful to marginalized groups).

68. Schacter, *supra* note 58, at 109.

69. *Id.* at 155.

70. *Id.* at 156.

71. *Id.* at 109 n.5.

72. *Id.* at 160.

73. Considering the time in which Schacter was writing—a time of "Tough on Crime" rhetoric when California aired strongly worded television commercials attempting to pass criminal law amendments via voter initiatives—this warning is contextualized. Schacter, *supra* note 58, at 158.

Schacter instructs courts to interpret language that implicitly targets socially marginalized groups extremely narrowly, if at all. For example, Colorado’s voters passed a discriminatory ballot initiative in 1992 called “Amendment 2.”<sup>74</sup> The measure sought to repeal all gay rights ordinances in Colorado and also prevented the state from passing new gay rights ordinances. The measure passed with 53.2% of the vote but was later struck down by the Supreme Court in *Romer v. Evans*.<sup>75</sup> Schacter’s model would have instructed courts to essentially ignore Amendment 2 because of its discriminatory intent and its violation of the equal protection clause.<sup>76</sup>

Schacter proposes the following tests for ballot initiative interpretation: First, allow the ballot initiative to be “beta tested” by interpretive litigation. Second, interpret any language that is intended to negatively impact historically disadvantaged groups and protected classes extremely narrowly, if the court feels it should be given any weight at all. Intentionally discriminatory ballot measures—such as California’s Proposition 8—would likely be federally unconstitutional, so Schacter’s tests apply to those initiatives that are deemed constitutional.<sup>77</sup>

Schacter’s model has narrow applicability because few voter initiatives would be ruled constitutional that contain the intentionally discriminatory language she cautions against. However, if this does occur, Schacter’s theory would be the best to apply when interpreting those measures.

Schacter’s model, while groundbreaking, does little to resolve the inconsistency between SQ780 and the drug court statute. SQ780 and Oklahoma’s drug court statute are indirectly in opposition with each other and require judicial interpretation. The two laws do not reference each other and SQ780 makes no mention of repealing or amending the drug court statute.<sup>78</sup> However, there is a derivative impact on the drug court statute because SQ780 amends the drug possession statute. The drug possession statute previously outlined drug possession as a felony.<sup>79</sup> Therefore, when SQ780 declassified drug possession to a misdemeanor, the impact had a derivative effect on the drug court statute.<sup>80</sup>

Schacter would hesitate to apply Oklahoma’s rules of statutory construction to a ballot initiative because her goal is largely to limit the interpretation of voter-driven law. Since the issue here is that two laws stand in opposition—one voter-driven and one legislature-driven—Schacter would urge courts to narrowly apply the ballot initiative to pre-existing laws.<sup>81</sup> However, Schacter focuses heavily on the idea that ballot initiatives can hurt minorities who do not have money and access to special interest groups that draft

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74. “Colorado voters adopted by statewide referendum ‘Amendment 2’ to the State Constitution, which precludes all legislative, executive, or judicial action at any level of state or local government designed to protect the status of persons based on their ‘homosexual, lesbian or bisexual orientation, conduct, practices or relationships.’” *Romer v. Evans*, 517 U.S. 620, 620 (1996).

75. *Id.* at 635–36.

76. U.S. CONST., amend. XIV.

77. *Just the Facts: Proposition 8*, PUB. POL’Y INST. OF CAL. (Dec. 2008), [https://www.ppic.org/content/pubs/jtf/JTF\\_Prop8JTF.pdf](https://www.ppic.org/content/pubs/jtf/JTF_Prop8JTF.pdf).

78. OKLA. STAT. tit. 22, §§ 471.1–71.3 (2014).

79. OKLA. STAT. tit. 63, § 2-401 (1999).

80. *See generally* OKLA. STAT. tit. 22, §§ 471.1–71.3 (2014) and SQ 780, *supra* at note 3, to infer incompatibility.

81. Schacter, *supra* note 58, at 158–59.

state questions.

When looking at the intent behind SQ780, there is no evidence that the ballot initiative will negatively impact minorities—in fact, the outcome is likely the opposite. For instance, minorities are more likely to be negatively impacted by drug felonies, and also more likely to be negatively affected by having a felony on their record.<sup>82</sup> The imprisonment rate for black individuals in Oklahoma is 2,625 per 100,000 as compared to whites at 580 per 100,000 and Hispanics at 530 per 100,000.<sup>83</sup> Thus, eliminating the felony for drug possession will ultimately help minority defendants. In addition, the types of amendments prescribed in SQ780 are not the type to invite litigation in the ways that Schacter characterizes.<sup>84</sup> Many of the ballot initiatives she references are related to civil rights and, thus, vulnerable to litigation. Amending criminal statutes, as SQ780 does, is not likely to invite civil rights litigation because criminal statutes are facially neutral. Should a citizen's civil rights be infringed by the police, who were arresting under a criminal statute, those citizens would sue under civil rights laws, not the criminal statutes themselves.<sup>85</sup> For these reasons, applying Schacter's tests does little to resolve the inconsistency created by SQ780.

### C. Applying the Frickey Model of Ballot Initiative Interpretation<sup>86</sup>

Phillip P. Frickey was a constitutional and statutory interpretation scholar and professor of law at the University of Minnesota Law School before moving to Berkeley School of Law. Frickey believed that statutory interpretation of ballot initiatives should have two goals: “to give the electorate their due and to protect public values.”<sup>87</sup> Frickey felt that when there was a conflict between allowing voters' voices to be heard and protecting public values, then the initiative's constitutionality was called into question. These types of initiatives are better left to litigation. However, when the issues surrounding interpreting a ballot initiative deal with the “application of ambiguous language to circumstances not clearly encompassed within the core purposes of the measure,” then traditional canons of statutory interpretation are sufficient to deal with the inconsistencies.<sup>88</sup> Frickey believes that the traditional canons of statutory interpretation are implemented with the goals of deferring to the public and placing a high responsibility on the drafters (usually privately funded lobbying groups<sup>89</sup>) that are “well situated to

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82. HUMAN RIGHTS WATCH, *supra* note 13, at 12.

83. *State-by-State Data: Oklahoma*, THE SENTENCING PROJECT (2017), <https://www.sentencingproject.org/the-facts/#map> (last visited Nov. 1, 2018).

84. Most notable was California's Ballot Proposition 184, which passed in 1994. The so-called “Three Strikes” law allowed repeat felony offenders to get life in prison after their third felony conviction, even if the offenses were non-violent. This proposition drove a lot of due process litigation in the state. *See generally* Samuel H. Pillsbury, *A Problem in Emotive Due Process: California's Three Strikes Law*, 6 BUFF. CRIM. L. REV. 483 (2002).

85. 42 U.S.C. § 1983 (1996).

86. Phillip Frickey, *Interpretations on the Borderline: Constitution, Canons and Direct Democracy*, 1996 ANN. SURV. AM. L. 478 (1996).

87. *Id.* at 521.

88. *Id.* at 522.

89. Liz Whyte, *Corporations, Advocacy Groups Spend Big on Ballot Measures*, TIME MAG. (Oct. 26, 2014), <http://time.com/3532419/ballot-measures-corporations/>.

protect” themselves.<sup>90</sup>

Frickey institutes a three-part test for canonical interpretation of ballot measures: first, are there constitutional doubts that may be avoided by an alternative interpretation; second, when adopted laws are in tension with pre-existing laws, there should be a presumption of narrow construction; and third, when a ballot initiative runs up against a substantive canon like the rule of lenity, those canons should be applied more strongly than they would against a legislative law.<sup>91</sup>

Because Frickey’s model stresses the importance of interpreting ballot initiatives through the local rules of statutory interpretation, it is essential to examine Oklahoma’s common law rules of statutory interpretation. While SQ780 was a ballot initiative, ultimately it amended several statutes that are cornerstones of Oklahoma’s criminal law. Therefore, the ballot initiative affected changes to statutes, instead of placing a new law on the books like most ballot initiatives attempt to do. Thus, using Oklahoma’s rules of statutory interpretation to resolve discrepancies caused by SQ780 is what Frickey’s model calls for.

The Oklahoma Criminal Court of Appeals recently summarized Oklahoma’s common law rules on statutory interpretation in *State v. Stice*.<sup>92</sup> In *Stice*, the Cleveland County District Attorney motioned for a writ of mandamus against a trial judge who refused to order the defendant to pay his district attorney supervision fees. The judge maintained it was within his discretion to assess fees and to decide who would receive the fees. The district attorney argued that an enacted statute forced the judge to assess fees paid directly to the district attorney’s office. In its opinion, the *Stice* court examines Oklahoma’s common law history of statutory interpretation. *Stice* quotes extensively from *State v. Young* and *Loyza v. State*, which hold that statutes are to be construed “to determine the intent of the Legislature, reconciling provisions, rendering them consistent and giving intelligent effect to each.”<sup>93</sup> *Stice* also provides that “where an irreconcilable conflict exists between two statutes, the latter statute controls.”<sup>94</sup> The interpreter of conflicting statutes seems on firm ground when interpreting statutes passed into law by the legislature. According to the Frickey model, courts can also be comfortable applying these canons of statutory construction to state ballot initiatives.<sup>95</sup>

Frickey’s model is a slightly better fit than Schacter’s because the canons of statutory construction are clear. Frickey says that when interpreting an initiative that impacts other areas of the law (such is the case here) then the canons of construction provide the basis

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90. Frickey, *supra* note 86, at 522.

91. *Id.* at 522–23.

92. *State ex. rel. Mashburn v. Stice*, 288 P.3d 247 (Okla. Crim. App. 2013).

93. *Id.* at 250; *see also* *State v. Young*, 989 P.2d 949 (Okla. Crim. App. 1999) (discussing statutory interpretation issue regarding whether money in the Oklahoma State Insurance Fund is public); *Loyza v. State*, 932 P.2d 22, 25 (Okla. Crim. App. 1996) (explaining there is “a potential conflict between provisions in the Delayed Sentencing Program for Young Adults (Sections 996 through 996.3 of Title 22) and the Trafficking in Illegal Drugs Act (Sections 2–414 through 2–420 of Title 63)”).

94. *Stice*, 288 P.3d at 250. *See* *City of Sand Springs v. Dep’t of Pub. Welfare*, 608 P.2d 1139, 1151 (Okla. 1980); *Pickett v. Okla. Dep’t of Human Servs.*, 932 P.2d 543, 545 (Okla. Civ. App. 1996); *Taylor v. State*, 640 P.2d 554, 556 (Okla. Crim. App. 1982).

95. Frickey, *supra* note 86, at 478.

through which to interpret.<sup>96</sup> The interpretation under Frickey would then be to apply Oklahoma’s rules of statutory construction as laid out in *State v. Stice* to the inconsistency created between the drug court statute and SQ780.<sup>97</sup> The *Stice* court states that where two conflicting statutes can be read as “not irreconcilably conflicting,” then they can coexist.<sup>98</sup> However, if the two statutes conflict, then the statute that was enacted later controls.<sup>99</sup> There are then two possible interpretations under Frickey’s model: first, the statutes can coexist, but this would yield a much smaller number of eligible drug court participants; second, the statutes are irreconcilable and the later statute—SQ780—controls.<sup>100</sup> If the first option applied, lawmakers would do nothing about the problem. If the second option applied, it would implicitly repeal the drug court statute.

#### a. Policy Outcomes of Doing Nothing

Doing nothing is always an attractive option in law and policy making.<sup>101</sup> In many cases, constituents are not aware of a problem with the measure they passed, and thus lawmakers can leave inconsistencies on the books that are created by ballot initiatives. Doing nothing leaves voters free to think they made a positive difference when there are underlying legal issues standing in the way of proper implementation. In this case, because the statutes are not directly adverse but rather derivatively impacted, it would be simple for lawmakers to do nothing. However, lawmakers have actively sought to limit the impact of SQ780 and nullify the voters’ intent.<sup>102</sup> In 2017, the Oklahoma legislature put forward a bill to nullify the effects of SQ780, believing that voters did not know what they were doing when they passed the initiative.<sup>103</sup> This follows a large trend of legislators attempting to reverse the will of the people in any way they can.<sup>104</sup> Doing nothing is

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96. *Id.* at 500.

97. *Id.*

98. *Stice*, 288 P.3d at 251.

99. *Id.* at 249–50.

100. *Id.*; see Frickey, *supra* note 86, at 524 (an example of how to apply the model when there are conflicting laws but both laws must coexist); *id.* at 517 (discussing utilizing the quasi-constitutional canons of construction in circumstances of implicit repeal).

101. See generally Lauren French, *Congress Setting New Bar for Doing Nothing*, POLITICO (Mar. 22, 2016), <https://www.politico.com/story/2016/03/congress-supreme-court-budget-do-nothing-221057>; Kellie Mejdrieh, *Do Nothing Amendments Give Lawmakers Bragging Opportunity About Successes*, ROLL CALL (July 28, 2018), <https://www.politico.com/story/2016/03/congress-supreme-court-budget-do-nothing-221057>; Susan Milligan, *The Do-Nothing Congress*, U.S. NEWS & WORLD REP. (Sept. 8, 2014), <https://www.usnews.com/news/articles/2014/09/08/the-do-nothing-congress>; Darla Slipke, *Oklahomans React to Legislative Inaction*, OKLAHOMAN (Nov. 9, 2017), <https://newsok.com/article/5571467/oklahomans-react-to-legislative-inaction>.

102. “Republican legislators introduced Senate Bill 512, which would have amended SQ 780 to make possession of any Schedule I and II drugs (except marijuana) a felony punishable by a fine [sic] up to imprisonment of five years and a \$5000 fine. House Bill 1482 would have expressly overruled 780’s elimination of sentence enhancements for repeat drug possession offenders, and effectively overruled SQ 780 for much of the state by reclassifying possession of a controlled dangerous substance within 1000 feet of [a] school, church, or public park as a felony. Both of these bills raised public outcry and died in committee, and at present there is no talk of resurrecting either measure.” Stephen Galoob, Colleen McCarty, & Ryan Gentzler, *SQ780: Reform and Resistance*, 31 FED. SENT’G REP. 182, 182 (2019) (internal footnotes omitted).

103. S.B. 512, 56th Leg., 1st Sess. (Okla. 2017); More recently, the Oklahoma Senate passed SBI674, which makes possession of a controlled drug within 1000 feet of a school a felony again. See S.B. 1674, 57th Leg., 2d Reg. Sess. (Okla. 2020).

104. Timothy Williams, *First Came a Flood of Ballot Measures from Voters. Then Politicians Pushed Back.*,

preferable to rolling back the state questions passed by voters.

The results of doing nothing are evident in the policies and practices, which have continued for two years since the passage of SQ780. County drug courts are continuing along; however they have experienced a large downturn in admissions since SQ780 went into effect (See *Figure 1*). In 2017, Tulsa and Oklahoma counties reported stagnant or growing admissions to drug court as compared to previous years. In 2018, the year SQ780 took effect, these large counties experienced a combined twenty-three percent downturn in drug court admissions.<sup>105</sup>

	2010	2011	2012	2013	2014	2015	2016	2017	2018
Tulsa County	138	151	145	153	103	145	167	162	136
Oklahoma County	192	176	125	37	64	60	108	179	126

*Figure 2*<sup>106</sup>

The fees paid by defendants participating in the programs drive county drug courts' funding.<sup>107</sup> The fewer the participants, the smaller the budget of the drug court program. Therefore, if the numbers continue to decrease due to the lack of eligible defendants (since they will not have a felony drug charge), then drug court funding will eventually bottom out. In addition, leaving the text of these two pieces of law un-reconciled leaves drug court programs vulnerable to the whims of elected leaders who can wipe out drug courts as an unnecessary expenditure due to the fact that there are no longer drug possession felonies.<sup>108</sup>

#### b. Policy Outcomes of Implicit Repeal

Although it may shock many legislators and criminal justice reform advocates, implicit repeal of county drug courts could be the first step to establishing a state-wide proactive and therapeutic response to drug addiction in the state. County drug courts have an extremely variable success rate across the state and are often considered stops on the road to incarceration.<sup>109</sup> Due to low budgets and variant training of personnel, many county drug courts do not follow best practices in treatment of addiction or in administering sanctions to participants.<sup>110</sup> Further, as a result of poor administration, county drug courts can often be a driver of incarceration instead of a remedy as they were

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N.Y. TIMES, (Oct. 15, 2018), <https://www.nytimes.com/2018/10/15/us/referendum-initiative-legislature-dakota.html>.

105. Admissions Data, *supra* note 6.

106. *Id.*

107. Eric Swanson, *Uncertain Future for Drug Courts: State-Funded Program Could Lose Funding Due to Budget Crisis*, ADA NEWS (Dec. 1, 2017), [https://www.theadanews.com/news/local\\_news/uncertain-future-for-drug-courts-state-funded-program-could-lose/article\\_d4f583fd-3ac8-537e-883d-3c7ce0b5d2f6.html](https://www.theadanews.com/news/local_news/uncertain-future-for-drug-courts-state-funded-program-could-lose/article_d4f583fd-3ac8-537e-883d-3c7ce0b5d2f6.html).

108. SQ780 eliminated felony drug possession, but Possession with Intent to Distribute and Distribution still remain felonies. OKLA. STAT. tit. 63, § 2-401 (B)(1).

109. Bowers, *supra* note 49, at 786.

110. NAT'L INST. OF JUST., OFF. OF JUST. PROGRAMS & U.S. DEPT. OF JUST., DRUG COURTS: THE SECOND DECADE 17 (Jun. 2006), <https://www.ncjrs.gov/pdffiles1/nij/211081.pdf> [hereinafter THE SECOND DECADE].

intended.<sup>111</sup> Using the money generated by the passage of SQ781, counties could create private incentives for companies and private/public partnerships to build programs that truly address the root causes of addiction and implement trauma-informed care.<sup>112</sup> These organizations could focus on prevention, education, and a holistic community response to addiction in ways that the current drug courts cannot. Due to drug courts' statutory limitations, traditional programs may only operate within the jurisdiction of the court. This precludes them from general addiction education, addiction prevention, early intervention, and harm reduction strategies that non-profits and free clinics can provide.<sup>113</sup>

On the other hand, without the drug court statute, courts lose the ability to sentence defendants into alternative sentencing drug courts. Without the current framework of the drug court statute, courts and counties would be floundering to remake the wheel of supervised community sentencing. Many properly indicated defendants would lose the chance at rehabilitation and the courts would again be forced to choose between incarceration and probation.<sup>114</sup> The defendant could tell the court they were going to attend a private rehabilitation center, but there would be no compulsory element to their sentence.

There is a net positive of defendants coming out of drug court who are successful.<sup>115</sup> Although some are revoked and sent to prison, many do succeed and go on to remain drug free. In addition, the voters who passed SQ780 have a largely positive perception of drug courts.<sup>116</sup> Courts and legislators would likely face a public backlash if they used voter-driven criminal justice reforms to justify eliminating drug courts. This is true even if the replacement were ultimately better in many ways. For these reasons, implicit repeal is likely not the best option for reconciling SQ780 and the drug court statute. A more ideal solution would be to tweak the current system to more closely align with voters' intent. This discrepancy in the laws is an opportunity to implement needed law changes to improve the current system.

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111. Bowers, *supra* note 49, at 786.

112. SQ781 authorizes Oklahoma Management and Enterprise Services (OMES) to calculate savings from those defendants that were deferred from prison into a fund called the "Community Safety Investment Fund." OMES created rules and regulations for how to apply for any money in the fund. The responsibility of creating proposals and applying rests on DAs offices. 35 OKLA. REG. 1349 (Sept. 4, 2018). In July 2018, OMES calculated that in the first year of implementation, SQ780 generated \$63 million in savings to the state. This number was widely criticized as flawed and overblown. The first disbursement of the fund will occur at the end of Fiscal Year 2018 by the legislature and will likely be less than the \$63 Million suggested by OMES. Ryan Gentzler, *The Official SQ780 Savings Calculation Rests on Flawed Assumptions*, OKLA. POL'Y INST. (Sept. 6, 2018), <https://okpolicy.org/the-official-sq-780-savings-calculation-rests-on-flawed-assumptions/>.

113. A good example of a non-profit model to address addiction is Shatterproof. The organization focuses on public education, free resources, advocacy, and lobbying. Shatterproof's Task Force is dedicated to ensuring medical best practices are aligned with addiction treatment across the country. In addition, Shatterproof provides funding to private addiction treatment centers that follow a public health, medical science model of addiction treatment. SHATTERPROOF, <https://shatterproof.org> (last visited Mar. 10, 2019).

114. Morrissey & Brandt, *supra* note 9, at 772.

115. *Oklahoma Drug Courts One Pager*, OKLA. DEP'T OF MENTAL HEALTH & SUBSTANCE ABUSE SERVS. (2016), <https://ok.gov/odmhsas/documents/2017%20Dc%20One%20Pager.pdf>.

116. The Oklahoman Editorial Board, *Bottom Line on Oklahoma Drug Courts: They Work*, OKLAHOMAN (July 23, 2018), <https://newsok.com/article/5602132/bottom-line-on-oklahoma-drug-courts-they-work>.

Michael D. Gilbert is a law professor at the University of Virginia School of Law focusing on election law, legislation, and constitutional entrenchment. The Gilbert Model is the most modern model of ballot initiative interpretation examined in this Comment. Gilbert relies heavily on the ideal of the median voter. Unlike Schacter and Frickey, Gilbert embraces the idea of “majoritarianism”—the concept that a majority of the population has the right to make decisions that affect society.<sup>118</sup> While Schacter and Frickey seek to limit the power of the majority, Gilbert embraces it. He states that the median voter is most representative of the “Condorcet winner[,] . . . the proposal that would defeat all other proposals in a head-to-head vote under a system of majority rule.”<sup>119</sup>

In support of this work, Gilbert argues that, many times, a product of legislative democracy is bargain democracy—a kind of tit-for-tat voting that trades policy-making objectives among legislators. In bargain democracy, the citizens lose something because they are not getting to choose between one policy or the other, they are getting watered down laws that are the product of legislators trading votes with each other (i.e. “If you vote for my bill, I will vote for yours.”). He asserts that this can lead to less direct representation and a lack of action from legislators. In contrast, when voters get a chance to choose what they want, the majority rules, and there can be no question of whether the ballot initiative they voted for is the Condorcet winner. Because elected judges answer to the same electorate, when those judges act in accordance with the ballot initiative’s intent, they are acting legalistically even though they may be criticized for pandering to their voter base.

In alignment with the “Condorcet winner” concept, Gilbert argues that when discerning voter intent, courts must only ask one question—“among plausible interpretations, which one would the voters who voted on the initiative have preferred to all others?”<sup>120</sup> However, Gilbert also states that considering the median voter means taking into account the voters that opposed the measure and their intentions.<sup>121</sup> In this way, Gilbert advocates for some restriction on the interpretation of ballot measures, though not as strongly as Schacter and Frickey.

Gilbert’s theory of ballot initiative interpretation yields a much different result than the preceding two theories. Because Gilbert’s model seeks to embrace the will of the majority in a much different way than Schacter and Frickey, applying Gilbert’s model requires a deeper understanding of the median voter theorem. The median voter theorem is an economic theory that has led to many modern political prediction tools and other prominent theories in our society, such as Game Theory.<sup>122</sup> The basic principle in the median voter theorem is that a majoritarian system will reflect the most preferred will of

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117. See generally Gilbert, *supra* note 67.

118. Nicholas Capaldi, *Majoritarianism*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/topic/majoritarianism> (last visited Oct. 29, 2018).

119. Gilbert, *supra* note 67, at 1634.

120. *Id.* at 1639.

121. *Id.* at 1623.

122. Game Theory and the median voter theorem originated in Harold Hotelling’s historic piece, *Stability in Competition*. Examining the multitudinous ways this article has shaped society is outside the scope of this article. See Harold Hotelling, *Stability in Competition*, 39 *ECON. J.* 41 (1929).

the median voter—the voter with the most moderate understanding of the ballot measure as it was written.<sup>123</sup>

Using SQ780 and SQ781 as an example will help to explain the median voter theory. These initiatives were passed during the 2016 presidential election. Fifty eight percent of voters passed the initiatives. The text of the ballot initiative read:

This measure amends statutes to reform criminal sentences for certain property and drug offenses. It makes certain property offenses misdemeanors. It makes simple drug possession a misdemeanor. Property offenses where the value of the property is one thousand dollars or more remain felonies, and the distribution, possession with intent to distribute, transportation with intent to distribute, manufacture, or trafficking of drugs remain felonies.<sup>124</sup>

Keeping the text of the measure in mind, assume there were five voters that voted on SQ780. Assume all five of them are concerned about excessive state government spending and over-incarceration. Voter A felt the measure did not go far enough, and that more property crimes and more drug crimes should be declassified, but still voted yes. Voter B believed that the measure was too conservative and that more property crimes should be declassified, but agreed with the drug crime declassification, so voted yes. Voter C agreed with the measure as written, and so voted yes. Voter D found the measure too liberal, believing that possessing drugs should be a misdemeanor but that the property crimes should not be declassified, so voted no. Voter E voted no because she believed the measure was too liberal and that the property crimes and drug crimes should stay as they are. In this example, Voter C is the median voter who reflects the will of the majority.<sup>125</sup> Using Gilbert’s model, courts and legislators should interpret SQ780 to reflect the intentions of Voter C.

Understanding the intentions of Voter C is extremely cultural and fact dependent. Discerning the intentions of Voter C requires a deeper understanding of the election landscape in Oklahoma in 2016. SQ780 was passed by fifty-eight percent of the voting block during the November 2016 general election.<sup>126</sup> Oklahoma is traditionally a very Republican state: The state voted 65.32% for Donald Trump, and 67.74% for James Lankford, Republican Senate candidate.<sup>127</sup> Only eleven democratic candidates for State House were elected out of seventy-three State House districts.<sup>128</sup> This is indicative of a high number of voters utilizing straight party voting, which allows voters to check one box—Democrat or Republican—and that party’s candidate will be marked for the whole ballot. Straight party voting is not applicable to State Questions, so voters must independently choose “yes” or “no” manually.<sup>129</sup> Thus, straight party voting cannot be

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123. Gilbert, *supra* note 67, at 1645.

124. SQ780, *supra* note 3.

125. This hypo is a variant of the example in Gilbert, *supra* note 67, at 1647.

126. *Official Results: Federal, State, Legislative and Judicial Races General Election – November 8, 2016*, OKLA. ELECTION BD. (Nov. 17, 2016), [https://www.ok.gov/elections/support/20161108\\_seb.html](https://www.ok.gov/elections/support/20161108_seb.html).

127. *Id.*

128. *Id.*

129. Straight ticket voting allows voters to fill in “Republican,” “Democrat,” or “Independent” once at the top of their ballot, and that selection will carry throughout the ballot. Since State Questions and Referendums are answered on a “Yes/No” basis, straight ticket voting does not apply to those parts of the ballot, and voters must make a manual selection for each of the questions, usually at the end of the ballot. *Straight Ticket Voting*, BALLOTEDIA, [https://ballotpedia.org/Straight-ticket\\_voting](https://ballotpedia.org/Straight-ticket_voting) (last visited Dec. 1 2018).

used to explain the passage of any state question. During the same election, voters approved a legislative referendum, State Question 776, which allowed the legislature to designate any method of execution and reaffirmed that the death penalty is not cruel and unusual punishment.<sup>130</sup> With such a strong conservative base, the passage of SQ780 was unexpected. The most likely explanation is the cost savings and government spending reduction likely to come out of the implementation of SQ780,<sup>131</sup> as well as the number of every day Oklahomans that battle with or are touched by addiction.<sup>132</sup> All of these factors should be considered when determining the median voter's intent.

Gilbert also discusses the importance of considering opinion polls when determining the median voter's intent. He concedes it is not a perfect measure because some who are polled do not vote, but that polls can be a helpful tool for reflecting the true majority opinion into interpretation; “[p]oll respondents may be more representative of society than the subset of voters who voted on the initiative, and pollsters could . . . frame issues more clearly than initiative sponsors.”<sup>133</sup> In the case of SQ780 and SQ781, some opinion polls have been conducted regarding criminal justice reforms in Oklahoma as recently as 2018. A November 4, 2018 poll showed that seventy-two percent of Oklahomans believed that Oklahoma's criminal justice system needed “significant improvements.” Fifty-four percent of republicans and seventy-five percent of democrats believed it was very important to reduce the number of people in prisons and jails.<sup>134</sup> Using poll information to inform interpretation may do more to serve the majority than Schacter's or Frickey's models because where Schacter and Frickey seek to limit the power of the majority, Gilbert seeks to embrace it.<sup>135</sup> Therefore, the ultimate conclusion of the voters' intent using Gilbert's model is to implement the laws in a way that will reduce incarceration. This will require legislators to amend the current drug court statute to ensure that it complements SQ780 in a way that reduces incarceration and provides meaningful and effective treatment for addict populations.

The current administration of the drug court statute allows district attorneys sole discretion to admit defendants who have eligible felonies. Several types of felonies are considered admissible to drug courts such as receipt of stolen property, false personation, grand larceny, possession with intent to distribute, along with several more. The controlling charge does not have to be drug related in order for a district attorney to offer a defendant drug court. However, one managing Tulsa County district attorney has questioned whether defendants who commit those types of crimes “deserve” drug court.<sup>136</sup>

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130. State Question No. 776, Initiative Petition No. 367 (as proposed by Okla. Sec'y of State, Apr. 13, 2015), <https://www.sos.ok.gov/documents/questions/776.pdf>.

131. Ryan Gentzler, *SQ780 Should Save Oklahoma Millions Next Year*, OKLA. POL'Y INST., (June 14, 2017), <https://okpolicy.org/sq-780-save-oklahoma-millions-next-year/>.

132. Oklahomans have the highest rate of non-medical pain pill use in the nation at 8.1%, twice the national average. OKLA. DEP'T OF MENTAL HEALTH & SUBSTANCE ABUSE SERVS., STATE OF ADDICTION: A SERIES OF STORIES FROM THE OKLAHOMAN, TULSA WORLD, OKLAHOMA WATCH, STATE IMPACT OKLAHOMA, OETA KWTV-9, AND KGOU 4 (2010), [http://www.odmhsas.org/stateofaddictionc%20\(2\).pdf](http://www.odmhsas.org/stateofaddictionc%20(2).pdf).

133. Gilbert, *supra* note 67, at 1650.

134. *Strong Bi-Partisan Support for Ambitious Criminal Justice Reforms in Oklahoma*, FWD.US (Nov. 4, 2018), <https://www.fwd.us/news/ok-poll-memo/>.

135. Gilbert, *supra* note 67, at 1621.

136. “[Assistant District Attorney for Tulsa County, Erik] Grayless said now the only people eligible for felony

Historically, district attorneys preferred to admit defendants with felony possession charges to drug court. However, SQ780 removed that option. If district attorneys continue to restrict drug court admissions to first-time felons with low-level drug-related crimes, then drug court will become unsustainable because those felonies no longer exist. The voters' intent in passing SQ780 is at odds with the current district attorney framework for admitting defendants to drug court—where SQ780 seeks to expand addicts' access to treatment and reduce the number of addicts in prison, district attorneys seek to limit access to drug court on moral grounds.

The above analysis concludes that, under Gilbert's model of interpreting ballot initiatives, the voter's intent in passing SQ780 was to reduce prison overcrowding, reduce government spending on incarceration, and provide a more compassionate response to addiction-driven crime. The prospect of doing nothing and allowing the drug court statute to remain in conflict with the changes created by SQ780 runs counter to those intentions because it shrinks the pool of those eligible for drug court, the state's only court-mandated drug treatment program, thus taking away one vehicle for delivering a compassionate response to addiction. In addition, doing nothing does not meaningfully reduce the prison population or prison spending because some defendants in drug court still go to prison, and drug court has existed for eighteen years without creating a meaningful reduction in the prison population. Allowing SQ780 to implicitly repeal the drug court statute could allow practitioners and experts to create a whole new infrastructure for how the Oklahoma criminal justice system handles addiction, however this is an unlikely interpretation because lawmakers and courts would inflame the public by using SQ780 as a justification for eliminating drug courts.

The best path forward is using Gilbert's model to understand the voters' intent, and then using the goals articulated by the voters' intent to amend the drug court statute. This begs the question: what amendments to the drug court statute would reduce government spending on incarceration, reduce prison overcrowding, and provide a compassionate response to addiction based crimes?

#### IV. RECOMMENDATIONS: PROPOSED AMENDMENTS TO THE DRUG COURT STATUTE

Intellectually, interpreting the inconsistency created by SQ780 seems manageable. However, when put into practice, each of the interpretations would lead to vastly different policy outcomes that could have negative impacts across the state. Doing nothing and allowing the statutes to remain as they are could bottom out drug court funding due to the continuing downturn in eligible defendants. Implicitly repealing the drug court statute may be attractive to those who would like to start over with a more preventative and holistic approach to treating addicts in the system. However, in reality it would potentially end a program that is the most successful alternative thus far in treating addicts in the system.<sup>137</sup>

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drug courts are those arrested for more serious nonviolent crimes like intent to sell drugs or felony burglary. 'Is that the sort of person who deserves drug court?' Grayless asked." Chandler, *supra* note 52.

137. THE SECOND DECADE, *supra* note 110, at iii ("Research indicates that drug courts can reduce recidivism and promote other positive outcomes. However, research has not uncovered which court processes affect which outcomes and for what types of offenders. The magnitude of a court's impact may depend upon how consistently court resources match the needs of offenders in the drug court program.").

In addition, the funds from SQ781 intended to provide preventative community drug treatment are being funneled through district attorneys offices. Therefore, implicit repeal would leave the state with no infrastructure, no funds, and a treatment fund with no river to flow into.<sup>138</sup> Amending the drug court statute to reflect the intent of the voters is the most realistic and beneficial interpretation.

#### *A. Remove District Attorney as Gatekeeper*

There are several ways to amend the drug court statute to create a policy landscape more in tune with the voters' intent behind SQ780. The first and most impactful would be to remove district attorneys as drug court gatekeepers and place that responsibility with the court. The drug court statute currently mandates that district attorneys are the sole body that can recommend an offender for drug court.<sup>139</sup>

Evidence for this recommendation can be found in two privately-funded court alternatives run in Tulsa County: Women in Recovery and First Step Male Diversion Program. Both of these privately-funded, non-profit programs require the judge to make the ultimate decision on whether or not the offender gets sentenced into the program.<sup>140</sup> The district attorney still maintains control of the charge and can make recommendations as to whether or not the judge should admit the defendant to the program, but ultimately the court decides who is admitted.<sup>141</sup> This takes the admission control from the district attorneys, who historically shy away from alternative courts for offenders that do not fit a typical addict profile, and yet still suffer from addictions that are the root of their crimes.<sup>142</sup> Women in Recovery participants often have a more diverse criminal history than those traditionally put into drug court, and have a higher success rate.<sup>143</sup> Officials at the program pinpoint this success to a close working relationship with the judges who recommend defendants for admittance. In addition, the Women in Recovery program closely monitors the ORAS scores<sup>144</sup> (the diagnostic assessment used to gauge criminality and likelihood

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138. 35 OKLA. REG. 1349 (Sept. 4, 2018).

139. OKLA. STAT. tit. 22, § 471.2 (B) (2014).

140. Women in Recovery participants can enter a blind plea. After the plea is entered, the judge sentences the participant to Women in Recovery as an alternative sentencing program. Tracy LeGrand, *Women in Recovery Supported*, TULSA WORLD (Aug. 16, 2012), [https://www.tulsaworld.com/archive/women-in-recovery-supported/article\\_e1fde645-41dd-5394-a476-5ca67a5af130.html](https://www.tulsaworld.com/archive/women-in-recovery-supported/article_e1fde645-41dd-5394-a476-5ca67a5af130.html).

141. *Id.*

142. A typical drug court defendant has crimes that solely reflect addiction: Possession of a Controlled Drug, being the most popular drug court crime. Since possession is now a misdemeanor in Oklahoma, this is no longer available and District Attorneys must look to other crimes that are indicative of addiction. Some of those could include: possession with intent to distribute, burglary, false personation, child endangerment, unauthorized use of a motor vehicle, etc. The inquiry should always be fact dependent. District attorneys have expressed chagrin at these types of defendants receiving the chance at drug court. Chandler, *supra* note 52.

143. Stetson Payne, *Women in Recovery Celebrates 25th Graduating Class to Help Break Cycle of Addiction for Families*, TULSA WORLD (Oct. 9, 2018) [https://www.tulsaworld.com/news/courts/women-in-recovery-celebrates-th-graduating-class-to-help-break/article\\_611f05c9-7e09-5e61-91e4-5eeb388e5840.html](https://www.tulsaworld.com/news/courts/women-in-recovery-celebrates-th-graduating-class-to-help-break/article_611f05c9-7e09-5e61-91e4-5eeb388e5840.html).

144. The Ohio Risk Assessment System is an empirically researched and validated tool for discerning criminal risk factors. The tool "was developed to classify the risk level of offenders in the system while also identifying both criminogenic needs and barriers to programming." EDWARD LATESSA ET AL., CREATION AND VALIDATION OF THE OHIO RISK ASSESSMENT SYSTEM FINAL REPORT 6 (July 2009), [https://www.ocjs.ohio.gov/ORAS\\_FinalReport.pdf](https://www.ocjs.ohio.gov/ORAS_FinalReport.pdf). The ORAS tool is widely used in criminal justice systems across America to assess needs and risks of criminal defendants or inmates who may be reentering society through community sentencing, parole or bail. *Id.* at 2.

of recidivism) of its participants and only admits those who have a high chance of success. District attorneys can take the ORAS scores into account when determining sentencing, but more often district attorneys use the type of crime to make decisions about alternative sentences. Often, defendants with ORAS scores that indicate they could be successful in drug court are not offered the chance to enter drug court—even when the statute would allow it—because their crimes are deemed too serious to be allowed the chance at rehabilitation outside of prison.<sup>145</sup>

While this solution may increase the workload on the judiciary, especially in small counties with few judges, the workload would not increase by a large amount. Currently judges must still adjudicate defendants in drug court, however they have no say in who is accepted or rejected into the programs. Giving the gatekeeping function to the judge would allow the judge to do a fact-based analysis and decide the defendant’s status at the time of adjudication. There is a concern that in small counties where judges and district attorneys work closely together that the judge would simply follow all the same recommendations that the district attorneys make as far as which defendants get the chance at drug court. However, the largest impact would occur in the most populous counties—Tulsa County and Oklahoma County—where judges and district attorneys frequently disagree and there is less trepidation about a negative impact to their working relationships.

Removing the district attorneys as gatekeepers to drug court is aligned with the voters’ intent because, if the numbers from the above-mentioned private programs maintain, more defendants will be approved for drug court if the judge is in control of admissions. This would reflect the voters’ intent in three ways: first, it would reduce incarceration because the judge is more likely to follow the ORAS score recommendation. Second, removing the district attorney as gatekeeper allows the system to deliver compassionate addiction treatment to those defendants who would otherwise go directly into the prison system. Third, it reduces government spending on incarceration and adjudication because an individual costs the state \$5,000 per year in drug court as opposed to \$19,000 per year in prison.<sup>146</sup>

### *B. Remove the Prior Violent Felony Restriction and the Current Violent Felony Restriction*

The current drug court statute provides that “the offender has no prior felony conviction in this state or another state for a violent offense within the last ten (10) years,”<sup>147</sup> and also states that the current crime the defendant is being charged with must be non-violent. However, Oklahoma’s definition of a violent felony is broad. Under current law, the twenty-two eighty-five percent crimes are labeled as violent.<sup>148</sup> Additionally, anyone to whom conspiracy liability attaches can also be charged with a violent felony. This means that an accomplice who sits in the getaway car of a robbery

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145. Chandler, *supra* note 52.

146. *Adult Drug Court*, OKLA. DEP’T OF MENTAL HEALTH & SUBSTANCE ABUSE SERVS., [https://ok.gov/odmhsas/Substance\\_Abuse/Oklahoma\\_Drug\\_and\\_Mental\\_Health\\_Courts/Adult\\_Drug\\_Court/index.html](https://ok.gov/odmhsas/Substance_Abuse/Oklahoma_Drug_and_Mental_Health_Courts/Adult_Drug_Court/index.html) (last visited Dec. 1, 2018).

147. OKLA. STAT. tit. 22, § 471.2(2) (2014).

148. See sources cited *supra* note 40.

will be charged with a violent felony if the robbery is attempted or completed with a weapon. Many defendants are charged with violent felonies yet present no violent tendencies. It is these complexities in Oklahoma law that make sentencing and restrictions on rehabilitative treatment extremely punitive.

Allowing the court to be the gatekeeper of drug court, in addition to adding a neutral body to the process, will also allow judges to perform a balancing test in regard to prior and current “violent” felonies when deciding whether or not they should preclude drug court admission. This balancing test should consider what type of crime the defendant is held on, whether or not the defendant has a violent history, a history of mental health issues, and also whether the defendant’s addiction caused the behavior that led to the felony charge. If the defendant is indeed exhibiting violent outbursts, has a history of harming others, and his/her ORAS score does not indicate the defendant will be successful in drug court, then the court should take the steps to refuse drug court admission. However, allowing this analytical step to be taken by the court is an important first step to ensure Oklahoma is not excluding candidates from drug court who would benefit from and succeed in an alternative sentencing drug court.

There are other sociological problems with the prior felony restriction. A recent study by a University of Georgia sociologist found that while eight percent of the overall United States population has a prior felony conviction, thirty-three percent of African American males have a felony conviction.<sup>149</sup> This disproportionality impacts any system that limits access based on prior felony convictions. The Oklahoma drug court statute limits admission to those individuals who have no prior violent felony convictions in the past ten years.<sup>150</sup> This restriction enables district attorneys to limit access to treatment to first time drug offenders. However, this limitation creates flawed results. Those defendants with one or several prior felony convictions could have ORAS scores that indicate they would be successful in drug court. In addition, their underlying addiction could be a root cause of the behavior that led to their prior convictions. Rehabilitating the addiction can reduce or eliminate a defendant’s interface with the criminal justice system.

Nationally, states spend \$200 to \$600 per adjudication of a robbery defendant, and \$200 to \$800 per adjudication of a larceny defendant.<sup>151</sup> The cost to the state taxpayer increases exponentially when a defendant is sentenced to prison. Therefore, multitudinous resources are spent on those defendants who have multiple felony convictions. Allowing a prior felon access to an alternative sentencing drug court would racially equalize drug court participants as well as reduce state spending on adjudication and incarceration.

District attorneys employ a retributivist view of drug court that is largely based on moral concerns. They fear that those defendants who have multiple felony convictions are too far gone for rehabilitation. The logic is that those defendants went to prison, which

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149. Sarah Shannon, et al., *The Growth, Scope, and Spatial Distribution of People with Felony Records in the United States, 1948–2010*, 54 DEMOGRAPHY 1, 22–23 (Sept. 2017); see also Alan Flurry, *Study Estimates U.S. Population with Felony Convictions*, UGA TODAY (Oct. 1 2017), <https://news.uga.edu/total-us-population-with-felony-convictions/>.

150. OKLA. STAT. tit. 22, § 471.2(A)(2).

151. Priscilla Hunt, *The Price of Justice: New National and State Level Estimates of the Judicial and Legal Costs of Crime to Taxpayers*, 42 AM. J. CRIM. JUST. 231, 234 tbl.1 (2017).

was meant to rehabilitate them, and the rehabilitation was ineffective.<sup>152</sup> However, research shows that prison is ineffective for rehabilitation and frequently causes an increase in criminality when defendants are released.<sup>153</sup> Thus, individual defendants should not be blamed for the ineffectiveness of prison as a rehabilitative intervention and thus precluded from treatment options.

Eliminating the prior felon restriction from the drug court statute is consistent with voters' intent because more defendants of greater diversity will be approved for drug court if the prior felon/current violent felon restrictions are removed. This would reflect the voters' intent in three ways: first, it would reduce incarceration because more properly indicated defendants entering drug court means less prison admissions, thus less prison spending. Second, removing the prior violent felon/current violent felon restriction allows a more racially compassionate system. Equal access to state drug rehabilitation programs indicates that all Oklahoma citizens are being offered equal protection of the laws and not suffering from systemic discrimination. Third, allowing prior felons a chance to participate in drug court will take the "frequent fliers" in the criminal justice system and allow them a chance at true rehabilitation. Even if this theory only partially bears out (i.e. some defendants still fail and return to prison) the spending reduction on rehabilitating those who revisit the criminal justice system frequently would still create a net reduction in government spending.

### *C. The Drug Court Statute Should Provide That a Defendant Cannot Be Revoked Solely Due to Drug Relapse*

Public and scientific opinion surrounding addiction has changed vastly in the last twenty years.<sup>154</sup> The concept of addiction and addiction treatment is considered in America widely as a public health issue rather than one that should be handled in the courts.<sup>155</sup> Addiction, also called Substance Use Disorder, is a disease that impacts the brain in predictable and pathological ways.<sup>156</sup> The criminal justice system has been widely criticized for not implementing scientific advances into the way it treats drug addiction.<sup>157</sup>

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152. Scholars have long endorsed the concept that prosecutors can bring charges as long as they personally, morally believe the defendant is guilty. There is no reason not to infer this same personal belief transfers to allocation of alternative sentencing pleas. Bennett L. Gershman, *A Moral Standard for the Prosecutor's Exercise of the Charging Discretion*, 20 *FORDHAM URB. L.J.* 513, 524 (1993); see also Sarah French Russell, *Rethinking Recidivist Enhancements: The Role of Prior Drug Convictions in Federal Sentencing*, 43 *U.C. DAVIS L. REV.* 1135, 1146 (2010).

153. Serge Brochu et al., *Comparative Profiles of Addicted Adult Populations in Rehabilitation and Correctional Services*, 16 *J. SUBSTANCE ABUSE TREATMENT* 173, 173 (1999).

154. In the 2017 mid-term primaries, Oklahomans passed SQ788, which made medical Marijuana legal in the state. This is interesting, because prior to the passage of SQ780 (just a year previous), possession of Marijuana could have led to a decade long prison sentence if the defendant had prior drug crimes. Paul Armentano, *Public Support for Medical Marijuana Access Is Overwhelming and Bipartisan*, HILL (June 30, 2018), <https://thehill.com/opinion/judiciary/394915-public-support-for-medical-marijuana-access-is-overwhelming-and-bipartisan>; OKLA. STAT. tit. 43, § 2-402 (B)(3)-(4) (2016); State Question No. 788, Initiative Petition No. 412 (as proposed by Okla. Sec'y of State, Apr. 11, 2016), <https://www.sos.ok.gov/documents/questions/788.pdf>.

155. Nora Volkow et al., *Drug Use Disorders: Impact of a Public Health Rather than a Criminal Justice Approach*, 16 *WORLD PSYCHIATRY* 213, 213 (2017).

156. Bruce Goldman, *Neuroscience of Need: Understanding the Addicted Mind*, 29 *STANFORD MED. MAG.*, no. 1, 2012, at 24.

157. Editorial Board, *If Addiction Is a Disease, Why Is Relapsing a Crime?*, *N.Y. TIMES* (Mar. 29, 2018),

The National Association of Drug Court Professionals provides a list of best practices that all drug courts are encouraged to follow.<sup>158</sup> One of the most impactful and progressive practices provides that defendants should not be revoked from a drug court sentence due to a drug relapse.<sup>159</sup> Recent addiction and human behavior research suggests that relapse is a statistical inevitability when treating addict populations.<sup>160</sup> Though different drugs have different time periods for predicted relapse—some of which include months or years—the fact is that relapse is an expected and surmountable challenge inherent in addiction treatment.

Under current county drug court rules and regulations, many programs permit revocation of a drug court sentence after a defendant gives a drug-positive result on a urinalysis test.<sup>161</sup> This practice is widely variant across counties. Some drug courts may have a zero-tolerance policy for drug use while others may allow a few failed drug tests before revoking the sentence. A revocation means the defendant goes to prison to serve a sentence they agreed on with the judge should they fail drug court. Thus, revocations drive prison population growth. Having revocation policies that are inconsistent with the science of addiction is essentially ensuring that defendants will fail the programs and go to prison.

Legislators, judges, and district attorneys must ensure that the drug court programs are administered with the most up-to-date medical knowledge of addiction and the best practices for ensuring success. Certainly, there will still be drug court failures. However, those failures will not be predicated on a predictable outcome such as relapse. Ignoring relapse as a part of recovery is setting defendants up to fail, thus driving high incarceration rates. Encoding the inability to revoke sentences due to relapse into the drug court statute will ensure uniform practice across the state.

## V. CONCLUSION

This Comment argues that there is an irreparable inconsistency in the Oklahoma drug court statute created by SQ780, a ballot initiative passed by voters in 2016. The ballot initiative declassified drug possession from a felony to a misdemeanor. The drug court statute requires a felony for admission. This inconsistency has created a vacuum of drug court participants and threatens to bankrupt Oklahoma's alternative sentencing drug court programs, which depend on high levels of participation for funding. After examining three models of ballot initiative interpretation, this Comment demonstrates that the voters' intent in passing SQ780 was to reduce prison populations, reduce government spending on prisons, and create a compassionate way of treating addicts in the criminal justice system. The best way to achieve these ends is to amend the drug court statute in the following ways: remove district attorneys as gatekeepers to drug court admissions and substitute the court, remove the prior felony/current violent felon restrictions and employ a balancing test for violent felonies so that a violent felony does not preclude entry into drug court,

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<https://www.nytimes.com/2018/05/29/opinion/addiction-relapse-prosecutions.html>.

158. "Drug Courts have significantly poorer outcomes and are considerably less cost-effective when they terminate participants for drug or alcohol use." 1 NAT'L ASSOC. OF DRUG COURT PROF'L S, *supra* note 35, at 33.

159. *Id.*

160. *Id.* at 46.

161. FINIGAN, CAREY & COX, *supra* note 12, at 62.

and provide in the statute that defendants cannot have their drug court sentences revoked due to addiction-related relapse. These statutory changes will solidify the voter's intent in passing SQ780. Amending the drug court statute in these ways will remedy the inconsistency in the statutes and create a net reduction in the Oklahoma prison population while introducing compassion and common sense to Oklahoma's treatment of addicts in the criminal justice system.

- *Colleen McCarty\**

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