The Decriminalization Option: Should States Consider Moving from a Criminal to a Civil Drug Court Model?

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The Decriminalization Option: Should States Consider Moving from a Criminal to a Civil Drug Court Model?

Alex Kreit†

INTRODUCTION

As states look to shave their corrections budgets in the midst of the recession, many are thinking about options to reform what is widely considered to be a bloated and ineffective approach to drug policy. While the effort to move beyond failed drug war policies and adopt smarter and more cost-effective measures is a positive step, the policy debate has focused almost exclusively on traditional and well-worn reform ideas. Many states and localities have, for example, begun to explore dramatically increasing the use of criminal drug courts, which available evidence indicates may be both cheaper and more effective than current policies. Meanwhile, the Obama administration has pledged to significantly boost federal drug court grants as part of its effort to place a greater emphasis on treatment in our national drug control strategy. Even some of the more envelope-pushing reform proposals gaining traction in some states, like taxing and regulating marijuana, are new only in their political viability and not in their approach. Of course, the fact that ideas are not new does not mean they are not good. In examining options for lowering costs and improving drug policy, however, states and localities may also benefit from thinking outside the box and looking at approaches outside of the United States in order to generate new ideas.

In that spirit, this Article will consider an innovative drug law from overseas that has thus far garnered relatively little attention in the political dialogue, or among legal academics, with-

† Associate Professor and Director, Center for Law and Social Justice, Thomas Jefferson School of Law. I am grateful to João Castel-Branco Goulão, Margaret Dooley-Sammuli, Mark A.R. Kleiman, Robert A. Mikos, Eric J. Miller, and participants at the University of Chicago Legal Forum symposium for providing helpful information and comments on earlier drafts.
in the United States\textsuperscript{1}: Portugal's 2001 drug decriminalization measure. I will argue that states looking for smart, cost-saving drug policy measures should contemplate adopting a system similar to Portugal's, which removes drug users from the criminal sphere entirely in favor of what we might think of as a civil drug court system. This approach, I will contend, would address some of the lingering inefficiencies that are inherent in the criminal drug court model that has risen to prominence here in the United States.

In Part I of this Article, I provide a brief overview of the drug war's impact on state and local budgets and look at some of the proposals for reform that have gained the greatest attention among policy makers and politicians in recent years. Part II focuses on one of the most broadly supported reform ideas: criminal drug courts. I will argue that criminal drug courts, while likely superior to our current system, suffer from a handful of key inefficiencies that cause them to be less cost-effective than other possible alternatives. I will further argue that many of these inefficiencies are the result of placing drug courts within the criminal justice system. In Part III, I will turn to Portugal's drug decriminalization law, which removed all criminal penalties for drug possession and use in personal amounts and established a noncriminal drug treatment (or, as I will refer to it, "civil drug court") system. I will consider how such a system compares to the United States' criminal drug court model and contend that a decriminalized model like Portugal's would be likely to produce better results and at a lower cost than criminal drug courts.

\section{I. THE DRUG WAR'S IMPACT ON STATE AND LOCAL BUDGETS}

By any measure, spending on prisons and law enforcement has grown exponentially over the past three decades. The combined expenditures of local governments, state governments, and the federal government on corrections and law enforcement now totals approximately $200 billion annually, more than four times what we spent (in constant dollars) just twenty-five years ago.\textsuperscript{2} State corrections budgets alone have increased more than 300

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\begin{itemize}
\item \textsuperscript{2} Glenn C. Loury, \textit{Race, Incarceration, and American Values} 5 (MIT 2008).
\end{itemize}
percent over the past twenty years, to approximately $52 billion a year. This increase has outpaced growth in spending for nearly all other essential services—including education, transportation, and public assistance—over the same time period, with Medicaid as the sole exception. And, within the area of corrections budgets, spending on prisons, as opposed to probation and parole programs, has accounted for roughly 90 percent of the new funding.

Similarly, by any measure, our punitive drug policies (in the form of the so-called “war on drugs”) have been a leading cause of the explosion in our corrections budgets and prison population. Nearly one-quarter of the 2.3 million Americans in prison are there because of a drug offense. Indeed, the number of Americans incarcerated for drug offenses today is larger than the entire prison and jail population was in 1980.

The total cost of our drug policies, in terms of government spending, is notoriously difficult to measure. This is in large part because there are so many moving parts, many of which cannot easily be quantified. Indeed, estimates even for costs that may appear relatively straightforward to measure at first glance, such as how much money drug arrests cost state and local governments, can vary widely. This is because arrest figures generally do not distinguish between “stand-alone” drug arrests, in which a drug violation is the reason for the arrest, and incidental drug arrests, in which the drug charge is incidental to an arrest for some other crime. All this is to say that to describe spending estimates in this area as imprecise and heavily debated would be an understatement.

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4 Id. See also John F. Pfaff, The Durability of Prison Populations, 2010 U Chi Legal F 73 (discussing state expenditures on prisons).
5 See Pew Center, One in Thirty-One at 12 (cited in note 3).
6 Alex Kreit, Toward a Public Health Approach to Drug Policy, 3 Advance: J ACS Issue Groups 43, 43 n 5 (2009).
7 Erik Luna, Drug Détente, 20 Fed Sent Rep 304, 305 (2008) ("Frankly, however, calculating the aggregate expense of prohibition may be an impossible task, given the myriad areas of spending and the disinterest of drug warriors in revealing the actual cost of their crusade.").
With that disclaimer in mind, one of the more recent efforts to estimate the impact of drug laws on state budgets, a 2008 paper by Harvard economist Jeffrey Miron, can help to provide at least a broad sense of the numbers. Miron, who deliberately employed assumptions in his analysis that erred on the conservative side, found that the annual net state and local expenditures for drug prohibition, after subtracting revenue for seizures and fines, are about $30 billion overall, with $10 billion for marijuana law enforcement alone.\(^9\) Net federal expenditures, meanwhile, stand at around $15 billion annually.\(^10\) Whatever dollar estimate one finds most persuasive, however, there is little doubt that drug enforcement spending today consumes a significant percentage of our corrections and law enforcement resources.

In addition to direct expenses, the criminalization of drug use carries significant collateral costs, including the removal of drug offenders who are lawfully employed from the labor market, the erosion of relationships between the community and law enforcement, and broken families.\(^11\) There are also, of course, opportunity costs associated with drug-enforcement spending.\(^12\) A number of empirical studies have found that increases in expenditures for drug enforcement lead to a reduction in the enforcement of nondrug crimes, particularly property crimes, and may even raise crime rates in those areas.\(^13\) And, of course, money

\(^9\) Id at 8.
\(^10\) Id.

\(^12\) See, for example, Steven B. Duke, Drug Prohibition: An Unnatural Disaster, 27 Conn L Rev 571, 579 (1995) ("Repeal of drug prohibition would in effect add 400,000 police officers [to enforce other criminal laws]—at no cost.").

\(^13\) See Bruce L. Benson, Escalating the War on Drugs: Causes and Unintended Consequences, 20 Stan L & Pol Rev 293, 330–49 (2009) (providing an overview of the empirical literature in this area and concluding that "[s]upport for the hypothesis that drug enforcement causes property crime is robust across these studies"). See also Darren Urdada, et al, Evaluation of Proposition 36: The Substance Abuse and Crime Prevention Act of 2000: 2008 Report 213 n 6 (UCLA Integrated Substance Abuse Programs 2008), online at http://www.adp.ca.gov/SACPA/PDF/2008_Final_Report.pdf (visited Oct 3, 2010) (reporting in reference to a drop in violent crime following a California drug treatment initiative that "[o]ne untested hypothesis is that as Prop 36 has removed drug offenders from overcrowded jails and prisons, space has been created to incarcerate more offenders sentenced for more-serious [crimes] than would be possible in the absence of Prop 36, creating a larger drop in violent crime than would have been possible in the absence of Prop 36").
spent on drug enforcement is also unavailable for non-law-enforcement uses, like education.\footnote{14}

Yet, for all of the money we spend, there is little evidence that our current drug strategy has significantly affected drug use rates or availability. Nearly half of high school seniors have used an illegal drug by the time they graduate,\footnote{15} more kids say it is easier for them to buy marijuana than alcohol,\footnote{16} and a 2008 World Health Organization (WHO) study of seventeen countries found that the United States had the highest rates of illegal drug use.\footnote{17} Indeed, the WHO study found that the percentage of people who have used marijuana in America is more than double that in the Netherlands, where marijuana is openly bought and sold in coffee shops.\footnote{18} And, while drug prohibition undoubtedly increases the price of illegal drugs to users, our policies have not had much success even in that area. A 2008 report from The Brookings Institution, for example, found that “the street prices of cocaine and heroin fell steadily and dramatically” between 1980 and 2007.\footnote{19}

The Brookings report concluded that demand reduction is the only long-term solution to the problem of drug abuse. It recommended, among other things, that the United States government undertake a comprehensive reevaluation of its drug policies. Nevertheless, there continues to be a very troubling gap between the availability of drug addiction treatment and the

\footnote{14}{See, for example, The Pew Center on the States, One in 100: Behind Bars in America 14-16 (The Pew Charitable Trusts 2008), online at http://www.pewcenteronthestates.org/uploadedFiles/8015PCTS_Prison08_FINAL_2-1-1_FORWEB.pdf (visited Oct 3, 2010) (discussing how corrections spending crowds out spending on other priorities such as education).}


\footnote{16}{National Center on Addiction and Substance Abuse at Columbia University, National Survey of American Attitudes on Substance Abuse XIII: Teens and Parents 17 Figure 3.P (Columbia Aug 2008), online at http://www.casacolumbia.org/articlefiles/380-2008%20Teen%20Survey%20Report.pdf (visited Oct 3, 2010) (showing 23 percent of teens say marijuana is the easiest drug for them to buy while only 15 percent say beer is).}


\footnote{18}{See id.}

number of individuals who need it. The Substance Abuse and Mental Health Services Administration has estimated, for example, that in 2007 only 17.8 percent of persons who needed drug treatment received it, a number that has remained largely unchanged throughout the decade.\textsuperscript{20}

In sum, drug enforcement measures have been a chief contributor to dramatic increases in state and local corrections and law enforcement budgets over the past thirty years. But despite pouring more and more money into the effort, we haven't had much success in combating the problem of drug abuse.

Given these two dynamics, it is not surprising that as state and local governments look to trim their budgets in the midst of the current recession, drug enforcement has attracted a great deal of attention as an area where they may be able to reduce corrections and law enforcement spending without compromising (and perhaps even improving) public safety. This trend has led to a range of reform proposals. A handful of states have even begun to seriously explore the idea of taxing and regulating marijuana like alcohol. In California, for example, State Assemblyman Tom Ammiano introduced a marijuana legalization bill, citing economic considerations in the form of revenue and savings as his chief motivations.\textsuperscript{21} Spurred by the momentum of Ammiano's proposal, reform advocates in California gathered signatures to place the issue on the November 2010 ballot.\textsuperscript{22} As Robert Mikos argues in his contribution to this Symposium, there may be cause for skepticism that legalizing marijuana would generate significant revenue for states, at least in the short term.\textsuperscript{23}

Despite public opinion polling that shows support for taxing and regulating marijuana approaching the 50 percent mark, the idea is still viewed in most states as politically controversial.\textsuperscript{24} One cost-cutting drug policy reform idea that does appear to have gained a broad consensus among both politicians and policy

\textsuperscript{20} Substance Abuse and Mental Health Services Administration, \textit{DHHS Publication No SMA 08-4343: Results from the 2007 National Survey on Drug Use and Health: National Findings 83} (Department of Health and Human Services Sept 2008), online at http://www.oas.samhsa.gov/nsduh/2k7nsduh/2k7Results.pdf (visited Oct 3, 2010).

\textsuperscript{21} See Robert A. Mikos, \textit{State Taxation of Marijuana and Other Federal Crimes, 2010 U Chi Legal F} 223 (discussing this phenomenon and arguing that taxing and regulating marijuana may not be the budget panacea many proponents claim it would be).

\textsuperscript{22} Jesse McKinley, \textit{Latest Legal-Marijuana Push is All About the Tax Revenue}, NY Times A1 (Mar 28, 2010).

\textsuperscript{23} Mikos, 2010 U Chi Legal F 223 (cited in note 21).

\textsuperscript{24} See, for example, Karl Vick, \textit{Support for Legalizing Marijuana Grows Rapidly Around the US: Approval for Medical Use Expands Alongside Criticism of Prohibition}, Wash Post A7 (Nov 23, 2009).
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analysts, however, is shifting resources away from incarceration and toward treatment when it comes to low-level and nonviolent drug offenders. The overwhelming weight of studies in this area indicates that shifting drug-control resources toward treatment would not only save money but would quite likely achieve better results than our current approach. An analysis by the RAND Corporation, for example, found that each cocaine-control dollar used for treatment generates societal cost savings of $7.48, compared to savings of only 52 cents for every dollar used for domestic law enforcement.

II. THE POSSIBILITIES, AND LIMITATIONS, OF CRIMINAL DRUG COURTS

There are, of course, many different ways that a state might shift its drug policy spending away from corrections and law enforcement and toward treatment. When it comes to cost-saving approaches for dealing with drug users specifically, however, criminal drug courts are rapidly emerging as a popular alternative to incarceration. A recent survey by the National Center for State Courts reported that “[e]xpanding the use of drug courts . . . [was] among the leading current sentencing reform efforts in the states.” This trend is only likely to grow stronger as President Obama has made expanding funding for state and local drug courts a cornerstone of his drug-control strategy. Already, the administration has upped funding for the federal drug courts grant program by 250 percent, a number that seems quite likely to increase next year as well.

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29 White House Tries to Combat Drug Demand, CNN.com (cited in note 25).
With such rapidly growing support, it would not be a stretch to envision a future in which drug courts become the customary model for processing low-level drug offenders in the criminal justice system. Yet, while criminal drug courts certainly offer many advantages over the current system, they also suffer from a number of inefficiencies and problems of their own. In this Part, I will provide an overview of the criminal drug court model and its benefits, along with a detailed look at some of its shortcomings.

A. An Overview of Drug Courts

Fifteen years ago, the subject of The University of Chicago Legal Forum’s annual symposium was “Toward a Rational Drug Policy.” Two of the participants at that event cited drug courts as an emerging and promising treatment-oriented alternative to jail sentences for drug addicts. At the time, the concept of drug courts was still in its infancy. The first modern drug court had opened its doors just five years earlier in Miami, Florida, and the National Association of Drug Court Professionals was formed in the same year as the Legal Forum Symposium. Today, we have over two thousand drug courts in the United States, a number that, as noted above, is likely to increase in the coming years along with the expanding budget.

Drug courts vary widely in the details of their operations, but in essence they allow some drug offenders to obtain treatment under the close supervision of a drug court in place of a traditional sentence. Drug courts are designed to be nonadversarial, with the prosecutor, defense attorney, and judge working

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30 Mathea Falco, Toward a More Effective Drug Policy, 1994 U Chi Legal F 9, 18 (“Some cities, such as Miami, have created special drug courts to provide immediate treatment for drug offenders. These programs have shown good results, with a treatment cost per offender of less than $1,000.”); Clarence Lusane, In Perpetual Motion: The Continuing Significance of Race and America’s Drug Crisis, 1994 U Chi Legal F 83, 103 (arguing in favor of “providing treatment in prisons and creating drug courts, similar to the system used by Janet Reno in Florida, where successful completion of a court-sanctioned drug treatment program allows those caught with small amounts of drugs to avoid prison or jail time”).


together for the goal of promoting public safety. Drug court judges typically monitor and evaluate defendants through regular status hearings, frequent drug and alcohol testing, and other methods. If a drug court participant fails to comply with program requirements—by, for example, testing positive for drugs—the judge may impose sanctions. These sanctions are generally imposed on a graduated basis and can range from the imposition of work detail or community service to brief jail sentences to termination from the program. Judges can likewise reward participants who are on track with intermediate benefits, such as complimentary public transportation passes.

In 1997, the National Association of Drug Court Professionals, in partnership with the U.S. Department of Justice, formalized this basic structure by publishing a report with “ten key components” for drug courts and requiring state and local drug courts to abide by them in order to be eligible for federal funding. Beyond these ten components, however, there is a wide diversity in the operation of drug courts. In terms of procedural posture drug courts can be grouped into three basic models: (1) pre-plea/pre-adjudication, (2) post-plea/pre-adjudication, and (3) post-adjudication. In the first category, prosecution is deferred while the defendant goes through the drug court process. A defendant will typically be required to waive certain procedural rights (such as the right to a speedy trial), but will retain her right to challenge the charge against her should she fail to complete the program and be returned to a traditional court. In the “post-plea/pre-adjudication” scenario, a guilty plea is part of the price of admission into the drug court, but the plea is held in abeyance during the defendant’s participation in the program. If the defendant succeeds in the drug court, the charge will be dismissed, but if she fails, the plea is

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33 See NACDL Report at 17–18 (cited in note 32) (discussing the use and types of sanctions imposed in drug courts).
34 See id.
37 NACDL Report at 17 (cited in note 32).
38 See id.
39 See id; Miller, 65 Ohio State L J at 1489 (cited in note 36).
40 See NACDL Report at 17 (cited in note 32).
entered and a sentence is imposed.\textsuperscript{41} Finally, in the post-adjudication model, a defendant pleads guilty and is convicted.\textsuperscript{42} The sentence is then suspended pending the successful completion of the drug court program.\textsuperscript{43} Some post-adjudication programs provide a method for a successful defendant to have her record expunged.\textsuperscript{44} In others, however, a successful defendant will escape imposition of the suspended sentence but will still have a conviction on her record.\textsuperscript{45}

Eligibility requirements also vary significantly from court to court, though typically a defendant who wishes to gain entry into a drug court program must be charged with drug possession or another nonviolent offense and must demonstrate that she has a substance abuse problem.\textsuperscript{46}

For all their differences, perhaps the most important quality that unites American drug courts is that they are uniformly a part of the criminal system. Drug possession remains criminalized and those caught with drugs are arrested and processed by the police as usual. Drug court programs only enter the picture at this stage, offering a way out for individuals who are facing a prison sentence or who would simply prefer not to have a criminal record. In every instance—whether pre-plea or post-adjudication—the threat of a criminal sanction hangs over the treatment process, and judges are responsible for meting out graduated sanctions. As a result, within the drug court system, "[t]he court, rather than treatment center, becomes the focal point of the treatment process."\textsuperscript{47} Similarly, though drug courts operate on the premise that drug addiction is a disease that should be treated and not punished, criminal sanctions ultimately await those who fail the program and those who either choose not to participate or are excluded from participating.\textsuperscript{48}

\begin{itemize}
\item \textsuperscript{41} Id.
\item \textsuperscript{42} Id.
\item \textsuperscript{43} Id.
\item \textsuperscript{44} See NACDL Report at 17–18 (cited in note 32).
\item \textsuperscript{45} Id.
\item \textsuperscript{47} Eric J. Miller, Drugs, Courts, and the New Penology, 20 Stan L & Pol Rev 417, 423 (2009).
\item \textsuperscript{48} See Morris B. Hoffman, The Drug Court Scandal, 78 NC L Rev 1437, 1474–75 (2000) (discussing the conflicted dual role of drug courts as both a cure for a disease and a solution for a crime).
\end{itemize}
B. Why Drug Courts Are (Almost Certainly) Better than the Status Quo

Drug courts appear to have been born primarily out of necessity. As drug war arrests and prosecutions reached a crescendo in the late 1980s, many urban court and prison systems were having a hard time keeping pace. Drug courts were conceived as a method for helping to control rapidly increasing court caseloads and prison populations.\textsuperscript{49} But as the courts spread during the early 1990s, drug court advocates began to look beyond the immediate benefits in managing caseloads and jail populations and focused their attention on drugs courts as a potentially more effective and therapeutic alternative to the status quo.\textsuperscript{50}

Today, most drug court advocates view them as both a less expensive method for processing low-level drug offenders through the criminal justice system and a more humane and effective approach to addressing the problem of substance abuse than conventional options. Whatever faults that drug courts may have, there does appear to be a fairly broad consensus for the proposition that drug courts produce better results than incarceration and at a reduced cost.\textsuperscript{51} Various studies have found that drug courts reduce criminal justice and victimization costs as compared to incarceration or even simple probation, and others have found long-term savings have been achieved in counties where drug court programs have been instituted.\textsuperscript{52} An analysis in California, for example, found that the drug courts studied

\textsuperscript{49} See McCoy, 40 Am Crim L Rev at 1520 (cited in note 31) ("In 1989–1992, all of the articles [about drug courts] concerned the crushing court caseload caused by the War on Drugs and management approaches for addressing it.").

\textsuperscript{50} See id at 1521 ("At this point, the intellectual agenda ‘turned,’ as historians and literary scholars say. Therapeutic rhetoric was overtaking management rationales for court reform.").

\textsuperscript{51} See Kleiman, Brute Force at 161–62 (cited in note 27) (stating that "[a]s a means of incapacitation, drug treatment is by far more cost-effective than incarceration" and noting that "[w]hile outcome evaluations have been mixed, there seems little doubt that some drug courts are performing quite well and saving money"); Avinash Singh Bhati, John K. Roman, and Aaron Chalfin, To Treat or Not to Treat: Evidence on the Prospect of Expanding Treatment to Drug-Involved Offenders 52–58 (The Urban Institute 2008), online at http://www.urban.org/UploadedPDF/411645_treatment_offenders.pdf (visited Oct 3, 2010) (examining the cost-effectiveness of treating currently eligible drug court participants). But see Michael M. O’Hear, Federalism and Drug Control, 57 Vand L Rev 783, 827–28 (2004) (reviewing the argument that drug courts might actually increase incarceration rates through a "net-widening" effect that leads police to make arrests, and prosecutors to file charges, in low-level cases that they would not have pursued previously).

\textsuperscript{52} King and Pasquarella, Drug Courts at 5–9 (cited in note 46) (providing an overview of key studies).
cost only $3,000 on average per client while generating an average savings of $11,000 per client in reductions in recidivism and costs to victims. A systemic review of drug court research by the Government Accountability Office (GAO) in 2005 found that the studies showed net benefits ranging from $1,000 to $15,000 per drug court participant. As the 2009 National Drug Control Strategy put it when summarizing the research into the efficacy of drug courts, “Over a decade of drug court research shows that [drug] courts work better than jail or prison.”

My aim here, however, is not to evaluate or question the premise that drug courts are, in general, a cost-effective and more humane alternative to incarceration. Indeed, I have previously argued elsewhere that federal funding for drug courts should be expanded. My goal in this paper is to consider how criminal drug courts might fare in comparison to an alternative civil drug court system. Accordingly, taking it as a given that the weight of authority shows drug courts to be more effective than conventional punishment, I will keep my discussion of studies about the merits of criminal drug courts to a minimum and turn now to the task of drawing out their shortcomings.

C. Drug Court Inefficiencies

For all of the praise heaped upon drug courts, they are not without their critics. Just last year, as the Obama administration embraced the expansion of drug court funding as a key component of its drug control strategy, the National Association of Criminal Defense Lawyers (NACDL) issued a high-profile and highly critical assessment of the current drug court model. The NACDL report highlighted a number of areas for concern, with a

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56 Kreit, 3 Advance: J ACS Issue Groups at 49 (cited in note 6).
particular emphasis on the problems attendant to "post-plea" or post-adjudication drug courts, which require a defendant to enter a guilty plea to access treatment, as well as problems that arise "from the fundamental tension between the defense lawyer's traditional role as a zealous advocate for clients and the drug court's ... nonadversarial, collaborative approach." The NACDL's report also took issue with drug court admissions criteria, noting that many drug courts currently have no official criteria at all and give prosecutors nearly complete discretion to determine which defendants get into the system and which do not. And, in a criticism that is related to the lack of objective admissions criteria in many drug courts, there has been a growing concern that the severe racial disparities seen in general drug enforcement are exacerbated in the drug court system. Though research in this area has been limited, the available evidence indicates that a disproportionate percentage of drug offenders who gain admittance into drug courts are white and that, even among drug court participants, drug court sanctions are disproportionately visited upon people of color and the indigent. While racial disparity, admissions criteria, and the ethical obligations of defense attorneys are all important issues facing drug courts, this section will look specifically at how drug courts, while more cost effective than traditional measures, still fall short from a cost-benefit standpoint.

As discussed above, there is a great deal of evidence that when it comes to dealing with low-level drug offenders, drug courts are less expensive and far more effective than incarceration. And yet, drug courts that operate within the criminal system are still a very cumbersome way to address the underlying concerns in this area: drug demand, drug abuse, and drug addiction. First, drug courts are overinclusive because they cause individuals who do not have drug abuse or addiction problems and

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59 See id at 22–23.
60 See id at 23, 42–45 ("The eligibility criteria and the blanket prohibitions have contributed to serious concerns about racial and socio-economic class discrimination in admission policies.").
61 See id; Michael M. O'Hear, Rethinking Drug Courts: Restorative Justice as a Response to Racial Injustice, 20 Stan L. & Pol Rev 463, 477 (2009) ("[M]uch evidence now suggests that white drug offenders are more likely to benefit from this 'pathway out' than black drug offenders. This means that [drug treatment courts] are apt to exacerbate, not ameliorate, overall racial disparities."); Robert V. Wolf, Race, Bias, and Problem-Solving Courts, 21 Nat'l Black L J 27, 40–42 (2009) (discussing issues of race and drug courts). For a review of racial disparity and drug enforcement generally, see Doris Marie Provine, Unequal Under Law: Race in the War on Drugs (Chicago 2007).
are not in need of drug treatment to use precious treatment resources in order to avoid the consequences of a conviction. Second, drug courts are also underinclusive. Many defendants who qualify for drug court programs and need treatment may nevertheless decide not to participate in a drug court program because the consequences of a conviction are not severe enough to make entering into the program worthwhile.

1. Treatment, whether or not you need it.

The criminal prohibition of the possession and distribution of small quantities of controlled substances turns all drug users into criminals, whether or not they are addicted, violent, or otherwise law abiding. A substantial percentage of drug users, however, do not have a drug abuse problem and will never develop one. Indeed, the available evidence shows that most people who use an illegal drug will stop using entirely within five years. Of many more will continue to use drugs regularly or sporadically without any negative impact on their lives. And, even among users who do go on to abuse drugs (including alcohol), many will simply outgrow the problem without treatment. Of course, someone who is arrested for drug possession or sale is more likely than the average user to suffer from an abuse or addiction problem. A person who has an addiction or abuse problem may be more likely to engage in risky behavior that would lead them to encounter the police and be arrested for drug possession. And a drug abuser is more likely to be in possession of a controlled substance at any given time than a casual user simply because someone who abuses or is addicted to drugs will use and carry them more frequently. Nevertheless, in any system that criminalizes the possession, cultivation, and distribution of small quantities of controlled substances, a substantial percentage of those who are arrested and prosecuted will inevitably be nonaddicts and nonabusers.

For these reasons, drug courts that operate within the criminal justice system run into the problem of overinclusiveness and

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run the risk of funneling nonaddicts into treatment that they don't need.\textsuperscript{64} Not surprisingly, then, drug courts often require would-be participants to have either tested positive for drugs or to demonstrate that they suffer from an abuse problem in order to gain entry.\textsuperscript{65} These requirements are undermined, however, by the relative ease with which an individual can fake an abuse or addiction problem and by incentives that tend to result in the admission of nonaddicts into drug court programs.

Nonaddicted defendants will often have a very strong motivation to embellish the extent of their use in order to prove that they have an abuse problem and become eligible to participate in a drug court. This is because, for an individual without addiction or abuse problems, a drug court will often be a far more preferable alternative to a drug conviction. Even if the punishment a person is facing is relatively minimal, an otherwise law-abiding recreational drug user will generally have an especially strong interest in avoiding a drug conviction. A drug conviction carries with it a wide array of collateral legal consequences (in addition to the social stigma associated with a criminal conviction), including the loss of a range of federal benefits and professional licenses.\textsuperscript{66} A nonaddict, who may be a student or have a regular job, is likely to be more concerned with these types of consequences than someone who is suffering from an abuse or addiction problem and living on the margins of society. At the same time, participating in a drug court program is a low-risk endeavor for a nonaddict because he will not have much difficulty passing drug tests and adhering to other program requirements. As one commentator put it: "Defendants understand that they have

\textsuperscript{64} See Miller, 65 Ohio St L J at 1551–53 (cited in note 36) (arguing that because the drug court process is "facilitated by the competing classificatory goals of treatment providers and criminal justice professionals . . . a system initially targeted at drug addicts comes primarily to serve drug users who may or may not be addicted"); David W. Rasmussen and Bruce L. Benson, \textit{Rationalizing Drug Policy under Federalism}, 30 Fla St U L Rev 679, 733 (2003) (arguing that drug courts are "very likely to squander valuable treatment resources by imposing treatment on casual experimenters who have no discernable drug problem").


to play the treatment game to pass through the criminal hoops.\textsuperscript{67} And, because addiction and abuse are imprecise disorders the diagnosis of which will typically depend on an individual's self-reported behavior,\textsuperscript{68} it would be difficult to stop a determined defendant from entering a drug court program under false pretenses even in a system that was firmly dedicated to weeding out nonaddicts.

At the same time, despite the letter of their eligibility requirements, drug courts generally have a very strong interest in admitting nonaddicted clients. This is because drug courts rely on funding that is contingent, implicitly or explicitly, upon demonstrating results and treating a sufficient number of defendants.\textsuperscript{69} Indeed, a substantial amount of anecdotal evidence indicates that many drug courts actively seek out "low-risk" nonaddicted clients and do their best to "skim" high-risk clients away from their programs in order to boost their success rate.\textsuperscript{70} Many drug court gatekeepers may also have less self-interested reasons for admitting nonaddicts. The NACDL report recounted the testimony of a drug court judge who "favors opening the door 'as wide as we can' because 'treatment court is the best game in town.'"\textsuperscript{71}

In a recent illuminating and insightful article, Josh Bowers explains how these dynamics play out in New York City drug courts to create what he deems a "dealers court," in which nonaddicted drug dealers are the primary beneficiaries of the pro-

\textsuperscript{67} Morris B. Hoffman, \textit{Therapeutic Jurisprudence, Neo-Rehabilitationism, and Judicial Collectivism: The Least Dangerous Branch Becomes Most Dangerous}, 29 Fordham Urban L. J 2063, 2069 n 25 (2003). See also, for example, NACDL Report at 73 n 484 (cited in note 32) (reporting the testimony of a public defender who said "I've had clients that really were at the wrong place, wrong time, got busted for possession, and they weren't drug addicts, yet they have to go through the entire system, urine, go to meetings, and it's unfortunate the way it is").

\textsuperscript{68} See Stephen J. Morse, \textit{Hooked on Hype: Addiction and Responsibility}, 19 L & Phil 3, 8 (2000) (observing that "there is no consensus definition [of addiction] and any definition chosen will be problematic").

\textsuperscript{69} Josh Bowers, \textit{Contraindicated Drug Courts}, 55 UCLA L.Rev 783, 800 & n 69 (2008) (noting that drug courts are funding-dependent entities, and the money streams hinge on meeting capacity and treatment targets).

\textsuperscript{70} Id; NACDL Report at 22–23 (cited in note 32).

\textsuperscript{71} NACDL Report at 49 (cited in note 32). See, for example, id at 73 n 484 (reporting the testimony of a public defender who observed that "Nobody has ever done that interview and said, 'You don't need our services. Go and be well.' Everybody's got a problem"); Miller, 65 Ohio St L. J at 1553 (cited in note 36) ("Treatment programs, in an effort to demonstrate effectiveness, start cherry picking the low-risk candidates who would have been screened out of a traditional diversion system and channeling up and into the criminal justice system the high-risk candidates they were originally designed to serve.").
Relying on two empirical studies of New York City drug courts as well as his own experiences as a Bronx County public defender, Bowers reports that prosecutors would skim high-risk defendants from the system while doing “almost nothing to ensure that treatment offers went to the addicted.” The prosecutors would begin their assessment of potential drug court cases by reviewing the file for “paper eligibility”—a nonclinical paper-based assessment that would turn entirely on the defendant’s current charges and past record, not on his therapeutic need or lack thereof. Prosecutors would make their offers on the paper-based assessment alone. At that point, defendants would undergo a clinical assessment. But, Bowers reports, “only a small fraction of candidates were rejected for insufficient addiction or use.” As a result, Bowers observes that a substantial percentage of New York City drug court participants are actually non-addicted drug dealers.

Few studies have attempted to quantify the prevalence of drug court participants who do not have addiction or abuse problems within drug court programs. Drug court studies that have attempted to assess rates of drug dependency among participants, however, indicate that a substantial number of drug court clients do not have a substance use disorder. One team of researchers that has measured drug dependency in drug court found that “nearly one half of misdemeanor drug court clients, one third of felony drug court clients, and two thirds of pretrial clients in a drug treatment and monitoring program produced ‘sub-threshold’ drug composite scores on the Addiction Severity Index.”

An examination of past-month use rates of individuals entering treatment from the Substance Abuse and Mental Health’s Treatment Episode Data Set suggests that the findings in the handful of individual studies to address the issue are not anomalous.

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73 Id at 798.
74 Id.
75 Id at 799.
76 See Bowers, 55 UCLA L Rev at 790–803 (cited in note 69). See also Timothy Edwards, The Theory and Practice of Compulsory Drug Treatment in the Criminal Justice System: the Wisconsin Experiment, 2000 Wis L Rev 283, 334 (“[T]he criminal justice system casts a wide net in an attempt to provide treatment to drug users who would not qualify as ‘addicts’ under traditional clinical classification schemes.”).
The data set includes the frequency of a treatment client’s drug use prior to entering treatment for his or her primary drug substance of abuse, as well as the person or entity responsible for referring the client to the program. Looking at the frequency of use by referral type from the most recent available year (2007) reveals that an unusually large number of individuals referred to treatment by the criminal justice system had used their primary substance of supposed abuse either not at all or only rarely within the month before entering treatment. Specifically, 38 percent of individuals who entered treatment because of a referral from a state or federal court had not used drugs at all within the past month. Another 17 percent had only used their primary substance of abuse one to three times in the one month prior to entering treatment. That means 55 percent of all individuals who were referred to treatment by a court program had used their primary drug of abuse less than three times in the month before they entered into treatment. By comparison, only 21 percent of individuals who referred themselves to treatment had used their primary drug of abuse less than three times in the past month. The charts below provide a more detailed picture. In reading the charts, it is worth paying particular attention to the striking difference between use rates among drug court referrals and use rates among all other categories of referrals.

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79 See id.
80 Unfortunately, the referral data does not separate drug courts from other court referrals. However, DUI and DWI referrals are excluded from this figure, making it likely that a very large percentage of the referrals in this category come from drug courts.
81 TEDS-A (cited in note 78).
82 Id.
83 See id.
84 These charts were compiled from statistics in TEDS-A (cited in note 78).
Figure 1. Frequency of use (primary) by detailed criminal justice referral

- **State/Federal Court, Other Legal Entity**: 11% (No Use in Past Month), 12% (1-2 Times in Past Month), 17% (1-3 Times in Past Month), 22% (3-6 Times in Past Month), 49% (Daily)
- **Probation/Parole, Prison**: 10% (No Use in Past Month), 9% (1-2 Times in Past Month), 16% (1-3 Times in Past Month), 44% (3-6 Times in Past Month)
- **DUI/DWI**: 8% (No Use in Past Month), 6% (1-2 Times in Past Month), 17% (1-3 Times in Past Month), 44% (3-6 Times in Past Month)
- **Diversion Program**: 13% (No Use in Past Month), 10% (1-2 Times in Past Month), 19% (1-3 Times in Past Month), 44% (3-6 Times in Past Month)
Figure 2. Frequency of use (primary) by principal source of referral

<table>
<thead>
<tr>
<th>Source</th>
<th>0%</th>
<th>20%</th>
<th>40%</th>
<th>60%</th>
</tr>
</thead>
<tbody>
<tr>
<td>Individual (Includes Self-Referral)</td>
<td></td>
<td></td>
<td>13%</td>
<td>59%</td>
</tr>
<tr>
<td>Alcohol/Drug Abuse Care Provider</td>
<td>7%</td>
<td>26%</td>
<td>47%</td>
<td></td>
</tr>
<tr>
<td>Other Health Care Provider</td>
<td>11%</td>
<td>14%</td>
<td>51%</td>
<td></td>
</tr>
<tr>
<td>School (Educational)</td>
<td>18%</td>
<td>26%</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Employer/EAP</td>
<td>19%</td>
<td>29%</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Other Community Referral</td>
<td>15%</td>
<td>31%</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Court/Criminal Justice Referral/DUI/DWI</td>
<td>17%</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

- No Use in Past Month
- 1-2 Times in Past Week
- 3-6 Times in Past Week
- Daily

Interestingly, when we look at the numbers for a particularly addictive substance, such as heroin, the difference between criminal justice referrals and others is even more striking.
Figure 3. Frequency of use by principal source of referral for clients with heroin as their primary substance of abuse.

<table>
<thead>
<tr>
<th>Source of Referral</th>
<th>No Use in Past Month</th>
<th>1-2 Times in Past Week</th>
<th>1-3 Times in Past Month</th>
<th>3+ Times in Past Week</th>
<th>Daily</th>
</tr>
</thead>
<tbody>
<tr>
<td>Individual (Includes Self-Referral)</td>
<td>8%</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Alcohol/Drug Abuse Care Provider</td>
<td>4%</td>
<td>9%</td>
<td>21%</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Other Health Care Provider</td>
<td>3%</td>
<td>6%</td>
<td>11%</td>
<td></td>
<td></td>
</tr>
<tr>
<td>School (Educational)</td>
<td>4%</td>
<td>8%</td>
<td>14%</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Employer/EAP</td>
<td>4%</td>
<td>8%</td>
<td>14%</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Other Community Referral</td>
<td>4%</td>
<td>6%</td>
<td>38%</td>
<td>21%</td>
<td></td>
</tr>
<tr>
<td>Court/Criminal Justice Referral/DUI/DWI</td>
<td>7%</td>
<td>5%</td>
<td>7%</td>
<td>37%</td>
<td></td>
</tr>
</tbody>
</table>
These statistics are, of course, inherently limited in their ability to tell us the total number of drug court participants who do not have a genuine abuse or addiction problem. It is certainly possible, for example, for a person to suffer from a substance abuse or addiction problem without having used (or having used only infrequently) within the month prior to their admission into treatment. Similarly, some criminal justice treatment clients might be motivated to conceal their use or to scale back their use before entering treatment in order to demonstrate their compliance to the court. While these statistics cannot tell us the scope of the overinclusiveness problem with specificity, however, the abnormally large number of criminal justice treatment clients who had used three times or fewer prior to entering treatment seems to provide strong corroboration for the general proposition that a not-insubstantial number of drug court participants do not have a substance abuse or addiction problem. Rather, these individuals are gaming the system and entering treatment not because they have any need for it but because it is a preferable alternative to the punishment they would otherwise receive.

It is self-evident, of course, that sending an individual who does not have a drug abuse or addiction problem to receive drug treatment is not an efficient use of scarce and costly drug treatment resources. Processing nonaddicts through the machinery of drug courts—including regular drug testing, drug court appearances, and other requirements—is also unlikely to provide significant benefits in return for the investment. Indeed, participation in drug court programs may be counterproductive for nonaddicted defendants since meeting program requirements are likely to interfere with their work and family responsibilities. Because drug courts generally attempt to tailor their treatment regimens to the participant, it is worth noting that low-risk offenders without abuse problems may cost drug courts less than the average drug court participant. And drug courts are still less expensive than incarceration. This fact, however, is precisely why there is unlikely to be a solution to the overinclusiveness prob-

85 See Substance Abuse and Mental Health Services Administration, Substance Abuse Treatment Admissions Referred by the Criminal Justice System (SAMHSA Aug 2009), online at http://www.oas.samhsa.gov/2k9/211/211CJadmits2k9.pdf (visited Oct 3, 2010) (analyzing trends and reporting that criminal justice referral admissions are nearly twice as likely as all others to be employed full or part time and that the fastest growth in criminal justice referrals has included admissions for marijuana).

86 See DeMatteo, Marlowe, and Festinger, 52 Crime & Delinq at 118 (cited in note 77) (arguing that program "requirements may compete with clients' legitimate responsibilities, such as work, which puts them in a tough spot").
lem within criminal drug courts. As long as treatment or typical criminal justice solutions like incarceration are the only options, drug courts will be seen as the most cost-effective option for low-risk defendants, even those who do not have substance abuse problems.

2. Why drug courts fail to treat many defendants in need.

While criminal drug courts can lead government to direct treatment resources to those who do not need them, they can also be an inefficient method for ensuring that those who truly do need treatment receive it. Drug courts suffer from two key shortcomings that cause them to be underinclusive.

The most prominent underinclusiveness critique of drug courts is that many drug court programs exclude a wide range of offenders with substance abuse problems, either automatically or at the discretion of the prosecutor. For example, individuals who have a prior conviction for a violent offense and those who have a history of failed treatment are frequently barred from drug courts. A 2008 study by the Urban Institute estimated that allowing individuals with a crime of prior violence to participate in drug courts nationwide would yield a total of $4.3 billion in benefits at a cost of $2 billion. Further, removing all of the common barriers to entry into drug courts would produce a net benefit of $32 billion.

There is, on the other hand, evidence suggesting that at least some percentage of individuals who are currently excluded from drug courts may be sufficiently likely to commit serious nondrug crimes that allowing them into a diversion program would not be worth the cost. Statistics from California’s drug treatment diversion program “Proposition 36,” for example, have shown that individuals who had five or more nondrug arrests within the thirty months prior to treatment were significantly more likely to commit serious nondrug crimes during their participation in the diversion program. Accordingly, excluding that

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87 See Bhati, Roman, and Chalfin, To Treat or Not to Treat, at 26–34 (cited in note 51) (discussing drug court eligibility in general); NACDL Record at 22–23 (cited in note 32) (discussing eligibility criteria in general).
88 See Hoffman, 78 NC L Rev at 1462 (cited in note 48). See, for example, Bhati, Roman, and Chalfin, To Treat or Not to Treat at 60–62 (cited in note 51) (discussing the past-violence exclusion in drug court eligibility).
89 Bhati, Roman, and Chalfin, To Treat or Not to Treat at 60–62 (cited in note 51).
90 Id at 66.
91 Kleiman, Brute Force at 162 (cited in note 27) (noting that while only 1.6 percent of
limited subset of individuals from treatment programs and incapacitating them through incarceration may be cost beneficial. Wherever the line is ultimately drawn, however, there does appear to be persuasive evidence that dropping many of current drug court restrictions would provide substantial cost savings.92

The eligibility problem, however, is not a problem that is inherent to criminal drug courts. Indeed, to the extent eligibility restrictions are a problem, they could easily be addressed within the current criminal drug court system simply by doing away with the inefficient restrictions. So, while easing eligibility restrictions may provide cost benefits, the fact that most drug courts incorporate eligibility restrictions does not weigh against keeping drug courts within the criminal system.

A trickier underinclusiveness problem for criminal drug courts relates to defendants who are eligible for drug court programs but who choose not to participate in them or are never given the offer because their offense is not serious enough. Very often, defendants who are eligible to participate in drug court programs would be likely to receive probation or a relatively light prison sentence in a traditional criminal court.93 For these defendants, the burdens and risks of participating in a drug court may not be worth the potential rewards.

Ironically, defendants who have the greatest treatment need are the most likely to be counseled by their attorneys not to participate in a drug court program. This is because, according to a growing body of evidence, defendants who participate in a drug court program but fail to complete it often receive longer sentences (sometimes quite longer) than similarly situated defendants who are conventionally adjudicated.94 A study of New York City drug courts found, for example, that failing participants generally received sentences two to five times as long as conventionally defendants.95 Needless to say, defendants with the most severe addiction problems are the most likely to fail treatment. As a result, defendants who have the greatest treatment need

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92 See generally, Bhati, Roman, and Chalfin, To Treat or Not to Treat (cited in note 51).
93 See O'Hear, 20 Stan L & Pol Rev at 479 (cited in note 61).
94 See NACDL Report at 29 (cited in note 32) (discussing increased sentences for drug court participants who fail); Bowers, 55 UCLA L Rev at 792 & n 30 (cited in note 69) (discussing studies and anecdotal evidence to support this proposition).
95 See Bowers, 55 UCLA L Rev at 792 (cited in note 69).
THE DECRIMINALIZATION OPTION

may ironically have the strongest incentive not to participate in
criminal drug court programs. As the NACDL report on drug
courts explained, in many cases "the best advice is to litigate the
suppression motion to take a guilty plea to time served to avoid a
likely drug court failure and a longer sentence."\textsuperscript{96}

Even defendants who are confident that they would be able
to complete the treatment process successfully, however, may opt
not to because they view the alternative as less onerous.\textsuperscript{97} A first-
time drug possession offender, for example, might prefer proba-
tion to the often more time-consuming and intrusive require-
ments of drug courts.\textsuperscript{98} Other low-level offenders may even re-
ceive offers for deferred prosecution without any treatment com-
ponent. Yet many of these individuals may have a drug abuse or
addiction problem or be at risk for developing one. Providing
treatment to those in need or a "brief intervention"\textsuperscript{99} and as-
essessment to those who do not yet have abuse or addiction prob-
lems at the earliest opportunity would be more cost effective
than waiting until the individual has reoffended and is facing a
sufficiently severe punishment to persuade him or her to enter
treatment.

Because criminal drug courts are premised on making de-
fendants choose between a criminal sanction and a punitive
treatment program, there does not appear to be an easy solution
to this underinclusiveness problem. To be sure, eliminating the
practice of increased sentences for those who fail to complete the
drug court program would help to address the problem in part.
But the problem that many first-time offenders may simply not
be facing a severe enough punishment to entice them into a drug
court could seemingly only be addressed within the current sys-
tem by increasing punishments for first-time offenders. Of
course, because incarcerating drug addicts is more costly and

\textsuperscript{96} NACDL Report at 31 (cited in note 32). See also Bowers, 55 UCLA L Rev at 786
(cited in note 69) (arguing that "drug courts are 'contraindicated' for genuine addicts").

\textsuperscript{97} See Richard C. Boldt, \textit{Rehabilitative Punishment and the Drug Treatment Court
Movement}, 76 Wash U L Q 1205, 1256 (1998) ("Nevertheless, defendants who progress
through the entire treatment court regime and who upon 'graduation' have their charges
dismissed ultimately may have received 'a more onerous disposition in terms of the
length of time [they are] subject to court control' than they would have received if the
charges had been resolved through standard plea negotiations or trial.").

\textsuperscript{98} See NACDL Report at 43 (cited in note 32) (discussing the difficulties associated
with following through with drug court while working full-time).

\textsuperscript{99} For an overview of the screening and brief intervention model, see Pamela Anderson,
et al, \textit{Screening and Brief Intervention: Making a Public Health Difference}, (Join
Together 2008), online at http://www.jointogether.org/aboutus/ourpublications/pdf/sbi-
inefficient than treatment, this option would not appear to be much of a solution.

III. SHOULD STATES CONSIDER DECRIMINALIZATION?

Even if criminal drug courts may have their shortcomings, it does not necessarily mean that they are not our best option. Drug use—along with abuse and addiction—has existed in almost every society in recorded history. There is no silver bullet that will solve the problem of drug abuse and addiction, and any system that we design is going to involve trade-offs.

The inefficiencies discussed above, however, seem to be preventable problems that flow primarily from a single source: the criminalization of drug use and abuse. Because drug courts are located within the criminal system, they put individuals who are caught in possession of drugs to a choice between a drug court treatment program and the (more costly and less effective) traditional criminal penalty. In some cases, this choice will lead defendants who do not have a drug abuse problem and are unlikely to develop one to obtain treatment they do not need to avoid the punishment they would otherwise face. In others, defendants who might benefit from a detailed course of treatment or a brief medical consultation about their substance use are counseled by their attorneys not to enter drug court programs because the punishment they face does not justify the risks or burdens of drug court. As a result, drug courts can, in some instances, waste scarce treatment resources on those without drug problems while allowing others who truly need treatment to pass through the system without so much as speaking with a treatment or addiction specialist.

That criminal drug courts retain these inefficiencies is not surprising. Criminal laws against possession of small quantities of drugs for personal use are not really concerned with possession itself or even with drug use generally. They exist in order to address the problems of drug abuse and drug addiction—problems that are medical in nature and that only affect a small

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100 See Charles H. Whitebread and Ronald Stevens, *Constructive Possession in Narcotics Cases: To Have and Have Not*, 58 Va L Rev 751, 753 (1972) (noting that "possession crimes are somewhat anomalous" because "[p]ossession of an object in and of itself is not the law's real concern"). But see O'Hear, 57 Vand L Rev at 804, 790 (cited in note 51) (arguing that drug courts "have a 'treatment-as-punishment' character that makes them palatable to the legalist mindset" which holds that "people who consume unlawful substances make a morally wrong decision regardless of whether any tangible harm results").
percentage of those in possession of drugs. As a result, criminal
laws against possession of small drug quantities are a very im-
precise method for addressing the chief problem with which they
are concerned.

All of this leads to the question that I will focus on for the
remainder of this Article: would decriminalization work any bet-
ter? I will argue that drug decriminalization, implemented in
combination with a civil drug court system, would likely be even
more successful at addressing abuse and addiction than criminal
drug courts, and would do so at a lower cost.

A. (Re)defining Decriminalization: Lessons from Portugal

Despite all of the debate about drug decriminalization in pol-
icy and legal circles, the term remains surprisingly nebulous,
especially in relation to the distinct but associated concept of
drug legalization.101 That said, decriminalizing a drug generally
means removing criminal penalties for its use and possession.102
Manufacture and retail sale of the drug, however, remain prohib-
ited in a decriminalization regime. Legalization, by contrast, re-
fers to a system in which a substance is taxed and regulated like
alcohol or tobacco.

Marijuana has already been decriminalized in a number of
states, most recently Massachusetts, where Bay State voters ap-
proved a marijuana decriminalization ballot initiative with 65
percent of the vote.103 These laws typically treat possession of
small amounts of marijuana like a traffic violation, with violators
subject to a citation and a small fine.104 Although decriminaliza-
tion has not gained much political traction outside of the mariju-
ana context in the United States, the decriminalization of all
drugs is a frequently debated academic topic. Almost all of the
commentary that considers the subject seems to envision laws

101 See Juan R. Torruella, One Judge's Attempt at a Rational Discussion of the So-
called War on Drugs, 6 BU Pub Int L J 1, 12 (1996) (noting that the terms decriminaliza-
tion and legalization, "although technically distinct, are often used almost interchangea-
bly").

102 See Douglas Husak, Predicting the Future: A Bad Reason to Criminalize Drug Use,

103 Kreit, 3 Advance: J ACS Issue Groups at 44 (cited in note 6).

104 See Eric E. Sterling, The Sentencing Boomerang: Drug Prohibition Politics and
Reform, 40 Vill L Rev 383, 403–05 (1995) (providing an overview of marijuana decrimin-
alization efforts); Robert MacCoun, et al, Do Citizens Know Whether Their State Has
Decriminalized Marijuana? Assessing the Perceptual Component of Deterrence Theory, 5 Rev
L & Econ 347, 351–53 (2009) (listing states that have considered to have decriminalized
marijuana and noting that some of these states have technically retained marijuana
possession as a criminal offense but provided for a small fine as punished).
similar to our existing marijuana decriminalization laws, with all civil and criminal penalties for the possession and use of drugs removed except, perhaps, civil fines.\textsuperscript{105} Decriminalization, however, is not necessarily limited to options like eliminating all penalties for drug possession or instituting a civil fine.

As Portugal’s innovative drug decriminalization law\textsuperscript{106} demonstrates, decriminalization can be much different from what most of us are likely to envision when we hear the phrase. Portugal’s law also provides a useful jumping-off point for considering how a noncriminal drug court treatment system might compare, in terms of costs and benefits, to the criminal drug court model currently favored in the United States. Under Portugal’s law, passed nearly a decade ago, simple possession of small amounts of drugs is no longer a crime. And yet, the possession and use of drugs remains subject to close scrutiny by the Portuguese government.

A brief overview of Portugal’s system is instructive.\textsuperscript{107} Beginning in July of 2001, Portugal implemented a “decriminalization model” for drug users. The law removes criminal penalties for the purchase, possession, and cultivation of all drugs for personal-use quantities, which the law defines as an amount sufficient for ten days’ usage for one person. The sale of drugs in any quantity, meanwhile, remains illegal in Portugal.

What distinguishes Portugal’s approach from the traditional decriminalization model is what happens to users who are caught with drugs in personal-use amounts. Rather than receiving no penalty or being given a fine, individuals who are found in possession of personal-use quantities of drugs are referred into what we might think of as a civil drug court system. Because drug possession has been decriminalized, when a police officer in Portugal encounters a person under the quantity limit, she is not permitted to make an arrest. Instead, she issues a citation for the person in possession of drugs to appear before what the law

\textsuperscript{105} See, for example, Mark A.R. Kleiman and Aaron J. Saiger, Drug Legalization: The Importance of Asking the Right Question, 18 Hofstra L. Rev 527, 556–58 (1990) (discussing issues involved with decriminalization of marijuana).


\textsuperscript{107} The following description of Portugal’s drug decriminalization law draws primarily from Glenn Greenwald, Drug Decriminalization in Portugal (cited in note 1); Caitlin Hughes and Alex Stevens, The Effects of Decriminalization of Drug Use in Portugal (The Beckley Foundation 2007), online at http://www.beckleyfoundation.co.uk/pdf/Briefing Paper14.pdf (visited Oct 3, 2010); and an interview I conducted with João Castel-Branco Goulão, the director of Portugal’s principal drug policy agency, the Instituto da Droga e da Toxicodependência, on Aug 3, 2009.
calls a "dissuasion panel." Typically, a person will appear before the commission within seventy-two hours of receiving the citation.

Dissuasion panels are organized to be as nonadversarial in nature as possible. They are made up of three members—typically two people from the medical or social services fields and one attorney. The panels meet with the individuals who appear before them in order to try to assess their treatment needs and to assist them in addressing any abuse or addiction problems. The "offender"\(^{108}\) is not represented by counsel when he appears before the commission, though he does have the right to request a therapist of his choice to take part in the proceedings or to have a medical examination conducted to aid in the panel's review.

One of the primary objectives of the dissuasion panel structure is to try to foster a supportive atmosphere that is focused exclusively on the health of the offender. Every effort is made to guard against creating an impression that the panels are there to assess guilt or that drug usage is morally blameworthy conduct. So, for example, the commission members sit at a table with the offender, as opposed to behind an elevated bench as in a courtroom.

Consistent with this approach, the dissuasion panel has a good deal of flexibility in terms of how it will handle cases where an individual appears to have an abuse or addiction problem. If, however, the panel determines that an offender is a nonaddicted consumer of drugs with no prior offenses, the law requires it to suspend proceedings and impose no sanction. This is the result in approximately 80 percent of all proceedings. Of course, in these cases the panel still has the opportunity to talk with and advise the individual about drug addiction and abuse issues as part of the meeting.

For offenders who do not fall into the dismissal category, the panels can take a range of action, including issuing a warning to the offender, requiring the offender to check in with the panel at specified times, ordering the offender to enter into a treatment program, and even banning the offender from visiting certain places or associating with certain people. The panels can also impose a fine, but the law provides that fines are to be imposed as a last resort. The more common course with regard to a fine is that a panel may order treatment or some other sanction along

\(^{108}\) Offender is somewhat of a misnomer for individuals who appear before the dissuasion commission but will be used here for the sake of simplicity.
with a fine, but suspend the fine contingent upon meeting the required treatment. Because drug possession has been decriminalized, the panels cannot, under any circumstances, impose prison sentences or even send someone to treatment through civil commitment—instead fines are the only mechanism for enforcing compliance with orders to seek treatment.

Portugal’s decriminalization law was, perhaps unsurprisingly, strongly criticized by United States and United Nations drug enforcement officials and in the international press. Critics worried that the country would become a destination for “drug tourism.” Nearly ten years later, however, these fears have not been realized and Portugal’s program appears to have been quite successful at reducing the harms associated with drug use in a cost-effective manner. A 2009 CATO Institute Report on Portugal’s decriminalization policy by Glenn Greenwald concluded that “usage has declined in many key categories and drug-related social ills have been far more contained in a decriminalized regime.” There has, for example, been a substantial decline in HIV infections among drug users, with instances of new cases dropping from 1,400 to 400. Likewise, drug overdose deaths dropped from 400 to 290. Meanwhile, the reforms have helped to alleviate some of the burdens on Portugal’s criminal justice system and contributed to progress in addressing prison overcrowding. The savings in criminal justice spending has allowed Portugal to increase its treatment capacity and helped lead to a 147 percent increase in the number of people in substitution treatment from 1999 to 2003.

João Castel-Branco Goulão, the director of Portugal’s principal drug policy agency—the Instituto da Droga e da Toxicodependência—is careful to emphasize that he does not believe decriminalization by itself has been the driving force behind the

110 See UN Office on Drugs and Crime, World Drug Report 2009 168, online at http://www.unodc.org/documents/wdr/WDR_2009/WDR2009_eng_web.pdf (visited Oct 3, 2010) (noting that “Portugal’s policy has reportedly not led to an increase in drug tourism” but also noting some controversial points such as an increased murder rate which may or may not be tied to the drug policy).
111 Greenwald, Drug Decriminalization in Portugal at 11 (cited in note 1).
112 Id at 16 (mentioning that increased usage of needle exchange programs may be a possible explanation for the reduction in new HIV cases).
113 Id at 17.
114 See Hughes and Stevens, Effects of Decriminalization at 4 (cited in note 107).
115 Id at 2.
successes of Portugal’s model. Rather, in his view, decriminalization has provided Portugal with a framework for the noncriminal dissuasion commission system to operate and to treat drug supply and demand as distinct problems. By detaching drug use from the criminal justice system and treating the issue through a civil system, Portugal was able to create an atmosphere in which addiction is viewed purely as a medical and public health problem.

B. Comparing Civil Drug Courts to Criminal Drug Courts

While the available studies indicate that Portugal’s decriminalization law has been successful on its own terms, there has been little discussion of what the benefits and drawbacks of such a system might be in comparison to other approaches. In this section, I will argue that a civil drug court system similar to Portugal’s, in which possession of personal-use quantities of drugs has been decriminalized and those found in possession are given medical consultations before civil panels, is likely to be more cost effective than our current criminal drug court model. Specifically, a civil drug court system would have the potential to address the key inefficiencies inherent in criminal justice-based treatment programs, while retaining most, if not all, of the benefits of criminal drug courts. While this assessment is speculative by its nature, there would seem to be strong reasons for states that are interested in reducing criminal justice costs and expanding criminal drug court programs to consider decriminalizing drugs and implementing a civil drug court system, even if only on a trial basis.

A civil drug court like Portugal’s model would remedy the overinclusiveness problem of spending treatment resources on those who do not need them. When drug courts are incorporated within the criminal justice system, drug court treatment programs exist only as an alternative to the traditional penalty the offender would otherwise face. As a result, drug defendants who do not have an abuse or addiction problem often have a strong incentive to enter into treatment through drug courts whether or not they need it.

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116 Interview with João Castel-Branco Goulão (cited in note 107).
117 Id.
118 Id.
119 Glenn Greenwald’s report, for example, considers the effects of Portugal’s policy in comparison to drug usage trends in other countries though does not discuss in detail why Portugal’s policy may be more effective than other approaches. See Greenwald, Drug Decriminalization in Portugal at 19–27 (cited in note 1).
not they truly need it. Moving drug courts from the criminal to civil system would squarely address this problem by allowing the court or treatment panel to base the outcome in each case entirely on the individual's treatment needs.\(^\text{120}\) Those without abuse or addiction problems—who constitute a substantial majority of offenders\(^\text{121}\)—could be sent on their way with nothing more than a warning and a consultation, accompanied by information about the benefits of cessation and how to recognize the early signs of addiction in their own behavior. Nonaddicted defendants, in turn, would no longer have an incentive to exaggerate their drug use. Because there are few, if any, conceivable benefits from treating or punishing individuals in this category of offenders, this would yield substantial cost savings over criminal drug courts while incurring minimal additional costs.

At the same time, a decriminalized drug court model could also address the underinclusiveness in criminal drug courts by providing the significant number of individuals who are currently arrested for a drug offense but do not have an incentive to go to criminal drug courts with treatment options that actually provide some benefit to both the offender and society. In 2002, for example, there were 1.5 million drug arrests, 77 percent of which were for simple possession.\(^\text{122}\) Under the criminal drug court system, the vast majority of those arrested either will not have a sufficient incentive to participate, or will not be eligible to participate, in a drug court program. Many may simply receive probation or have the proceeding continued without a finding.\(^\text{123}\) As a result, a drug offender might face multiple arrests and convictions before she receives treatment or even addiction counseling. Still other defendants may opt for a jail sentence after being advised not to risk entering drug court and ending up with a longer

\(^{120}\) See, for example, O Instituto da Droga e da Toxicodependência de Portugal, Executive Summary of The National Plan Against Drugs and Drug Addiction 2005–2012 6 (2005), online at http://www.idt.pt/PT/RelacoesInternacionais/Documents/DocumentosIngles/2008/12/NPAD.pdf (visited Oct 3, 2010) (explaining the Portuguese system’s principle that “[t]he interventions for substance abuse are not an end in themselves, so they shouldn’t focus on the substances but rather on the individual and on his/her objective and subjective needs”).

\(^{121}\) See NACDL Report at 47 (cited in note 32) (“The vast majority of first-time offenders do not have a drug addiction that requires the intensive approach of drug courts.”).


sentence following a drug treatment failure. The result is a treatment gap in which many individuals who are arrested for drug offenses and in need of treatment will not have access to it. A civil drug court model would address this issue by sending everyone found in possession of a personal-use amount of illegal drugs directly to a treatment panel. Because of the flexibility in a decriminalized drug court system, civil drug courts would be well positioned to provide beneficial services to individuals at risk of developing an addiction or abuse problem in addition to those who already have one. As a result, civil drug courts could be both a place for coordinating treatment for addicts and for intervening to help prevent casual experimentation from leading to abuse or addiction.

At the same time, a civil drug court system would likely be less expensive to administer than criminal drug courts. Removing possession of small quantities of drugs from the criminal sphere would result in a significant decrease in police and court resources that are currently used to process offenders through the initial stages of the criminal justice system. Under a civil drug court system, there would be no need to arrest offenders, make charging decisions, appoint public defenders, or set bail.  

Instead, those found in possession of drugs could be issued a citation, similar to a traffic ticket, to appear before a civil drug treatment panel or court. This would have an added benefit of eliminating the negative economic impact attendant to an arrest in the form of disruptions to work and family life.  

To be sure, civil drug court panels similar to Portugal's—with two medical or treatment professionals and one attorney—would be costly to run. However, it is likely that the cost of administering a civil drug court and criminal drug court would be comparable, and the civil fines themselves can help offset the costs.

While the flexibility of a decriminalized drug court system may provide some substantial benefits over the rigidity of our current criminal drug court model, critics may counter that any

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124 For a discussion of the impact on enforcement costs of Massachusetts's decriminalization of marijuana, see Jeffrey A. Miron, The Effect of Marijuana Decriminalization on the Budgets of Massachusetts Governments, with a Discussion of Decriminalization's Effect on Marijuana Use: An Update of Miron (2002a) 5-6 (2008), online at http://www.economics.harvard.edu/faculty/miron/files/decrim_update_2007.pdf (visited Oct 3, 2010) (estimating that decriminalizing marijuana in Massachusetts would save 1.9 percent of all police expenditures, or $29.5 million annually).

125 See O'Hear, 20 Stan L & Pol Rev at 473 (cited in note 61) ("An arrest alone can significantly disrupt family and work life, especially for defendants who are unable to post bail and are thereby forced to endure several days or weeks of pretrial detention.").
benefits from addressing the over- and underinclusiveness problems discussed above would be outweighed by losses from removing the deterrent value of the criminal justice system. Deterrence-based objections to a civil drug court system might proceed on two fronts. First, some might argue that removing criminal penalties for possession of small amounts of drugs would lead to an increase in new and casual drug users who may presently be dissuaded by the possibility of criminal punishment. Second, some might argue that treatment courts will not be as effective if judges are unable to deter bad behavior through the use of short jail stints to punish those who slip up or the threat of a prison sentence for those who fail the programs entirely.

The fear that decriminalization may lead to an increase in use, particularly by new users, while understandable in theory, is belied by the experience in Portugal. In the decade since Portugal enacted its decriminalization policy, drug use rates in the country have largely remained stable or declined. Use rates among the key demographics of thirteen to fifteen-year-olds and sixteen to eighteen-year-olds fell by approximately 4 and 6 percent respectively in the years following decriminalization in Portugal. These results are also consistent with the experiences of states and countries that have decriminalized possession of small amounts of marijuana. In their landmark book Drug War Heresies, Robert J. MacCoun and Peter Reuter theorize that decriminalization may not lead to an increase in drug usage because, among other reasons, it does not affect important deterrence metrics including drug price and availability.

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127 See Andrew D. Leipold, The War on Drugs and the Puzzle of Deterrence, 6 J Gender Race & Just 111, 116 (2002) ("There must be a significant number of people who would like to use drugs, or who would use them more frequently, but do not because of the fear of arrest or because they simply obey laws.").
128 See National Institute of Justice, Drug Courts: The Second Decade at 3 (cited in note 35) (listing the use of sanctions and rewards as one of the 10 key components to a successful drug court program).
129 See Greenwald, Drug Decriminalization in Portugal at 11 (cited in note 1).
130 Id at 11–12.
131 MacCoun and Reuter, Drug War Heresies at 76–98 (cited in note 62). See also Louisa Degenhardt, et al, 5 PLoS Medicine at 1057 Table 2, 1065 (cited in note 17) (comparing drug usage rates across countries and finding that "countries with more stringent policies toward illegal drug use did not have lower levels of such drug use than countries with more liberal policies").
gal's would lead to any increase in drug usage, let alone a significant one.

The argument that removing drug courts’ access to criminal sanctions will diminish their ability to incentivize treatment is a more serious and realistic concern. For example, in his insightful book When Brute Force Fails, Mark Kleiman points to the successes of an innovative probation program in Hawaii as evidence that a regime with increased drug testing and criminal sanctions may be more effective that current models that focus on treatment at the outset. In the program, named Hawaii’s Opportunity Probation with Enforcement (HOPE), a state judge tired of probation violations put problem probationers on a strict program in which any violation—from a failed drug test to a missed appointment—would result in an immediate but short jail sentence. The results were impressive, with a decrease of over 90 percent in the violation rates of program participants and rearrest rates less than half than the comparison group. Kleiman argues that the lesson to be learned from Project HOPE is that successful diversion programs should include “frequent [drug] tests and quick and consistent sanctions for failure to comply.”

Although the HOPE program persuasively demonstrates that sanctions can be a successful tool for problem probationers, evidence on the effectiveness of sanctions in drug court programs remains inconsistent. While some studies have shown sanctions to be effective, others have found that they have little, if any, effect. A study in Clark County, Nevada, for example, even indicated that imposing sanctions was associated with higher rearrest rates and lower graduation rates.

The inconsistent evidence may be due, in part, to differences in the make-up of offenders in the studies. Specifically, sanctions for failed drug tests might be expected to be more effective in deterring use in programs that include large percentages of individuals without drug abuse or addiction problems. This is

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132 See Kleiman, Brute Force at 34–41, 163 (cited in note 27).
133 Id.
134 Id at 163.
135 See King and Pasquarella, Drug Courts at 9–12 (cited in note 46).
136 Id at 11–12 (summarizing the literature and finding that “[t]he data on sanctions presents a mixed picture”).
137 Id at 11.
138 Another factor complicating study of how the use of sanctions affects drug court success is that “many [drug] courts do not have a formal system under which sanctions are imposed, nor are records kept for when and why sanctions are enforced.” Id at 10.
because those without addiction or abuse problems are better able to abstain from drug use and more likely to respond more rationally to threats of punishment than are addicts.\textsuperscript{139} In assessing the implications of the HOPE program and the usefulness of sanctions, then, it is important to consider that HOPE’s participants were not primarily drug offenders, but rather felony probationers who had been convicted of a wide range of offenses—from sexual assault and burglary to drug dealing—and were facing five- to ten-year prison terms.\textsuperscript{140} Likewise, the program’s aim was to reduce probation violations, not address substance abuse or addiction problems.\textsuperscript{141} Accordingly, while HOPE provides strong evidence that incorporating swift and certain sanctions for probation violations is an effective method for deterring such violations and recidivism among serious felony offenders, it does not necessarily mean that the availability of sanctions provides better outcomes among drug court populations. This is not to say that sanctions may not be an effective method for persuading some drug addicts to stay on track in drug court programs, only that we should be careful not to overstate their importance.

Even if we grant that the deterrent effect of sanctions is likely to help some drug court participants stay on track, civil drug courts may offer other benefits that would counter the loss of a deterrent effect and leave treatment success rates unchanged. In particular, a civil drug court system modeled after Portugal’s might be able to achieve better outcomes for some participants than a coercion-based system. There is a wealth of evidence that indicates internal motivation to be a strong predictor of treatment success and reveals that voluntary treatment is more successful than compulsory treatment.\textsuperscript{142} There is good reason to believe that a decriminalized civil drug court system, in which addicts meet with a treatment panel to determine the outcome in their cases, would be better positioned to convince participants that they need treatment than a criminal system in which their

\textsuperscript{139} See Bowers, 55 UCLA L Rev at 808–18 (cited in note 69) (discussing the irrationality of addicts’ behavior); id at 826–27 (arguing that many studies purporting to show that coerced treatment is effective have been “methodologically unsound” because “the unaddicted skew upward the success rates of coerced treatment regimes”).

\textsuperscript{140} Kleiman, \textit{Brute Force} at 34 (cited in note 27).

\textsuperscript{141} Id.

participation is based entirely on external coercion. Rather than facing a judge who is mandating sobriety as evidenced by clean drug tests, an offender would meet with treatment professionals who would have the opportunity to discuss his use and convince him that he is in need of treatment. If civil drug courts are successful at inspiring internal motivation among participants, the benefits from that effect may balance any possible negative consequences from the loss of criminal sanctions as a deterrent tool. And, while a civil system would remove the availability of jail sanctions, sanctions in the form of fines or other civil remedies would remain an option in the event of noncompliance. Finally, we must keep in mind that jail sanctions are not cost free. Indeed, they are quite expensive, both in terms of the direct costs of incarceration and the collateral costs of disrupting the treatment client's social bonds and ability to maintain employment.

Even if those who argue that eliminating criminal sanctions would decrease the overall rate of success among treatment participants are correct, the benefits of addressing the over- and underinclusiveness problems inherent in a criminal drug court system might still make a civil drug court system more efficient overall. Solving those problems would result in substantial cost savings by ensuring treatment resources are not wasted on those who do not need treatment. It would also dramatically expand the net of drug users who have the opportunity to consult with treatment professionals. By sending all users directly to a treatment panel, we could expect to see dramatic long-term savings through "brief interventions" that reach casual users before they have become addicted, as well as treatment of addicts who may not have a sufficient incentive to enter a drug court in a criminal system. Thus, even if the success rate for treatment in a civil drug court system were lower than in a criminal drug court system, the significantly larger pool of individuals receiving treatment consultations in a civil system, in combination with the savings achieved by removing nonaddicts from costly treatment programs, make a compelling case for the proposition that civil drug courts are likely be more cost effective than criminal drug courts.

Conclusion

After a forty-year-long war on drugs, it is becoming politically fashionable again to say that drug abuse should be treated as a public health problem, at least when addressing drug demand. This is a welcome development. Moving toward such an approach would not only save governments money, but it would also achieve better results than does our current system. In this Article, I have argued that the best way to treat drug addiction as a public health problem is to end the criminalization of drug use and addiction entirely and enact a civil drug court system similar to Portugal’s. I argue that a system like Portugal’s is likely to be more effective and less expensive than the criminal drug court model that has proven popular here in the United States. As states look to cut corrections costs, then, they would be wise to give serious consideration to the alternative of a decriminalized civil drug court system.

In making this argument, I have focused on costs and benefits in a somewhat narrow sense by leaving out the noneconomic benefits that we might also arguably see from decriminalization, such as a heightened respect for individual autonomy. Instead, my focus has been on the more discrete costs and benefits of civil and criminal drug courts. Admittedly, my reasoning and conclusions are only speculative in nature. Whether or not a model like Portugal’s would actually be more cost effective than criminal drug courts is an empirical question that we cannot yet answer. The costs of Portugal’s program and the success rates of individuals referred to treatment through that program, in particular, would be useful to study in greater depth. Whether or not readers are ultimately persuaded that a civil drug court model is preferable to criminal drug courts, I hope that the reasoning outlined above at least helps to urge additional detailed investigations into Portugal’s decriminalization law.