

EXECUTIVE SUMMARY

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The debate over drug enforcement policy in the United States is almost always framed in stark terms premised on narrow options. Conventional thinking about criminal justice issues—prison, community corrections, probation, or possibly some sort of diversion program for minor offenses and first-time offenders—has not worked, nor has it abated the addiction problem. Drug courts have swept the nation without much debate or input from the criminal defense bar. That input is long overdue.

This report seeks to inform and redefine the debate by considering and challenging the fundamental criminal justice lens through which drug-related issues are evaluated. Because “the definition of the alternatives is the supreme instrument of power,”¹ accepting the criminal justice paradigm legitimizes drug courts while ignoring other smart, fair, effective, and economical approaches. The report also summarizes the history and evolution of drug courts, evaluates their operation and effectiveness, makes an overarching recommendation on the treatment of addiction, and offers a number of recommendations to ensure that the procedures and practices in drug court comply with constitutional and ethical norms. The recommendations include:



Address substance abuse as a public health issue — not a criminal justice issue.

Policymakers, courts, and lawyers must take a step back and examine the problem being solved: drug addiction. Addiction is an illness.² Illnesses should be treated through the public health system — not punished through the criminal justice system. Conditioning treatment on an arrest and entry in the criminal justice system sends a perverse message to the person who is ill and is an enormous waste of scarce public and court resources.

NACDL has long believed that “addiction to any substance, whether legal or illegal, is really a health problem best treated by the medical community and others trained in the causes and treatments of addiction.”³ Thoughtful policymakers from all points on the political spectrum have recommended the decriminalization of all drugs as the best way to combat drug addiction and make effective use of criminal justice resources. The experience of European nations provides powerful support for the soundness of this approach and belies concerns that drug use would increase. Although politicians have been unwilling to engage in a serious debate about legalizing drugs, the broader public has shown interest in the issue. It is time for a serious discussion of decriminalization.



Drug court recommendations

Until decriminalization occurs, the conventional paradigm is likely to continue, and drug courts will have a role. Drug courts are largely well-intentioned efforts to offer substance abuse treatment as an alternative to lengthy prison terms and lifelong felony convictions. Much of the support for drug courts ultimately turns on their existence as the sole, or best, alternative to draconian punishment. Although drug courts may offer some positive benefits to some participants, they also cause problems and engender disparities in many areas, including the admission process, the role and ethical obligations of defense counsel, and the misguided use of limited public resources.

◆ **A defendant should not be required to plead guilty before accessing treatment.**

Most drug courts require a guilty plea as the price of admission. When guilty pleas are required before offering treatment, drug courts become little more than conviction mills. In post-adjudication courts, the defendant must plead guilty before entering drug court, and even if he or she is successful and completes the program, the conviction will never go away. In pre-adjudication courts, the defendant must plead guilty, but then, if he or she successfully completes the program there is a possibility that the plea can be withdrawn and the charge dismissed. Although procedures vary, the hoops through which participants must jump result in dismissals for relatively few defendants. Profound consequences flow from every failure.

A pre-plea, pre-adjudication program preserves due process rights, allows defendants an opportunity to seek treatment, and provides a strong incentive for successful completion. If the participant successfully completes the program, the charge is dismissed. If the participant does not succeed, the traditional court process can be pursued.

Pre-plea, pre-adjudication programs are also the only ones that permit informed, thoughtful decision-making by defendants and counsel. Conversely, in post-plea programs defendants often lack sufficient time to make informed decisions, do not have discovery, and are unable to litigate motions. This often creates impossible ethical quandaries for defense counsel.

◆ **Admission criteria must be objective and fair, and prosecutors must relinquish their role as gatekeeper.**

Criteria for admission to drug court must be transparent and fully disclosed. Currently, many courts have no official criteria or have stated criteria that are backward or counterintuitive. For example, many drug courts exclude all violent offenders, including defendants charged with domestic violence. Excluding domestic violence offenses leads to the odd result of “the domestic violence offender who gets drunk and beats his wife up checking with his probation officer once every six weeks” while nonviolent offenders are appearing regularly for status hearings, giving random weekly urine samples, and attending 90 meetings in 90 days.⁴

In many courts, whether a defendant is permitted to enter drug court is up to the prosecutor. Prosecutors are frequently hesitant to allow higher risk offenders, even those who desperately need and want the treatment and supervision, into drug court out of fear that they will be blamed for participant failure or recidivism. As one witness testified, when prosecutors serve as gatekeepers they face the political risk of “a headline waiting to happen.”⁵⁵

To avoid politics improperly affecting access to drug court programs, prosecutors should not be able to determine access. Admission criteria should be drafted by a panel or commission with broad representation from stakeholders in the criminal justice community, including judges, prosecutors, defense counsel, and social service providers. Admission criteria should be broad, allowing those who need and want treatment access to the program.

◆ **Ethical rules should not change; the drug court framework must accommodate long-standing ethical rules.**

Drug courts seek to impose a team concept on defense lawyers, creating difficult ethical dilemmas and virtually no role for private counsel. In many situations, the current structure of drug courts requires defense attorneys to set aside their ethical obligations to further the purpose and framework of the drug court. That must change. When counsel says nothing in representing the interests of clients, defense lawyers appear headed “to an old Soviet Union model where your job as a lawyer is simply to hold your client’s hand as they go off to the gallows — here’s what’s going to happen next.”⁵⁶

Protecting defendants’ Sixth Amendment right to competent counsel requires a process that allows defense attorneys to satisfy their ethical obligations of loyalty, confidentiality, and zealous advocacy. Doing so will not dismantle the drug court process or its objectives; rather, it will enhance the credibility of the process with both the participants and anyone who observes the court.

◆ **Drug courts must be used for high-risk defendants facing lengthy jail terms; less onerous and expensive alternatives to drug court must be readily available for low-risk defendants and those who commit low-level offenses.**

Too often, the criteria and process for admission into drug court are guided largely by tough-on-crime politics, focusing on first-time or nonviolent offenders, with little consideration of smart-on-crime approaches that target those most in need of intensive treatment who would otherwise spend a long time in prison. The Task Force wholeheartedly agrees with the judge who testified he was “tired of everybody talking about being tough on crime. It’s about time we get smart on crime.”⁵⁷

Courts frequently select those most likely to succeed to participate in drug court — a process called skimming. As one witness noted, when they engage in skimming, the drug courts are “sucking up all the resources that the community has to deal with this very thorny issue of addiction, and . . . using it on cream puffs.”⁵⁸ In fact, drug courts, with their program of intense supervision, should be utilized for high-risk offenders for whom everything else has failed. Courts should focus on those who are facing the longest sentences and most need treatment, “where we would get the biggest bang for our buck.”⁵⁹

Other less intensive alternatives to drug courts must be developed for low-risk offenders, who perform better without intensive judicial intervention.¹⁰ Communities should not “invest all of their addiction resources into one program. You can’t ignore the people who don’t get into drug court who are drug-and alcohol-involved. They have the same needs, the same rights, and impose the same dangers as every-one else.”¹¹

◆ **Drug courts must be open to all people regardless of race, economic status, or immigration status; methodologically sound research must be done to ensure drug courts are open to all.**

After 20 years, significant concerns continue to exist about the populations served by drug courts. Too often it seems that drug court eligibility and admission criteria serve to exclude mostly indigent and minority defendants. Drug courts must address these fundamental and disturbing disparities. Entry requirements must be carefully considered to ensure the same road to success is available to all. Opening doors for a privileged, Caucasian client base without doing the same for minorities, immigrants, and the poor cannot be tolerated. Not only must courts be equally available to all who wish to take advantage of the services, the road to graduation must be a realistic one with reasonable assistance from judges and drug court teams who truly want participants to succeed. Methodologically sound research must be done to ensure these basic requirements of fairness are met.

Despite the significant problems outlined above, there are a number of problem-solving courts that demonstrate best practices. Some problem-solving courts offer opportunities and resources to those who desperately need help through programs that also protect basic due process rights. The drug court in Philadelphia was created with significant contributions from defense lawyers and functions in a way that minimizes many due process and ethical concerns. The newly elected prosecutor in Milwaukee worked with defense lawyers and judges to create diversion and deferral agreements that have dramatically reduced the racial disparity that plagued Milwaukee’s criminal justice system. Finally, mental health courts throughout the country have largely done an effective job of providing integrated services, reducing recidivism, and preserving due process and fairness for participants.

These examples demonstrate the enormous potential of problem-solving courts. Adoption of the recommendations of the Task Force can ensure that, like these examples, drug courts across the country are fair and effective as they endeavor to address the enormous problem of addiction and with it, the problem of crime.