

# THE YALE LAW JOURNAL POCKET PART

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## Prisoners of Their Own War: Can Policymakers Look Beyond the “War on Drugs” to Drug Treatment Courts?

The United States is suffering from what Judge Morris Hoffman has called our “national schizophrenia about drugs.”<sup>1</sup> We simultaneously want drug abuse to be “a crime and . . . a disease.”<sup>2</sup> Our answer to these dueling notions seems to be to chip around the margins of drug policy and to avoid reassessing the larger basis of the War on Drugs.<sup>3</sup> This tendency has played out most clearly in the development and expansion of drug treatment courts, which are courts designed to urge drug offenders into drug rehabilitation programs and re-integrate them into their communities. Drug treatment courts have quietly grown and spread all across the country. And yet, it is the judiciary and not the legislature that has been the driving force behind their remarkable expansion. Why? Drug treatment courts challenge the fundamental tenets upon which the War on Drugs rests. To take up drug treatment courts is to engage in a problem far larger than the courts themselves and to enter politically dangerous territory. It is to question the foundation of the War on Drugs itself.

Today every state (as well as Puerto Rico, Guam, and the District of Columbia) has at least one drug treatment court, with 1699 operational drug

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1. Morris B. Hoffman, *The Drug Court Scandal*, 78 N.C. L. REV. 1437, 1477 (2000).

2. *Id.*

3. Many associate the beginnings of the “War on Drugs” with Ronald Reagan, but others trace it back to Richard Nixon’s declaration in 1971 that drug abuse was “public enemy number one.” See, e.g., Juan Williams, Moderator, Debate at the Georgetown University Law Center: The War on Drugs: Fighting Crime or Wasting Time? (Mar. 14, 2001), in 38 AM. CRIM. L. REV. 1537, 1539 (2001).

courts total, and another 349 in the planning stages.<sup>4</sup> In spite of drug treatment courts' impressive rise, there has been no thorough formulation of their purpose and surprisingly little attention paid to drug treatment courts as an institution or their place in the War on Drugs. This is particularly notable given the extent to which these courts go against the broader retributive trends in drug policy. Mandatory minimums and the Federal Sentencing Guidelines, which were promulgated during the 1980s as the War on Drugs began to escalate, treat drug offenders with a severity unrivaled in most other countries. The average federal drug trafficking sentence is longer than the average federal sentence for manslaughter (34.3 months), assault (37.7 months), and sexual abuse (65.2 months).<sup>5</sup> The number of incarcerated drug offenders has increased 1100% since 1980,<sup>6</sup> and the War on Drugs has played no small part in creating what is now the largest prison population in the world, with more than one in one hundred American adults behind bars.<sup>7</sup>

Drug treatment courts stand out against the stark backdrop of the War on Drugs. Most drug treatment programs focus on nonviolent drug-addicted offenders. They aim to free participants of drug dependency and reduce related criminal activity through rehabilitative programs, regular meetings with the court, drug testing, counseling, education, and job training. Programs are often divided into phases broadly outlined as: (1) detoxification to eliminate physical dependence on drugs; (2) stabilization or rehabilitation through counseling sessions; and (3) reintegration into the community by helping the participant gain educational or vocational training and find a job.<sup>8</sup>

Drug treatment courts typically have a nonadversarial environment, in which the prosecutor, defense counsel, judge, corrections officers, and treatment professionals collaborate and share information about the participant's progress. Most programs have a series of graduated penalties if participants slip up, ranging from more frequent drug testing to short periods

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4. BUREAU OF JUSTICE ASSISTANCE DRUG COURT CLEARINGHOUSE PROJECT, SUMMARY OF DRUG COURT ACTIVITY BY STATE AND COUNTY 111 (Apr. 16, 2007), [http://spa.american.edu/justice/publications/us\\_drugcourts.pdf](http://spa.american.edu/justice/publications/us_drugcourts.pdf).
  5. AM. BAR ASS'N, REPORT OF THE ABA JUSTICE KENNEDY COMMISSION FACT SHEET 3 (2004), <http://www.abanet.org/media/kencomm/factsheet.pdf>.
  6. MARC MAUER & RYAN S. KING, THE SENTENCING PROJECT, A 25-YEAR QUAGMIRE: THE WAR ON DRUGS AND ITS IMPACT ON AMERICAN SOCIETY 2 (2007), *available at* [http://www.sentencingproject.org/Admin%5CDocuments%5Cpublications%5Cd\\_p\\_25yearquagmire.pdf](http://www.sentencingproject.org/Admin%5CDocuments%5Cpublications%5Cd_p_25yearquagmire.pdf).
  7. PEW CTR. ON THE STATES, ONE IN 100: BEHIND BARS IN AMERICA 2008, at 5 (2008), *available at* <http://www.pewcenteronthestates.org/uploadedFiles/One%20in%20100.pdf>.
  8. GEN. ACCOUNTING OFFICE, DRUG COURTS: OVERVIEW OF GROWTH, CHARACTERISTICS, AND RESULTS, REPORT TO THE COMMITTEE ON THE JUDICIARY, U.S. SENATE, AND THE COMMITTEE ON THE JUDICIARY, HOUSE OF REPRESENTATIVES 25 (1997).

of “shock incarceration,” generally at the discretion of the judge. Several studies have demonstrated that drug treatment courts lower offender recidivism rates and cost less than incarceration. For example, a recent study of the Multnomah County Drug Court in Oregon found that re-arrest rates were reduced by thirty percent over five years and that the Drug Court saved \$6744 per participant, including offsets from reduced recidivism.<sup>9</sup>

Drug treatment courts arose as a judicial response to the War on Drugs. In the 1980s, the proliferation of crack-cocaine and the implementation of harsher drug policies dramatically increased court caseloads as well as the prison population nationwide.<sup>10</sup> As the decade progressed, there was a growing recognition that mandatory sentences were overburdening court dockets and prisons and did little to curb drug abuse. In 1989, in response to the unsustainable caseload and growing number of prisoners, a Miami judge created the first drug treatment court. And the judiciary has remained responsible for most of the support for and expansion of drug treatment courts ever since.

State legislatures and Congress have acted as silent partners in drug treatment courts, continuing to fund them without offering any leadership. As a result, there has been little centralized management of drug treatment courts, and procedures are disparate, varying widely from court to court, even within a single state.<sup>11</sup> While advocates of drug courts have made some efforts to bring court procedures closer together, there has not been a real push to unify practices or develop common goals. Legislators have remained hands-off, letting the judiciary take primary responsibility for a movement that has involved hundreds of millions of dollars<sup>12</sup> and hundreds of thousands of

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9. MICHAEL W. FINIGAN, SHANNON M. CAREY & ANTON COX, NPC RESEARCH, *THE IMPACT OF A MATURE DRUG COURT OVER 10 YEARS OF OPERATION: RECIDIVISM AND COSTS* at II, IV (Apr. 2007).
  10. John Terrence A. Rosenthal, *Therapeutic Jurisprudence and Drug Treatment Courts: Integrating Law and Science*, in *DRUG COURTS: IN THEORY AND IN PRACTICE* 145, 158 (James L. Nolan, Jr. ed., 2002) (“In 1985 alone, 647,411 people were arrested for drug-related crimes. By 1991, the number of individuals incarcerated for drug offenses exceeded one million.”).
  11. Most notably, the Woodbury County Community Drug Court in Iowa has a panel of community members who fill the role of judge. See Dwight Vick & Jennifer Lamb Keating, *Community-Based Drug Courts: Empirical Success. Will South Dakota Follow Suit?*, 52 S.D. L. REV. 288, 295-300 (2007).
  12. There is no official current estimate of the total spent on drug treatment courts, but in 1997, the General Accounting Office estimated that the federal government had provided over \$80 million in funding. GEN. ACCOUNTING OFFICE, *supra* note 8, at 32. Congress has continued to allot millions every year since, including \$15 million in grants for 2008. Bureau of Justice Assistance, *Drug Court Discretionary Grant Program Frequently Asked Questions*, <http://www.ojp.usdoj.gov/BJA/grant/o8DrugCourtFAQ.pdf> (last visited Apr. 7, 2008).

people<sup>13</sup> because to take up drug treatment courts would be politically risky. Any honest consideration of drug treatment courts requires an examination of not just the courts, but of drug policy as a whole, since drug treatment courts are irreconcilable with the underlying principles of the War on Drugs. Drug treatment courts are largely rehabilitative in nature and are founded on the belief that drug offenders are “sick” and in need of treatment. They treat drug abuse as a socio-medical problem in need of a socio-medical solution (rehabilitation, education, employment). The War on Drugs, on the other hand, treats drug offenders as criminal wrongdoers who “deserve” punishment. It views drug abuse as a problem of poor moral or legal choices and imprisonment as necessary to both punish offenders for their choices and deter them from choosing drugs in the future. As former President George H.W. Bush’s 1992 National Drug Control Strategy stated, “To explain the drug problem by pointing to social conditions is to ‘victimize’ drug users . . . . The drug problem reflects bad decisions by individuals with free wills.”<sup>14</sup>

Yet legislators continue to invest in and expand drug treatment courts without discussing the contradiction between these courts and the rest of drug policy. Investing in drug treatment courts sends the message that drug offenders are addicts, not criminals. But this leads to larger, more uncomfortable questions. If rehabilitation works with these offenders, will it work with others? Why not spend more resources on rehabilitation than imprisonment? Did the War on Drugs get it wrong?

These are dangerous questions for politicians to be asking. Any call for an honest reassessment of drug policy will be answered with labels of being “soft on crime.” For example, Deputy Attorney General Larry Thompson told the Sentencing Commission that reducing crack sentences to be more in line with cocaine penalties would “send the wrong message. The message that we care more about crack dealers than we do about the people and the communities victimized by crack.”<sup>15</sup> Drug policy has become the “third rail” of politics,<sup>16</sup> and policymakers, the prisoners of their own war. In times of political outcry,

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13. At any given time, there are 70,000 people participating in drug treatment courts. C. WEST HUDDLESTON, III, ET AL., NAT’L DRUG COURT INST., PAINTING THE CURRENT PICTURE: A NATIONAL REPORT CARD ON DRUG COURTS AND OTHER PROBLEM SOLVING COURT PROGRAMS IN THE UNITED STATES 7 (2005).

14. WHITE HOUSE, NATIONAL DRUG CONTROL STRATEGY: A NATION RESPONDS TO DRUG USE 2 (1992).

15. Public Hearing, U.S. Sentencing Comm’n (Mar. 19, 2002) (statement of Larry D. Thompson, Deputy Att’y Gen.), <http://www.ussc.gov/hearings/031902.htm>.

16. Misha Glenny, *The Lost War*, WASH. POST, Aug. 19 2007, at B01, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/08/17/AR2007081701716.html>.

legislators will let a few moderate policies slip through, but just enough to allay the sharpest criticism. This safety-valve practice allows legislators to do just enough to avoid discussing the efficacy and merit of the War on Drugs.

Drug treatment courts, which focus only on low-level offenders, are just one example of this safety valve. The Federal Sentencing Commission's recent narrowing of the crack-cocaine disparity is another. The change reduces sentences on average by twenty-seven months, but the average crack offender sentence is still over ten years. The Commission focused on the crack-cocaine disparity (which still exists but has been reduced from 100:1 to somewhere between 75-25:1, depending on the offense), without reexamining the wisdom of the punitiveness of drug policy as a whole.

Regardless of whether one believes drug treatment courts work, there is something disingenuous about continuing to invest in these courts without openly discussing their purpose and their merits. The reluctance of legislators to fully examine and define the place of drug treatment courts is indicative of a larger reluctance to reassess drug policy and what must be called our "failed war."<sup>17</sup> Drug treatment courts in their current state only mitigate the most egregious aspects of drug sentencing policy. Until we address our "schizophrenia" head-on by discussing the basis for our drug policy, officially recognizing the important role of rehabilitation for drug offenders, and doing away with sensationalist political rhetoric that makes real dialogue over drug policy impossible, we will continue to fill our prisons with an ever greater percentage of our population.

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Preferred Citation: Jennifer Broxmeyer, *Prisoners of Their Own War: Can Policymakers Look Beyond the "War on Drugs" to Drug Treatment Courts?*, 118 YALE L.J. POCKET PART 17 (2008), <http://thepocketpart.org/2008/06/30/broxmeyer.html>.

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17. *Id.*