HOW THE OPIOID EPIDEMIC IS CHANGING THE WAY THE LEGAL PROFESSION SHOULD WORK IN CHILD WELFARE: THE IMPORTANCE OF IMPLEMENTING FAMILY DRUG TREATMENT COURTS

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I. INTRODUCTION

One in four children in the United States live in a home where someone is suffering from substance abuse.[1] Due to the realities of the Opioid Epidemic, the rising number of children in need of services creates a major issue for the United States' child welfare system.[2] The United States Department of Health and Human Services (HHS) has stated that child welfare agencies across the country are having difficulty responding to growing child welfare needs.[3]

Parents are not the only victims of this Opioid Epidemic—their children are as well.[4] This epidemic is robbing children of their childhood and, many times, reversing the parent-child relationship by making the child feel as though they are a caretaker of the parent under the influence of these drugs.[5] These children will stay up late to make sure that their parent does not hurt themselves if they fall asleep while they are smoking a cigarette.[6] They will try to fight their parent from driving a vehicle when they can barely hold their

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[1] *Guide for Children of Addicted Parents*, AM. ADDICTION CTRS., https://americanaddictioncenters.org/guide-for-children (Apr. 17, 2020) [https://perma.cc/A9U3-RDNP].

[2] *See generally* Child Welfare Information Gateway, *Parental Substance Use and the Children Welfare System*, CHILD.'S BUREAU, OFF. OF THE ADMIN. FOR CHILDREN & FAMILIES 3 (Oct. 2014), https://www.childwelfare.gov/pubPDFs/parentalsubabuse.pdf [https://perma.cc/G2GP-XTWC].

[3] LAURA RADEL, ET AL., OFF. OF THE ASSISTANT SEC'Y FOR PLAN. AND EVALUATION, SUBSTANCE USE, THE OPIOID EPIDEMIC, AND THE CHILD WELFARE SYSTEM: KEY FINDINGS FROM A MIXED METHODS STUDY 4 (2018), https://aspe.hhs.gov/system/files/pdf/258836/SubstanceUseChildWelfareOverview.pdf [https://perma.cc/9D44-C3YA].

[4] Editor's note: This Note expresses the author's perspective as a child of a parent struggling with opiod addiction. Statements describing the author's perceptions will be hereafter cited as "Author's recollection," "Author's opinion," or "Author's perspective."

[5] Author's perspective.

[6] *Id.*

eyes open.[7] A lot of kids take on the impossible task of shielding younger siblings from the reality in which they live.[8] Sometimes these kids get taken away from their parents by child welfare services.[9] From the perspective of some children, this seems worse than continuing to be the caretaker of their parent who is momentarily not fit to take care of their children.[10] Ultimately, even if the parent is a drug addict, a lot of children still want to be with their parent.[11] From an outside perspective, it can look like the parent is choosing drugs over their children, but in many cases they want more than anything to get their disease under control so they can once again be active in their child's life.[12] So, the question becomes: how do we help the growing number of parents and children in these situations in the United States child welfare system?

Traditional models for the United States child welfare system are not serving the needs of parents and children who suffer from the impacts of opioid or another drug addiction.[13] These models are also not effective means of spending millions of tax dollars.[14] Family Drug Treatment Court (FDTC) is a better model to combat the growing burden on courts across the United States that are adjudicating these delicate issues.

The purpose of this Note is to bring attention to the Opioid Epidemic's impact on the child welfare system, and how FDTCs can help mitigate some of the negative impacts of drug addiction to promote better outcomes for children and parents across the United States. Implementation of FDTCs would change the way individuals in the legal profession tackle child welfare issues. These issues include parental drug abuse, out-of-home placement of children, and the protection of a parent's constitutional right to childrearing. Despite the issues with funding and societal perceptions of drug addicts, the legal profession can shift from an adversarial approach to cooperative approach in the child welfare area of law by implementing FDTCs and using the best practices known in terms of treatment and cost benefit analysis. Parents, children, legal professionals, and tax payers can all benefit from the implementation of FDTCs.

In Part II of this Note, there will be a brief overview of the history and the current state of the Opioid Epidemic, the impact of the Opioid Epidemic

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[7] *Id.*
[8] *Id.*
[9] Child Welfare Information Gateway, *supra* note 2, at 3.
[10] Author's perspective.
[11] *Id.*
[12] *Id.*
[13] Author's opinion.
[14] Author's opinion.

on children and the child welfare system, and a brief description of FDTCs. In Part III of the Note, there will be an explanation of legal precedent and parental rights in order to emphasize why the United States should adopt FDTCs to protect a parent's Constitutional Right to parent their child. Next, the major issue for which this Note seeks to provide a solution will be addressed: there has been a major influx of children in need of child services due to the current state of drug use in the United States, specifically involving opioids. By having states put these courts into practice, they can alleviate the burdens occurring in response to those issues. This Note will explore the criticisms of FDTCs and potential reasons why states have not yet adopted them. In order to reach the goal of implementing FDTCs and meeting the growing needs of the child welfare system, the public's perceptions of drug abuse must be altered, first, by educating them about the cost of FDTCs, and second, by changing their perception of drug addicts. Lastly, this Note will address concerns about and provide a solution for managing the growing caseload in the field of child welfare by describing characteristics of the most successful FDTCs based on models adopted by some states.

II. HISTORY

A. The Opioid Epidemic

Chances are that you have been impacted or know someone that has been impacted by the current Opioid Epidemic that plagues the United States. Some statistics report that 128 people die a day from opioid overdose in the United States.[15] These individuals are husbands, wives, aunts, uncles, children, and parents of minor children. The United States government has declared a public health emergency due to the growing opioid use as of October 2017.[16] The Opioid Epidemic is currently an issue that is a focus of

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[15] *Opioid Overdose Crisis*, NAT'L INST. ON DRUG ABUSE (May 27, 2020), https://www.drugabuse.gov/drugs-abuse/opioids/opioid-overdose-crisis#one [https://perma.cc/MKG3-634A].

[16] Mark R. Jones et al., *A Brief History of the Opioid Epidemic and Strategies for Pain Medicine*, 7 PAIN THER. 13, 13 (2018).

political debate,[17] a source for offensive internet memes,[18] and a high burden on United States tax payers.[19] But how did the United States get to this point?

Opioid use is not a new phenomenon. People have been using opioids since approximately 3,400 B.C. when the Sumerians in Mesopotamia grew the poppy plant.[20] Since then, people all over the world have been using various forms of the poppy plant for pain management and its euphoric effect.[21] Certain medical advancements, such as the invention of the hypodermic needle, have aided researchers in extracting substances from the poppy plant to create medicines, such as morphine.[22] By 1898, Bayer Pharmaceutical Company was producing and selling heroin as a cough suppressant.[23] By 1915, when the Harrison Narcotics Tax Act[24] came into effect, United States' law makers and the public were becoming very aware of the opioid problems in the country.[25] In June 1915, C.E. Terry wrote:

> It is daily becoming better known that opium, its derivatives and cocaine are being used in alarming amounts all over this country. Various factors, such as the careless prescribing of these drugs by physicians, the spread of habit from person to person, the cupidity of druggists and patent medicine manufacturers, and vice and dissipation are responsible for the existing conditions.[26]

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[17] German Lopez, *How the Democratic Presidential Candidates Would Combat the Opioid Epidemic*, VOX (Oct. 24, 2019), https://www.vox.com/policy-and-politics/2019/9/10/20851108/opioid-epidemic-2020-democratic-presidential-candidate [https://perma.cc/XQ4M-PMDV].

[18] Raj Prashad, *Sheriff Responds After Controversial, 'Tasteless' Drug Overdose Meme Circulated his Department*, AOL, (Dec. 12, 2017, 10:14 AM), https://www.aol.com/article/news/2017/12/12/sheriff-responds-after-controversial-tasteless-drug-overdose-meme-circulates-his-department/23304820/ [https://perma.cc/R6FY-K3NU].

[19] COUNCIL OF ECON. ADVISERS, EXEC. OFF. OF THE PRESIDENT OF THE U.S., THE UNDERESTIMATED COST OF THE OPIOID CRISIS 1 (Nov. 2017), https://www.whitehouse.gov/sites/whitehouse.gov/files/images/The%20Underestimated%20Cost%20of%20the%20Opioid%20Crisis.pdf [https://perma.cc/TY9Z-W7MP] ("CEA estimates that in 2015, the economic cost of the opioid crisis was $504.0 billion.").

[20] Andrew Rosenblum et al., *Opioids and the Treatment of Chronic Pain: Controversies, Current Status, and Future Directions*, 16 EXPERIMENTAL & CLINICAL PSYCHOPHARMACOLOGY 405, 405 (2008).

[21] *Id.* at 405–06.

[22] *Id.*

[23] Lecia Bushak, *How Did Opioid Drugs Get to be So Deadly? A Brief History of its Transition from Trusted Painkiller to Epidemic*, MED. DAILY (July 26, 2016, 3:34 PM), https://www.medicaldaily.com/opioid-drugs-heroin-epidemic-prescription-painkillers-abuse-history-392747?rel=most_shared5 [https://perma.cc/VK9F-3HYE].

[24] Harrison Narcotics Tax Act of 1914, Pub. L. No. 63-223, 1914 U.S.C.C.A.N. (38 Stat. 785).

[25] C.E. Terry, *The Harrison Anti-Narcotic Act*, 5 AM. J. PUB. HEALTH (N.Y.) 518, 518 (1915).

[26] *Id.*

The Harrison Narcotics Tax Act made specific acts of commerce involving opioids, cocaine, or their compounds illegal if they were not in the original stamped packages.[27] This act also taxed doctors and pharmacists who prescribed those substances.[28] Eventually, the belief among professionals during most of the twentieth century was that opioids were not appropriate for long-term pain management because of the risks of addiction and other conditions.[29] However, a shift occurred in the United States in the 1990s.[30]

The current Opioid Epidemic has its genesis in the late 1990s.[31] In 1996, OxyContin was introduced to the market.[32] OxyContin was novel because it was a slow release pain killer that had a longer duration than previous medications.[33] This is when pharmaceutical companies perpetuated the lie to physicians that the pain killing drugs they were putting on the market would not make their patients addicted like the medications did in the past.[34] Doctors fell for this marketing campaign and began prescribing.[35] As a result, more patients started to abuse and misuse these drugs.[36] In 1991, before OxyContin was introduced into the market, doctors wrote seventy-six million opioid prescriptions and, by 2012, that number had risen to 259 million opioid prescriptions.[37] By 2018, over ten million individuals were abusing prescription opioids, some turning to more serious drugs like heroin.[38] The shift to heroin use occured because it had become more accessible and cheaper than prescription opioids.[39] In May 2007, Purdue Pharma (the company responsible for the creation and marketing scheme of OxyContin) and three top executives admitted to fraudulent marketing of their drug and

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[27] Christopher J. Frisina, *Let FDA Regulate its Own Drugs!: An Argument for Narcotic Control and Enforcement Under the Risk Evaluation and Mitigation Strategies (REMS)*, 27 LOY. CONSUMER L. REV. 238, 247 (2015).

[28] *Id.*

[29] Rosenblum, *supra* note 20, at 406.

[30] *Id.*

[31] *What is the U.S. Opioid Epidemic?*, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES (Sept. 4, 2019), https://www.hhs.gov/opioids/about-the-epidemic/index.html [https://perma.cc/HD56-JFCY].

[32] SUZANNE C. BRUNDAGE & CAROL LEVINE, UNITED HOSP. FUND, THE RIPPLE EFFECT: THE IMPACT OF THE OPIOD EPIDEMIC ON CHILDREN AND FAMILIES 9 (2019), https://uhfnyc.org/media/filer_public/59/b2/59b20ad0-6acf-4980-ba9a-07ad5f565386/uhf-opioids-20190307.pdf [https://perma.cc/9ZGX-Y47R].

[33] *Id.*

[34] *What is the U.S. Opioid Epidemic?*, *supra* note 31.

[35] *Id.*

[36] *Id.*

[37] NAT'L COUNCIL FOR ADOPTION, THE U.S. OPIOID EPIDEMIC AND ITS EFFECT ON CHILD WELFARE (2015) (on file with the UNIVERSITY OF LOUISVILLE LAW REVIEW).

[38] *What is the U.S. Opioid Epidemic?*, *supra* note 31.

[39] Theodore J. Cicero, et al., *The Changing Face of Heroin Use in the United States: A Retrospective Analysis of the Past 50 Years*, 71 JAMA PSYCHIATRY 821, 821 (2014).

paid a fine of $600 million—a small amount in comparison to the damage the Opioid Epidemic has caused millions of families.[40]

This health crisis knows no limit. The Opioid Epidemic takes the lives of men, women, rural people, urban people, and people of all races and ages.[41] In 2018, the states with the highest amount of opioid drug overdoses were West Virginia, Delaware, Maryland, Pennsylvania, and Ohio.[42]

B. The Opioid Epidemic's Impact on Children and the Child Welfare System

As time goes on, it is increasingly clear that not only are people in the United States dying due to the Opioid Epidemic, but children across the country are being heavily impacted by their parent's drug use. One in four children live in homes where substance abuse is present in the United States.[43] Because of the large number of children in these circumstances there are many ripples into the childhood wellbeing and society.

Children in homes where substance abuse is present have many obstacles to overcome as a consequence of their parents' drug use. One study found that children with parents that have a substance abuse problem were more likely "to show depressive symptoms and . . . be anxious, tense or worried."[44] Children of these parents also are suffering academically. One study found that forty-one percent of children in these homes had failed a grade in elementary school, and nineteen percent had a finding of truancy.[45] Additionally, these children had performed at a lower level academically and misbehaved more often at school, and thirty percent of these kids had been suspended at one point.[46] Lastly, these children are more likely to get involved with the wrong group of friends, engage in criminal activity, and use drugs like their parents.[47]

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[40] Barry Meier, *In Guilty Plea, OxyContin Maker to Pay $600 Million*, N.Y. TIMES (May 10, 2007), https://www.nytimes.com/2007/05/10/business/11drug-web.html [https://perma.cc/QQZ5-LQ9N].

[41] Lawrence Scholl et al., *Drug and Opioid-Involved Overdose Deaths — United States, 2013–2017*, 67 MORBIDITY & MORTALITY WEEKLY REPORT 1419, 1420 (2019).

[42] *Drug Overdose Deaths*, CTR. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/drugoverdose /data/statedeaths.html [https://perma.cc/C5RT-3NRQ].

[43] *Guide for Children of Addicted Parents*, *supra* note 1.

[44] Marina Barnard & Neil McKeganey, *The Impact of Parental Problem Drug Use on Children: What is the Problem and What Can Be Done to Help?*, 99 SOC'Y FOR THE STUDY OF ADDICTION 552, 553 (2004).

[45] *Id.*

[46] *Id.*

[47] *Id.*

The negative impacts on children caused by their parents' drug use has pushed many states to change their laws regarding child abuse.[48] By 2014, almost every state addressed at least one facet of parental substance abuse.[49] According to Child Welfare Information Gateway, states did this by expanding "civil definitions of child abuse and neglect to include a caregiver's use of a controlled substance that impairs the ability to adequately care for a child and/or exposure of a child to illegal drug activity."[50]

The Opioid Epidemic is impacting the United States child welfare system. The Opioid Epidemic has a positive correlation with an increased number of children that have been removed from their parents' care.[51] An article in *JAMA Pediatrics* found that, from 2000 to 2017, there was a 147.05 percent increase in the number of children entering the foster care system because of issues surrounding parental drug use.[52] Children that are getting involved in the child welfare system mostly suffer from parental neglect and are not entering because of physical or sexual abuse.[53] Due to the widespread nature of the Opioid Epidemic, the HHS stated that child welfare agencies across the country are having difficulty in responding to the growth of child welfare needs.[54]

Because of the reasons mentioned above, major issues arise when parents with substance abuse problems care for their children. However, the national consensus in 2017 was that in fifty-six percent of the instances where a child is removed from their parent's care, the goal is reunification.[55] Despite this goal, reunification for parents with substance abuse issues have unique challenges. This is because of limited addiction treatment options and difficulties getting parents engaged in treatment.[56] Parents with substance abuse issues also have the added pressure of the Adoption and Safe Families Act, which was signed into law in the 1990s by President Clinton. It mandates that state "child welfare agencies file a petition to terminate parental rights once a child has resided in foster care for 15 of the previous 22 months."[57]

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[48] Child Welfare Information Gateway, *supra* note 2.

[49] *Id.*

[50] *Id.*

[51] NAT'L COUNCIL FOR ADOPTION, *supra* note 37.

[52] Angélica Meinhofer & Yohanis Angleró-Díaz, *Trends in Foster Care Entry Among Children Removed from Their Homes Because of Parental Drug Use, 2000 to 2017*, 9 JAMA PEDIATRICS 881, 882 (2019).

[53] Barnard & McKeganey, *supra* note 44, at 553 (2004).

[54] RADEL ET AL., *supra* note 3, at 9.

[55] Child Welfare Information Gateway, *Foster Care Statistics 2017*, CHILD.'S BUREAU, OFF. OF THE ADMIN. FOR CHILD. & FAMS. (March 2017) (on file with UNIVERSITY OF LOUISVILLE LAW REVIEW), https://www.childwelfare.gov/pubs/factsheets/foster/ [https://perma.cc/JE3L-VTU4].

[56] RADEL ET AL., *supra* note 3, at 8.

[57] *Id.*

This law was put in place to address a child's need for permanency.[58] The law puts significant pressure on parents struggling with opioid addiction or other drug addiction because of the amount of time it takes for someone to be treated. The National Institute on Drug Abuse found that individuals who participate in treatment for less than three months have limited success rates and recommends treatment for much longer to achieve more positive outcomes.[59] There is also the added reality that, of the individuals being treated for drug or alcohol abuse, forty to sixty percent relapse within a year.[60] Because of the harsh realities of drug abuse treatment, the fifteen-month milestone can creep up quickly on parents who are trying their best to get better for their children. When successful treatment can take up to and beyond a year, there is little room for error on the parent's part.

1. Family Drug Treatment Courts

With the vast number of families involved in the child welfare system, the United States needs to adopt better and more efficient processes to deal with growing caseloads. The solution to this growing issue is Family Drug Treatment Courts (FDTCs).

By 2012, sixty to eighty percent of child abuse and neglect cases involved a parent or guardian struggling with a substance abuse problem. [61] FDTCs have a goal of helping these parents and children in these situations get back to a normal and positive functioning family.[62] FDTCs are therapeutic courts that "use a multidisciplinary, collaborative approach to serve families who require substance use disorder treatment and who are involved with the child welfare system."[63] Common characteristics of FDTCs include "regular, frequent court hearings, intensive judicial monitoring, timely substance abuse treatment and other needed services, frequent drug testing, and rewards

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[58] *Id.*

[59] NAT'L INST. ON DRUG ABUSE, PRINCIPLES OF DRUG ADDICTION TREATMENT: A RESEARCH-BASED GUIDE 4 (2018), https://www.drugabuse.gov/publications/principles-drug-addiction-treatment-research-based-guide-third-edition/frequently-asked-questions/how-long-does-drug-addiction-treatment [https://perma.cc/LHD5-579B].

[60] Ruben Castaneda, *Why Do Alcoholics and Addicts Relapse So Often?*, U.S. NEWS & WORLD REPORT (April 24, 2017, 9:00 AM), https://health.usnews.com/wellness/articles/2017-04-24/why-do-alcoholics-and-addicts-relapse-so-often [https://perma.cc/3Q2H-LD54].

[61] DOUGLAS B. MARLOWE & SHANNON M. CAREY, NAT'L ASS'N OF DRUG CT. PROS., NEED TO KNOW: RESEARCH UPDATE ON FAMILY DRUG COURTS 1 (2012), https://www.nadcp.org/wp-content/uploads/Reseach%20Update%20on%20Family%20Drug%20Courts%20-%20NADCP.pdf [https://perma.cc/R3JR-JERS].

[62] *Family Treatment Courts*, NAT'L CTR. ON SUBSTANCE ABUSE & CHILD WELFARE, https://ncsacw.samhsa.gov/topics/family-treatment-courts.aspx [https://perma.cc/HS64-QESG].

[63] *Id.*

and sanctions linked to parental compliance with their service plan."[64] These courts are important because they target parents with substance abuse disorders who are the least likely to be reunified with their children.[65]

These courts differ from the traditional model in many ways. In the traditional setting, professionals from different parties request separately what they want done based on their beliefs of what is in the child's best interest or the best interest of the party who employs them.[66] The professionals utilized by FDTCs include treatment providers, public health systems, and the state's department of child services.[67] Due to this separation, the judge has to make a decision based on his or her limited view of the situation, which may lead to outcomes that are not in the best interest of the child and do not further the goal of reunification.[68] In FDTCs, individual professionals create a team with the parent and the judge often called a "drug court team."[69] While FDTCs always have the best interest of the child in mind, there is more of a focus on the parent's treatment needs in these courts.[70]

There are two different models for FDTCs: the parallel model and integrated model.[71] The parallel model utilizes a two judge system, one for child dependency matters and the other for recovery management.[72] In the integrated model there is one case, one judge, and one court.[73] There is no separation in dependency issues and treatment issues.[74] Both have strengths and weaknesses, but they both still use the collaborative approach in recovery management.[75] However, the National Drug Court Institute (NDCI) recommends the integrated model over the parallel model because of the better coordination of the services provided to the family.[76] The NDCI also

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[64] Sonia D. Worcel et al., *Effects of Family Treatment Drug Courts on Substance Abuse and Child Welfare Outcomes*, 17 CHILD ABUSE REV. 427, 428 (2008).

[65] *Id.*

[66] NAT'L DRUG CT. INST., FAMILY TREATMENT COURT: PLANNING GUIDE 8 (2018), https://www.cffutures.org/files/fdc/Family%20Treatment%20Court%20Planning%20Guide%20Update.pdf [https://perma.cc/EF3X-7GSA].

[67] *Id.*

[68] *Id.*

[69] Beth L. Green et al., *How Effective Are Family Treatment Drug Courts? Outcomes from a Four-Site National Study*, 12 CHILD MALTREATMENT 43, 44 (2007).

[70] *Id.*

[71] Hon. Karen S. Adam & Hon. Karen Ashby, Webinar for National Family Drug Court Technical Assistance and Training Program: Family Drug Court Models – Parallel vs. Integrated (Oct. 10, 2012), https://www.cffutures.org/webinar/fdcmodels/ [https://perma.cc/56LE-Z5PC].

[72] *Id.*

[73] *Id.*

[74] *Id.*

[75] *Id.*

[76] NAT'L DRUG INST., *supra* note 66, at 49.

recommends the integrated model because "courts are less likely to impose conflicting demands on families."[77] With the parallel model there is greater risk of this problem.[78] There are, however, some disadvantages to the integrated model, such as the heavy workload on the judges and perceived issues with *ex parte* communication.[79] Despite these disadvantages, the integrated model is still recommended by the NDCI.[80]

The concept of FDTCs has been around for several decades, with the first one being implemented in Reno, Nevada in 1995.[81] These courts were inspired by Adult Drug Courts used in the criminal justice system.[82] Adult Drug Courts use similar methods as FDTCs. Adult Drug Courts monitor the participant's drug treatment progress and provide rewards and punishment if the participants do not follow treatment plans.[83] The judge is also more actively involved in the participant's case, similar to the judges in FDTCs.[84] While these courts have many similarities, the incentive for FDTC participants, unlike criminal Adult Drug Courts, is reunification with their child, not avoidance of punitive consequences.[85]

The research is clear about FDTCs: they are effective.[86] One study found that parents who participated in FDTCs were "more likely to enter treatment, entered treatment more rapidly, stayed in treatment longer and were more likely to complete treatment than comparison [group] parents. In addition, findings from this study suggested that children of [FDTC] parents were more likely to be reunified with their parents than children of comparison [group] parents."[87] Those facts make it unsurprising that parents who complete FDTC programs are more likely to be reunified with their children.[88] Children of parents that completed this program also spent less time in foster care.[89] The

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[77] *Id.*

[78] *Id.* at 50.

[79] *Id.* at 49.

[80] *Id.*

[81] MARLOWE & CAREY, *supra* note 61, at 1.

[82] *Id.*

[83] What are Drug Courts?, NAT'L DRUG CT. RES. CTR., https://ndcrc.org/what-are-drug-courts/#:~:text=Drug%20Courts%20are%20an%20innovative,persons%20with%20substance%20use%20disorders [https://perma.cc/X8RC-U9FS] (last visited Mar. 15, 2021).

[84] Judge Leonard P. Edwards & Judge James A. Ray, *Judicial Perspectives on Family Drug Treatment Courts*, 56 JUV. & FAM. CT. J. 1, 17 (2005).

[85] MARLOWE & CAREY, *supra* note 61, at 1–2.

[86] Worcel et al., *supra* note 64, at 428.

[87] *Id.*

[88] MARLOWE & CAREY, *supra* note 61, at 6.

[89] *Id.*

success of these courts were consistent despite what drug was being abused or the differing levels of drug histories.[90]

While most research is clear that these courts are effective, they are still not very prevalent in the United States. According to the National Drug Court Resource Center, there are just over 300 FDTCs in the United States as of 2019.[91] This is a very small amount compared to the number of Adult Drug Courts. There are over 1,200 Adult Drug Courts across the United States as of 2019.[92] The amount of FDTCs seems even smaller when compared to the number of counties (or county equivalents) in the United States, which is 3,141.[93]

III. ANALYSIS

A. Why is the United States Not Adopting These Courts?

The growing needs of the child welfare system can be met by implementing FDTCs. That leaves the question: why isn't the United States adopting these courts? There are many potential reasons why states and counties are not adopting these courts, but the literature on states' rationales is sparse.[94] The growth of FDTCs since the first court in Nevada has mostly resulted from federally funded initiatives.[95] However, to fully serve the population that is in need of these services, states need to help fund these programs.[96] One article stated that some potential reasons states are not adopting these courts are "lack of support for FDTC implementation, lack of knowledge about FDTC outcomes and operations, generalized reluctance to adopt new service models (i.e., change aversion), lack of state and local cross systems infrastructure, and fear that the cost of initiating and operating such an intensive model will prove prohibitive."[97] This Note has already shed some light on the effectiveness and basic operations of FDTCs and hopefully

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[90] *Id.* at 7.

[91] Treatment Court Map, NATI'L DRUG CT. RES. CTR., https://ndcrc.org/wp-content/NDCRC_Court_Map/ [https://perma.cc/9TQ2-E6XC] (last visited Mar. 15, 2021).

[92] *Id.*

[93] *How Many Counties are There in the United States?*, U.S. GEOLOGICAL SURVEY, https://www.usgs.gov/faqs/how-many-counties-are-there-united-states (last visited Oct. 24, 2019) (on file with the UNIVERSITY OF LOUISVILLE LAW REVIEW).

[94] Author's research of state rationale for the adoption of FDTCs yielded limited results at the time of publication.

[95] *See* CHILD. & FAM. FUTURES, NATIONAL STRATEGIC PLAN FOR FAMILY DRUG COURTS 3 (2017), http://www.cffutures.org/files/FDC_StrategicPlan_V1R1.pdf [https://perma.cc/8TXY-BYLP].

[96] *Id.*

[97] Jody Brook et al., *Family Drug Treatment Courts as Comprehensive Service Models: Cost Considerations*, 67 JUV. & FAM. CT. J. 23, 25 (2016).

helps alleviate some concerns associated with adopting these courts.[98] However, cost effectiveness of these courts and the stigma associated with opioid and other drug use require more discussion.

1. Cost is Not a Barrier to the Adoption of FDTCs

Not only does research show that FDTCs are effective at treating parents for their drug addiction, but they are also cost effective. There is no denying that FDTCs would be quite the investment, with program costs ranging between $7,000 to $14,000 per family.[99] However, the average net savings for states that have adopted these courts are $5,000 to $13,000 per family.[100] These ranges in numbers are dependent on the amount of services provided to families.[101]

How are FDTCs producing these savings? The biggest reason for the cost savings is "the decreased use of child welfare resources by the children (e.g., less time in foster care) and decreased use of criminal justice resources by the parents (e.g., fewer rearrests and less time in jail or on probation)."[102] Foster care costs alone account for much of these savings. It was found that children who had parents in FDTCs spent ninety-four fewer days in foster care than children whose parents did not have FDTCs as a resource.[103] When a child is in foster care, the state pays foster parents a per diem rate as well as child educational, clothing, medical, allowance, tax, travel, and special occasion expenses.[104] These expenses can add up quickly. For example, in Indiana, foster parents are paid a per diem between $20.87 and $69.81 (cost is adjusted based on age of the child and any special needs the child may have).[105] If FDTC children are exiting foster care ninety-four days earlier than similarly situated children, that could mean a savings of foster parent per diem cost alone between approximately $1,961 and $6,500 per child. An FDTC program in Maine estimated a cost savings of approximately $10,000

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[98] *See generally* discussion of FDTC structure and operations, *supra* Part II.B.

[99] MARLOWE & CAREY, *supra* note 6161, at 4.

[100] *Id.*

[101] *Id.*

[102] *Id.*

[103] Brook et al., *supra* note 97, at 29.

[104] IND. DEP'T OF CHILD SERVS., INDIANA CHILD WELFARE POLICY MANUAL Ch. 16 § 1 (2020), https://www.in.gov/dcs/files/Child_Welfare_Policy_Manual.pdf [https://perma.cc/5MZ6-HGJV]; Child Welfare Information Gateway, *Health-Care Coverage for Youth in Foster Care — and After*, CHILD.'S BUREAU, OFF. OF THE ADMIN. FOR CHILD. & FAM. (May 2015), https://www.childwelfare.gov/pubPDFs/health_care_foster.pdf [https://perma.cc/LL42-THAS].

[105] 2019 Foster Parent Per Diem Letter from Elisa Suarez, Foster Care Program Manager, Ind. Dep't of Child Servs., (Dec. 20, 2018), https://www.in.gov/dcs/files/2019%20Foster%20Care%20Rate%20Letter.pdf [https://perma.cc/K9S7-QBTR].

per child after considering all needs that must be met.[106] Similarly, a program in Oregon estimated a $13,000 cost saving per child due to their implementation of FDTCs.[107]

Another cost savings factor that is not easily measured deals with pregnant women involved in FDTCs.[108] Through the duration of one study, no women that were pregnant while completing their FDTC programming gave birth to a child that had drugs in its system.[109] In 2014, eighty-two percent of babies born with neonatal abstinence syndrome were treated using tax payer funds from Medicaid.[110] According to the American Academy of Pediatrics, "[a]djusting for inflation, total hospital costs for [neonatal abstinence syndrome] births that were covered by Medicaid increased from $65.4 million in 2004 to $462 million in 2014."[111]

2. Stigma Associated with Drug Abuse

While the majority of individuals in the medical professional view addiction as a disease, only fifty-three percent of Americans viewed addiction as a disease in 2018.[112] There are still many public misconceptions about opioid abuse, such as the belief that opiod abuse is a "moral weakness or willful choice."[113] This stigma is made worse by the divide between addiction treatment and mainstream healthcare.[114]

Research conducted in 2013 found that the American public had more negative attitudes toward people with addiction than those classified as having a mental illness.[115] Those negative attitudes about addiction mean that people have less support for improvement in insurance coverage of drug addiction treatment or increase in government funding to achieve success in drug addiction treatment.[116] One idea for reduction in the stigma of drug

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[106] Brook et al., *supra* note 97, at 30.

[107] *Id.*

[108] *Id.* at 41.

[109] *Id.*

[110] Tyler N.A.Winkelman, et al., *Incidence and Costs of Neonatal Abstinence Syndrome Among Infants With Medicaid: 2004–2014*, 141 PEDIATRICS 1, 1 (2018).

[111] *Id.*

[112] Matthew Perrone, *AP-NORC Poll: Most Americans See Drug Addiction As a Disease*, ASSOCIATED PRESS (April 5, 2018) https://apnews.com/article/11ceb07aeea148cc9de2ff0a44a1511f [https://perma.cc/ULU6-72TL].

[113] Yngvild Olsen & Joshua M. Sharfstein, *Confronting the Stigma of Opioid Use Disorder — and its Treatment*, 311 JAMA 1393, 1393 (2014).

[114] *Id.*

[115] Colleen L. Barry et al., *Stigma, Discrimination, Treatment Effectiveness, and Policy: Public Views About Drug Addiction and Mental Illness*, 65 PSYCHIATRIC SERVS. 1269, 1270 (2014).

[116] *Id.* at 1270–71.

addiction is inspired by the changed attitudes toward HIV that have occurred: "[r]esearch on HIV supports the notion that increasing public recognition of treatability can reduce stigma and discrimination toward affected persons."[117]

FDTCs can help show that drug addiction is treatable. One study found that parents that were able to utilize FDTCs entered treatment quickly, completed treatment, and were less likely than similarly situated parents that were not under FDTC supervision to have subsequent out-of-home placements of their children.[118] Another study found that parents that did not participate in FDTCs had a drug treatment completion rate of thirty-six percent, while participants in these courts had a completion rate of sixty-four percent.[119] Parents that completed FDTC programs were also less likely to have new criminal arrests than similarly situated parents.[120] This shows not only that FDTCs are effective, but that the treatment they are providing is effective. This is helping children while also helping fight the stigma of drug addiction to help lead to better treatment options for all individuals struggling with this disease.

B. Adopting Family Drug Treatment Courts Helps Preserve the Constitutional Right to Parent

From 2012 to 2018, the number of parents having their parental rights terminated was on the rise.[121] In 2018, over 71,000 parents lost their parental rights.[122] Parental rights come from the Fourteenth Amendment of the United States Constitution.[123] The Supreme Court has held that the Fourteenth Amendment protects due process as well as substantive rights that are considered fundamental and liberty interests.[124] Parents' ability to care for their children in the way they see fit is one of the oldest fundamental rights and liberty interests that the Fourteenth Amendment recognizes and protects.[125]

Parental rights to childrearing were addressed in *Meyer v. Nebraska*, where the court concluded:

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[117] *Id.* at 1271.

[118] Green et al., *supra* note 69, at 56.

[119] Brook et al., *supra* note 97, at 29.

[120] MARLOWE & CAREY, *supra* note 61, at 3.

[121] Statista Res. Dep't, *Annual Terminations of Parental Rights in the U.S. FY 2008-2018*, STATISTA (Nov 15, 2019), https://www.statista.com/statistics/633207/annual-terminations-of-parental-rights-us/ [https://perma.cc/295P-9675].

[122] *Id.*

[123] Troxel v. Granville, 530 U.S. 57, 57 (2000).

[124] *Id.* at 65.

[125] *Id.*

> "[freedom] denotes not merely freedom from bodily restraint, but also the right of the individual . . . to marry, establish a home, and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."[126]

Pierce v. Society of Sisters built on the *Meyer* precedent by stating "[t]he child is not the mere creature of the state; those who nurture him and direct his destiny have the *right*, coupled with the high duty, to recognize and prepare him for additional obligations."[127] These common law ideals rely on the presumption that "natural bonds of affection lead parents to act in the best interests of their children."[128]

While it can be hard to sympathize with drug abusing parents, the Supreme Court in *Santosky v. Kramer* held that "[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State."[129] The Court also stated that the United States, when trying to terminate parental rights, must "provide the parents with fundamentally fair procedures."[130]

1. State Termination of Parental Rights: Statute Examples for Constitutional Analysis

To be compliant with the constitutional standards set forth by the Supreme Court, judges must make certain findings—determined by each state—before a parent's rights can be terminated. According to HHS, Children's Bureau, most state involuntary termination of parental rights statutes require the court to find "by clear and convincing evidence, that the parent is unfit, [and determine] whether severing the parent-child relationship is in the child's best interests."[131] The Indiana and Kentucky involuntary termination of parental rights statutes are good ones to analyze because they both contain the factors for termination identified by the Children's Bureau as most often used by states. For example, in Indiana, judges must find that

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[126] Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

[127] Pierce v. Soc'y of Sisters, 268 U.S. 510, 535 (1925) (emphasis added).

[128] Parham v. J.R., 442 U.S. 584, 602 (1979).

[129] Santosky v. Kramer, 455 U.S. 745, 753 (1982).

[130] *Id.* at 754.

[131] Child Welfare Information Gateway, *Grounds for Involuntary Termination of Parental Rights*, CHILD.'S BUREAU, OFF. OF THE ADMIN. FOR CHILD. & FAM. 1 (Dec. 2017), https://www.childwelfare.gov/pubPDFs/groundtermin.pdf [https://perma.cc/Z4ZY-83WQ].

the child has been removed from the parent for fifteen of the last twenty-two months, in addition to one of the following:

> (i) There is a reasonable probability that the conditions that resulted in the child's removal or the reasons for placement outside the home of the parents will not be remedied.
> (ii) There is a reasonable probability that the continuation of the parent-child relationship poses a threat to the well-being of the child.
> (iii) The child has, on two (2) separate occasions, been adjudicated a child in need of services.[132]

Kentucky has similar finding requirements under KRS § 625.090, some of which include: "the child has been removed from the biological or legal parents more than two (2) times in a twenty-four (24) month period by the cabinet or a court," "there is no reasonable expectation of improvement in parental care and protection, considering the age of the child," and that "the child has been in foster care under the responsibility of the cabinet for fifteen (15) cumulative months out of forty-eight (48) months."[133] FDTCs can help make these finding harder to prove by clear and convincing evidence, which is the minimum required burden of proof to terminate a parent's rights.[134]

FDTCs, if implemented, would make it significantly more difficult for parents to lose their substantive right to childrearing because it would be harder for the state to show they have met the elements required for termination of parental rights. In Indiana, for example, it would be unlikely for a judge to terminate a parent's rights if a parent is successfully and actively involved in a FDTC. A lot of this would be due to the frequency that the parent would be in front of the judge, according to some legal professionals.[135] The current system in Indiana only requires that a judge review a child welfare case every six months.[136] This means that a parent is only guaranteed two review hearings before the State of Indiana, and under the Adoption and Safe Families Act, parents would have to file a petition to terminate that parent's rights.[137] With the introduction of FDTCs, these parents would have to be in front of a judge weekly, biweekly, or monthly depending on the individual's treatment progress.[138]

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[132] Ind. Code Ann. § 31-35-2-4.

[133] Ky. Rev. Stat. § 625.090.

[134] Santosky v. Kramer, 455 U.S. 745 (1982).

[135] Anthony J. Sciolino, *The Changing Role of the Family Court Judge: New Ways of Stemming the Tide*, 3 CARDOZO PUB. L. POL'Y & ETHICS J. 395, 399 (2005).

[136] Ind. Code Ann. § 31-28-5.8-7.

[137] *See id.*

[138] GREGORY LEVINE, A STUDY OF FAMILY DRUG TREATMENT COURTS IN THE UNITED STATES AND

Implementing FDTCs would make it harder for judges to find for part (i) in the Indiana statute. Parents that are involved in these courts are twenty to thirty percent more likely to complete drug abuse treatment than similarly situated parents.[139] For parents that have had their child removed from their home due to drug abuse, completing treatment is a huge way they can show that the conditions for which the child was removed have a reasonable probability of being remedied.

Children with parents that are addicted to drugs are at greater risk of being a victim of neglect or abuse.[140] This poses a significant threat to their wellbeing. However, FDTCs help get parents off drugs, which brings that potential threat down. Because of this, finding for part (ii) in the Indiana statute by a clear and convincing standard would be more difficult for a judge.

Finding for part (iii) in the Indiana statute, which requires that a "child has, on two (2) separate occasions, been adjudicated a child in need of services[,]"[141] would also be harder if FDTCs were in place. As stated before, parents that complete this program are less likely than similarly situated parents to have subsequent out-of-home placements of their children.[142] If a parent's first experience with the child welfare system allowed him or her to utilize an FDTC, the likelihood of having two separate occasions where their child was found to be in need of services would be less than a parent that did not have that opportunity.

C. Successful Family Drug Treatment Court Practices

FDTCs have been around long enough that there are many resources that give guidance as to the best practices in these courts.[143] Some of the best practices include using a collaborative approach, providing effective programing for participants, creating good relationships with the judge, and providing accountability for the parent.

1. Collaboration

The biggest way that FDTCs are different from traditional family court is the collaboration required by the participants in the courtroom. For the

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THE UNITED KINGDOM 13 (2012), http://www.churchilltrust.com.au/media/fellows/2011LevineGreg.pdf [https://perma.cc/ST9N-BTJW].

[139] MARLOWE & CAREY, *supra* note 61, at 2.

[140] Child Welfare Information Gateway, *supra* note 2, at 2.

[141] Ind. Code Ann. § 31-35-2-4.

[142] Barry et al., *supra* note 115, at 1270.

[143] *See, e.g.*, NAT'L DRUG CT. INST., *supra* note 66.

FDTC to be successful, there needs to be collaboration that meets all of the needs of the family. Team members include child protective services employees, mental health professionals, individuals to help with housing, treatment providers, counselors, etc.[144] The leader of this team is the judge.[145] Using all of these different individuals gives the parents access to more expertise. This collaboration makes it so that the prescribed programming helps achieve the goal of the team, which is typically reunification.[146]

2. Programming

What participants actually do in these courts is very important. Parents need to get into substance abuse treatment, and they need to do it quickly.[147] The quicker this step is taken, the faster their children can be removed from foster care.[148] Completion and the length (treatment programs that last longer are shown to be more effective) of these treatment programs are important as well.[149]

A lot of times, these parents have additional issues other than just addiction that need to be addressed before they can get their children back.[150] More women are participants than men in FDTCs.[151] Because of this, there is more programming that addresses some of the unique needs of women in these situations.[152] This additional programming deals with "low self-esteem and depression, childhood trauma, domestic violence, [and] co-occurring health disorders."[153] Based on the success in criminal drug court, it has also been suggested that parents in FDTCs participate in parenting classes. In criminal drug court, it was found that "Adult Drug Courts that provided parenting classes had sixty-five percent greater reductions in criminal recidivism and fifty-two percent greater cost savings than Drug Courts that did not provide parenting classes."[154] Counseling is another important part of the parent's success in FDTCs. Studies find that the more frequently parents

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[144] *See id.* at 8.
[145] *Id.* at 9.
[146] Child Welfare Information Gateway, *supra* note 55, at 2.
[147] MARLOWE & CAREY, *supra* note 61, at 6.
[148] *Id.*
[149] *Id.*
[150] LEVINE, *supra* note 138, at 16.
[151] *Id.*
[152] *Id.*
[153] *Id.*
[154] MARLOWE & CAREY, *supra* note 61, at 7.

meet with their treatment counselor the more successful they will be in completing treatment.[155]

3. Role of the Judge

The judge is the leader of the FDTC team.[156] Judges in these courts are highly involved and interact with the parents much more than in the traditional setting.[157] It is often stated that the success of these courts is due to the devotion of the judge and their relationship with the parent as he or she goes through the FDTC program.[158] The judge gives praise when they need to, but they also have the symbolic black robe to remind participants of their power to sanction if appropriate.[159] Appearing before the judge so frequently is important because, as one study found, "eighty percent of participants indicated they would not have remained [in treatment] if they did not appear before a judge as part of the process."[160] Not only is this court beneficial for families suffering the consequences of addiction, but judges are personally and professionally satisfied with the work they are doing.[161] Judge Leonard P. Edwards and Judge James A. Ray wrote, "working in our respective FDTCs has been the most positive professional experience of our careers."[162]

4. Accountability

Parents that are in FDTCs must follow strict guidelines to be in the program. Most FDTC participants meet with the judge or team weekly, biweekly, or monthly depending on the individual's treatment progress.[163] Not only is the frequency of the meetings a responsibility of the parent, it is a motivator for compliance with their treatment program.[164] Another way to hold parents accountable is frequent drug testing. One study found that

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[155] SONIA D. WORCEL ET AL., FAMILY TREATMENT DRUG COURT EVALUATION (Mar. 2007), https://npcresearch.com/wp-content/uploads/FTDC_Evaluation_Final_Report.pdf [https://perma.cc/N4VS-9QEV].

[156] NAT'L DRUG CT. INST., *supra* note 66.

[157] Sciolino, *supra* note 135, at 399.

[158] *Id.* at 404.

[159] *Id.* at 405.

[160] *Id.* (citing CAROLINE S. COOPER, OJP DRUG COURT CLEARINGHOUSE AND TECHNICAL ASSISTANCE PROJECT, 1997 DRUG COURT SURVEY REPORT: EXECUTIVE SUMMARY 68 (1997), https://dra.american.edu/islandora/object/auislandora%3A63585/datastream/PDF/view [https://perma.cc/BC4U-NW6V]).

[161] Edwards & Ray, *supra* note 84, at 17.

[162] *Id.*

[163] LEVINE, *supra* note 138, at 13.

[164] *Id.*

"[p]articipants who were subjected to more frequent urine drug screens remained in treatment longer and were more likely to complete treatment."[165]

All these practices are some of the best ways to ensure an effective FDTC program. These best practices not only increase the quality of the programs, but make it so that parents are more likely to unify with their children and not lose their constitutional right to parent. By having an effective FDTC in the community, local child welfare systems will benefit in the long run due to its benefits.

IV. RESOLUTION

The growing caseloads in the child welfare system are putting heavy burdens on lawyers, judges, social workers, and families. Counties across the United States should be putting resources toward and adopting FDTCs. These courts will save millions of families and tax dollars. These courts will also serve both the children and parents by catering to both unique needs. The opioid epidemic and its harsh realities call for policies that help individuals with the disease of addiction. FDTCs allow counties to combat this epidemic while also preserving a constitutional right and helping the children of the United States. Counties in the United States need to get the public behind adopting FDTCs to help alleviate the problems associated with the growing caseloads. To get communities behind these courts, there needs to be more education of what FDTCs do, a change in the stigma surrounding drug abuse, and an explanation of all the cost saving benefits. Once these courts are implemented and individuals in the legal profession, social workers, and other community partners start to work collaboratively to save families and parental rights, the United States will see improvement in the number of families in need of child welfare services.

V. CONCLUSION

With the growing number of parents struggling with opioid addiction flooding the child welfare system, it is essential that the United States not only serve the children in these homes, but also provide resources to parents so they can get the treatment they need, be better parents, and lessen the burden on the system. This requires that the individuals in the legal profession look through a different lens. FDTCs require that all the actors look through a lens of collaboration and rehabilitation rather than one that is

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[165] MARLOWE & CAREY, *supra* note 61, at 7 (citing WORCEL ET AL., *supra* note 155).

combative or adversarial. This accomplishes cash savings, reunification between parents and children, less subsequent interventions, and less burden on the United States' child welfare system and professionals.

The research is very clear: the United States needs to adopt and invest in FDTCs. The constitutional right to parent one's children is too important not to protect. FDTCs not only protect individuals' constitutional rights, but they are more cost effective than traditional models currently used in child welfare. The burdens on the child welfare system are too heavy. With the current move toward criminal justice reform in the United States, advocating for FDTCs aligns with the current political narrative. FDTCs meet policy goals of conservatives and liberals in many of the same ways that criminal justice reform does. The time is now to advocate and implement more FDTCs in the United States.

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