

## **In a treatment setting, relapse is met with more intensive services. In drug court, relapse is often met with temporary or permanent removal of treatment services.**

many, and perhaps most, drug courts continue to prohibit methadone treatment or other maintenance therapies because of an ideological preference for abstinence.<sup>100</sup> This denial of a highly successful treatment for opioid dependence nearly guarantees that most opioid-dependent individuals will fail in drug court.

To be sure, some treatment quality issues are not unique to drug courts but are endemic to the larger publicly funded treatment system.<sup>101</sup> The lack of diverse, high-quality treatment options is particularly detrimental for people of color, women and young people. Programs are predominantly staffed by counselors who lack the training, skills and experience to treat the diverse populations they encounter.<sup>102</sup> African-American men and women with heroin or cocaine problems, for example, are asked to succeed in programs that were originally designed for white men struggling with alcohol problems.<sup>103</sup>

As a National Institute of Justice report concludes, some drug court treatment session attendance problems may not be caused by intractable participants, but rather by the placement of participants in inappropriate or low-quality programs.<sup>104</sup> People who are harmed more than helped by a treatment program – or treated in a manner insensitive to their race, socioeconomic status, gender, sexuality or, ironically, the severity of their drug problem – are left without recourse and ultimately punished by a system that short-changes them. In the end, struggling drug court participants are often blamed for the inadequacies of the treatment system.

### **Finding: Drug Courts May Not Improve Public Safety**

The claim that drug courts intend to reduce crime among “drug-involved offenders” is misleading. As previously mentioned, many drug court participants are not guilty of a crime against person or property but of a petty drug law violation – many of them apparently involving marijuana. Few drug court participants have long or varied histories of offending. Moreover, as previously noted, roughly one-third of drug court participants do not have clinically significant substance use disorders.<sup>105</sup> That is, the “criminal conduct” that drug courts are currently positioned to address is drug use, a behavior that for many participants is not compulsive.

Even when it comes to drug law violations, the majority of drug courts exclude all but those convicted of low-level drug possession. Even addicted persons who are caught selling petty amounts of drugs simply to support their own addictions are typically barred from drug court. As a result, most drug courts cater to those who are least likely to be jailed or imprisoned and who generally pose little threat to the safety of person or property. Only a handful of drug courts nationwide admit individuals with any previous serious or violent conviction, no matter how long ago the conviction occurred.<sup>106</sup>

Moreover, when drug court participants are arrested, it is typically for a drug law violation, not for a crime against person or property. Early findings of the Multi-Site Adult Drug Court Evaluation (MADCE), for example, show that arrests for “violent, weapons-related or public order offenses” were “rare” for both the drug court participants and those in the comparison group.<sup>107</sup>

As long as drug courts focus on people who use drugs (rather than on people who commit serious or violent crime), the programs are unlikely to provide worthwhile benefit over other policy approaches to drug use. Indeed, research consistently supports changing the population of drug court participants, because “drug courts work better for those who are at an inherently higher risk for future criminal behavior.”<sup>108</sup> Given who they accept, it is no surprise that drug courts on the whole have not produced significant reductions in serious or violent crime.

## Understanding Drug Courts: What the Research Shows

*continued*

### **Finding: Drug Courts May Not Reduce Incarceration**

While drug courts do often reduce pre-trial detention, the extent to which they reduce incarceration overall is questionable. This conclusion is supported by the preliminary results of the five-year Multi-Site Adult Drug Court Evaluation (MADCE), which found no statistically significant reduction in incarceration for drug court participants over the comparison group after 18 months.<sup>109</sup> Several factors contribute to these apparently counter-intuitive findings.

First, drug courts may actually increase the number of people incarcerated for drug law violations due to net-widening, a process by which the introduction or expansion of a drug court (or other diversion program) is followed by an increase in drug arrests.<sup>110</sup> Many of these newly arrested people will face incarceration rather than drug court because of drug court capacity constraints and strict eligibility criteria.

This phenomenon has been dramatic in Denver, where the number of people imprisoned for drug law violations doubled soon after the city established drug courts.<sup>111</sup> Net-widening may happen because law enforcement and other criminal justice practitioners believe people will finally “get help” within the system. Unfortunately, as in the Denver example, the number of people arrested for eligible offenses prior to the establishment of the drug courts had already far exceeded what the drug court could absorb.<sup>112</sup>

Second, people who do not complete drug court may actually face longer sentences – up to two to five times longer, according to one study – than if they had been conventionally sentenced in the first place.<sup>113</sup> Since somewhere between 30 and 70 percent of all drug court participants will complete the program,<sup>114</sup> the number of people ejected and facing potentially longer jail or prison sentences as a result of having participated in a drug court (partly for having forfeited their opportunity to plead to a lesser charge) is substantial.

Third, drug courts’ use of incarceration sanctions results in a significant total number of days spent behind bars.<sup>115</sup> Indeed, data from a Baltimore drug court suggested that participants were incarcerated *more often* and for the *same amount of total days* as a control group of probationers, generally for program violations, not even including the incarceration later experienced by the 45 percent of people expelled from the program.<sup>116</sup>

Drug courts, as currently constituted, may ultimately serve not as an alternative but as an *adjunct* to incarceration.<sup>117</sup>

## **Drug Courts As Adjunct – Not Alternative – to Incarceration**

**Three years into a study of Baltimore’s drug court, 31 percent of participants had graduated after spending an average of nearly 22 months in the program. Another 11 percent were still participating, while 45 percent had been terminated after an average of almost 17 months in the program.<sup>118</sup> In other words, nearly half of participants were deemed “failures” even though they had attempted to adhere to rigorous drug court requirements for nearly a year and a half – a period longer than what their conventional sentences may have been.**

**In a community-based program, improvements made during those 17 months could very well have been indicators of success, meriting further supports to maintain participants’ progress. In the drug court, however, 17 months of attempted adherence was eventually deemed insufficient, at which point the participants were removed from the program to begin serving day one of their original sentence.**

**Additionally, Baltimore’s misdemeanor drug court participants spent more than twice as many days incarcerated as their misdemeanor control counterparts and almost as many days as felony drug court participants.<sup>119</sup> The drug court thus punished participants with misdemeanor charges as if they had been convicted of a felony.**



**Finding:**  
**Drug Courts May Not Cut Costs**

Claims that drug courts save many thousands of dollars per participant, or millions of dollars annually per drug court, are misleading. Not a single cost analysis has looked at the full range of costs of a U.S. drug court. Moreover, preliminary results from MADCE show that the average net cost benefit to society is not statistically significant.<sup>120</sup>

Most studies calculate drug court savings based on assumed reductions in pre-trial detention and recidivism.<sup>121</sup> However, as illustrated above, it is unclear to what extent, if at all, drug courts actually reduce incarceration.<sup>122</sup> Even if drug courts do create some savings in pre-trial detention and recidivism, those savings are likely to disappear when program costs are accounted for – costs that are almost always overlooked. Such costs include drug tests, the not uncommon use of incarceration for detoxification,<sup>123</sup> net-widening,<sup>124</sup> incarceration sanctions,<sup>125</sup> and the cost of harsher sentences on expelled drug court participants.<sup>126</sup>

Additionally, drug court cost-savings assertions are often inflated by inaccurately assuming that all drug court participants are bound for jail or prison. Because most drug courts exclude people with more serious offenses or histories,<sup>127</sup> it is inappropriate to compare the cost of a one-to-three year drug

court program against the cost of a one-to-three year period of incarceration. Given who is actually in most drug courts, the cost of drug court is more accurately compared with a jail term of a few weeks or months followed by one-to-three years of probation – an issue overlooked in nearly every drug court cost analysis.<sup>128</sup>

Finally, it must also be asked whether drug courts save money not only in comparison with conventional sentencing of those who possess small amounts of drugs, but also in comparison with a non-criminal justice approach. Such a comparison would uncover significantly different outcomes, costs and savings for an entirely different set of investments. For example, drug treatment has consistently been associated with net benefits and savings, ranging from \$1.33 to \$23.33 saved per dollar invested.<sup>129</sup>

Although some may suggest that drug courts reduce “society costs” by reducing criminal behavior, this – even if true – is hardly unique to drug courts. Drug treatment itself is associated with significant reductions in illegal activity, particularly reduced drug use and reduced drug sales, as well as minor property offenses associated with drug-procurement behavior.<sup>130</sup> According to one recent analysis by the Washington State Institute for Public Policy, drug courts produced \$2 in benefits for every dollar spent. By contrast, drug treatment in the community produced \$21 in benefits to victims and taxpayers in terms of reduced crime for every dollar spent – or ten times the benefit produced by drug courts.<sup>131</sup>

# Mixing Treatment and Punishment: A Faulty Approach

The fundamental tension that exists between the goals of treatment and punishment – and the predominance of punishment over treatment in any criminal justice-based program – means that drug courts cannot hope to substantially reduce the number of people incarcerated for drug use as long as drug use is criminalized. Indeed, it means that drug courts are apt to incarcerate those who could most benefit from treatment.

## Fundamental Paradox of Drug Courts

Drug courts are grounded in two contradictory models. The disease model assumes that people with an addiction disorder use drugs compulsively – that is, despite negative consequences.<sup>132</sup> The rational actor model, which underlies principles of punishment, assumes that people weigh the benefits of their actions against the potential consequences of those actions.<sup>133</sup>

These dueling models result in people being “treated” through a medical lens while the symptoms of their condition – chiefly, the inability to maintain abstinence – are addressed through a penal one. The person admitted into drug court is regarded as not fully rational and only partially responsible for their drug use; yet the same person is considered sufficiently rational and responsible to respond to the “carrots and sticks” (i.e., rewards and sanctions) of drug court.<sup>134</sup>

Under this approach, those suffering more serious drug problems are most likely to “fail” drug court and be punished.<sup>135</sup> In the end, the person who has the greatest ability to control his or her own drug use will be much more likely to complete treatment and be deemed a “success.”

In blending two incompatible philosophies,<sup>136</sup> a drug court (or any other criminal justice-based program) cannot adhere to both approaches and faithfully embody either one. This incongruity results in thousands of drug court participants being punished or dropped from programs each year for failing to overcome addictions in a setting not conducive to their success.

## Abstinence-Only and the Predominance of Punishment Over Treatment

A health-centered response to drug use assesses improvement by many measures – not simply by people’s drug use levels, but also by their personal health, employment status, social relationships and general wellbeing. “Success” in the criminal justice context, by contrast, boils down to the single measure of abstinence – because any drug use is deemed illegal behavior. Both approaches already exist in the U.S. today; the wealthy often benefit from one, while people of less means are by and large subject to the other.

Rehabilitative regimes that rely on criminal justice coercion have historically devolved into increasingly punitive systems.<sup>137</sup> Drug courts’ attempts to meld treatment and punishment ultimately succumb to the dominance of punishment over therapeutic principles. Though a judge may provide leniency to those who make important strides, drug court participants will eventually be labeled “failures” and sanctioned unless they achieve and maintain abstinence for a period of time that the judge deems reasonable. Duty-bound to penal codes that criminalize drug use, drug courts’ ultimate demand is complete abstinence from drugs. Meanwhile, the many other medical and social indicators of wellbeing become secondary or tertiary.

No form of treatment – court-mandated or otherwise – can guarantee long-term abstinence from drug use. Moreover, lapses in treatment compliance are a predictable feature of substance use disorders, just as they are with other chronic conditions, including diabetes and hypertension. But drug courts make it difficult for people whose only “crime” is their drug use to extricate themselves from the criminal justice system. The court, bound to the benchmark of abstinence, and rooted in principles of deterrence, retribution and incapacitation,<sup>138</sup> equates drug relapse with criminal recidivism and punishes it as such.

Drug court adaptations in Canada, Australia and the United Kingdom have expanded measures of success to include decreased drug use and crime, while broadly allowing opioid-maintenance therapy (such as methadone) and, in some circumstances, tolerating cannabis use.<sup>139</sup> In the U.S., too, a handful of drug courts have adopted similar harm reduction measures, suggesting that some pragmatic reforms are feasible even absent a major shift in domestic drug policies.

## Proposition 36: Better But Not Health-Centered

California provides an important case study in how treatment within the criminal justice system will always come second to that system's primary missions of deterrence, retribution and incapacitation.

Passed by 61 percent of voters in 2000, Proposition 36 permanently changed the state's sentencing law to require probation and treatment rather than incarceration for a first and second low-level drug law violation. The Drug Policy Alliance, with support from many others, designed Prop. 36 and spearheaded the campaign to pass the law. Its intent is to provide universal access to treatment for eligible candidates while prohibiting their incarceration (including incarceration sanctions), to prevent cherry-picking of participants, to allow drug testing for treatment (but not punitive) purposes, and to empower health providers – not judges – to make treatment decisions.<sup>140</sup>



Prop. 36 represents a positive modification of drug courts, taken to scale. From 2001-2006, when Prop. 36 was funded at \$120 million a year, 36,000 people were enrolled annually<sup>141</sup> (nearly ten times the number of people enrolled in all of California's drug courts and nearly two-thirds the number of people participating in all drug courts nationwide),<sup>142</sup> completion rates were comparable to those of other criminal justice programs,<sup>143</sup> and the number of people in California prisons for drug possession dropped by more than 27 percent.<sup>144</sup> An estimated \$2,861 was saved per participant, or \$2.50 for every dollar invested,<sup>145</sup> and there were no adverse effects on crime trends.<sup>146</sup>

Prop. 36 is instructive in that its participants' completion rates are comparable to drug courts', but Prop. 36 participants were not cherry-picked and were not subject to incarceration sanctions.<sup>147</sup>

Nevertheless, Prop. 36 remains – like drug courts – squarely within the criminal justice system. Admission to the program follows conviction (similar to most drug courts), participants appear to have displaced voluntary clients in cash-strapped publicly funded programs (even though Prop. 36 funding helped establish nearly 700 new program sites),<sup>148</sup> and failure to maintain abstinence ultimately results in expulsion from the program and imposition of conventional sentencing.<sup>149</sup>

Despite Prop. 36's demonstrated cost savings and public safety record, funding decisions ten years later confirm that treatment in California remains secondary to punishment. Over a four-year period, California entirely eliminated treatment funding for Prop. 36 – from a high of \$145 million in 2007-08 to nothing in 2010-11.

# Toward a Health-Centered Approach to Drug Use

Twenty years of evidence clearly demonstrates that drug courts cannot effectively reduce the burden on the criminal justice system created by 1.6 million annual drug arrests and that they cannot provide health-oriented treatment within a punitive structure. Indeed, it appears that, on a policy level, they may be making matters worse by absorbing resources and momentum that could be focused on developing non-criminal justice responses to drug use and by preserving criminal justice resources for addressing crimes against people and property.

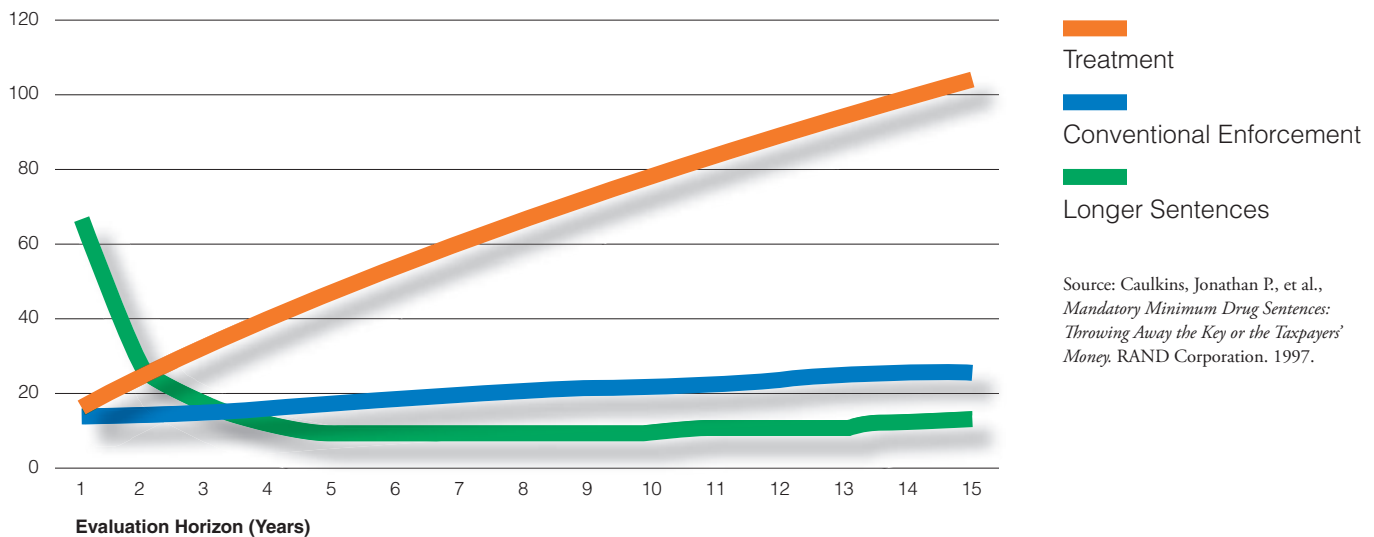
Stopgap measures to address the drug arrest epidemic within the criminal justice system have failed. It is time for a new approach to drug use – one focused on health. A health paradigm recognizes that the criminalization of drug use does more harm than good; that prevention, treatment and other social supports are often more appropriate and cost-effective than criminal justice involvement; and that, similar to alcohol consumption, drug use does not always impede a person’s functioning or ability to be successful, and therefore not everyone who uses a drug needs treatment.

Moving from the criminal paradigm to this new health paradigm entails improving and standardizing drug court practices, working toward the removal of criminal penalties for drug use, and shifting investments into public health programs that include harm reduction and other interventions and treatments.

## Recommendation: Reserve Drug Courts for Serious Offenses and Improve Practices

As this report emphasizes, drug courts are bound by the rules of the criminal justice system in which they exist. As policy makers and advocates work to improve that larger system, however, there are things that drug courts themselves – and those who dispense drug court funding – can do immediately to improve and standardize practices to more effectively and cost-effectively apply their limited resources.

**Kilograms of Cocaine Consumption Prevented per Million 1992 Dollars Spent**



Numerous scholars and researchers who have looked closely at drug courts have proposed a series of reforms and best practices to improve drug courts, including:

- Focus drug court resources on people facing lengthy prison terms to ensure that drug court is actually a diversion from incarceration and not more restrictive than the conventional sentence;<sup>150</sup>
- Adopt objective admission criteria and reduce the prosecutor's role as gate-keeper;<sup>151</sup>
- Use a pre-plea rather than a post-plea model;<sup>152</sup>
- Ensure due process protections and enhance the role of defense counsel;<sup>153</sup> and
- Improve data collection, research rigor, and implementation of demonstrated best practices.<sup>154</sup>

To this list, the Drug Policy Alliance recommends adding the following:

- Prohibit the use of incarceration sanctions for drug law violations and provide a treatment response instead;
- Incorporate health measures – not simply abstinence – into program goals;
- Improve overall treatment quality and employ opioid maintenance treatments and other evidence-based therapies;
- Work to ensure that drug courts are more health-oriented than punitive;
- Use drug tests as a treatment tool, not as punishment;
- Empower treatment professionals in decision-making;
- Reduce turnover of trained and experienced court, probation and treatment staff to improve program continuity and consistency;
- Ensure that punishment for “failing” the program is not worse than the original penalty for the offense; and
- Work to establish other local alternatives outside the drug court for those who want and need access to treatment but do not warrant intensive court resources (e.g., probation-supervised treatment).

While these short-term fixes would help improve the functioning, transparency and accountability of drug courts, policymakers must also ask what other interventions might be equally or more successful with different populations. After all, there will not be one policy solution to the issues of drug use or public safety. Rather, U.S. drug policy will benefit when a range of options is available and when robust research drives policy decisions.

### **Recommendation: Work Toward Removing Criminal Penalties for Drug Use**

Even as drug courts continue to proliferate, the federal government and some states are seeking out more systemic changes to address the dual burdens of mass drug arrests and incarceration. Many of these measures aim to reduce the number of people going to prison for a petty drug offense, shorten the length of time served for drug law violations, or reduce probation and parole revocations for drug use.<sup>155</sup>

To limit the number of people going to prison for a petty drug law violation, several states have implemented alternative-to-incarceration programs and others are moving in that direction. Several years ago, for example, Texas successfully opted for alternatives to incarceration rather than build a new prison.<sup>156</sup> New York adopted major reforms of its 36-year-old Rockefeller Drug Laws in 2009, including alternatives to incarceration for petty drug possession and sales offenses.<sup>157</sup> As this report was published, California was considering ending prison sentences for most petty drug offenses. South Carolina was aiming to reduce its prison population by handling more low-level drug and other offenses outside of prison walls.<sup>158</sup> And an Oklahoma legislator had promised to introduce his own plan to divert thousands of people convicted of petty offenses from prison.<sup>159</sup>

Programs that provide alternatives to incarceration for a substantial portion of people convicted of a petty drug law violation improve the utilization of limited resources and allow the criminal justice system to focus on matters of greater public safety. As some states are already learning, reducing penalties is an even more effective way to reduce costs while preserving public safety. In 2010, Colorado reduced penalties for some low-level possession offenses and New Jersey restored judges' discretion to waive mandatory minimum sentences for certain low-level drug law violations that take place in “drug-free zones.” In late 2010, Indiana's Criminal Code Evaluation Commission advised the state to shorten sentences for drug possession and some low-level sales offenses.<sup>160</sup> And at the federal level, landmark legislation in 2010 dramatically reduced disproportionate sentencing for crack cocaine, and repealed a mandatory minimum drug sentence for the first time since the 1970s (what had been a five-year sentence for possession of five grams of crack cocaine – the weight of two sugar packets).<sup>161</sup>