Can Drug Courts Help to Reduce Prison and Jail Populations?

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Drug courts have been widely praised as an important tool for reducing prison and jail populations by diverting drug-involved offenders into treatment rather than incarceration. Yet only a small share of offenders presenting with drug abuse or dependence are processed in drug courts. This study uses inmate self-report surveys from 2002 and 2004 to examine characteristics of the prison and jail populations in the United States and assess why so many drug-involved offenders are incarcerated. Our analysis shows that four factors have prevented drug courts from substantially lowering the flow into prisons and jails. In descending order of importance, these are: drug courts’ tight eligibility requirements, specific sentencing requirements, legal consequences of program noncompliance, and constraints in drug court capacity and funding. Drug courts will only be able to help lower prison and jail populations if substantial changes are made in eligibility and sentencing rules.

Keywords: drug courts; eligibility criteria; prison and jail populations; alternatives to incarceration

The U.S. “war on drugs” has markedly increased incarceration rates since the 1980s, as a greater number of drug-using offenders were sent to prison and jail for increasingly long periods of time (Blumstein and Beck 1999; Caulkins and Chandler 2006). The repercussions of this buildup remain with us today in the form of historically large incarcerated populations. What is more, a majority of offenders incarcerated for both drug and nondrug crimes either abused or were addicted to illegal drugs (Karberg and James 2005; Mumola and Karberg 2006), and there is reasonable evidence that substance use—especially frequent and heavy use—is associated with greater criminality (Bennett, Holloway, and Farrington 2008).

Against this backdrop, interest has grown in programs that combine community-based drug treatment with justice system oversight as an alternative to incarceration. Drug courts, in
particular, have emerged as the dominant national model of therapeutic jurisprudence. What began as a single drug court in Miami, Florida, in 1989 now encompasses (as of 2009) 2,459 programs that operate in every state and almost half of all U.S. counties (Franco 2010; Huddleston and Marlowe 2011). Although other diversion programs exist—including Treatment Alternatives to Street Crime (TASC), Drug Treatment Alternatives to Prison (DTAP), and Breaking the Cycle (Belenko 1999; Bull 2003)—no other model has been implemented to the national scale of drug courts, and in many cases these other programs have been incorporated into the growing drug court system (Anglin, Longshore, and Turner 1999; Bull 2003). Drug courts now operate in a wide cross-section of U.S. communities, and the model has successfully expanded into other domains, including juvenile, drunk driving, reentry, mental health, domestic violence, and veterans courts (Huddleston and Marlowe 2011).

As locally initiated interventions, drug courts vary greatly in their specific strategies, focus, and populations served. In general, drug courts couple community-based drug treatment with judicial supervision as an alternative to either prosecution (for pre-adjudication programs) or sentencing (for post-adjudication programs) (General Accounting Office 1997). The typical drug court operates by initially screening recent arrestees for program eligibility. Eligible arrestees are then offered entry into the drug court with the incentive of reduced or dismissed charges upon successful program completion. Drug courts generally consist of drug treatment, judicial monitoring of program progress, regular drug testing, and the use of graduated sanctions for program noncompliance.

Drug courts emerged and proliferated because they had broad appeal across the range of stakeholders concerned with drug policy. Originated during the crack epidemic when the population of drug-involved offenders was expanding rapidly, these programs offered some promise to judges and policymakers as a
strategy to conserve prison and jail bed space while retaining close community monitoring of criminal offenders (Fluellen and Trone 2000). Drug courts also held considerable appeal to treatment and public health communities, offering the possibility of closer coordination between criminal justice agencies and treatment providers that served the same offending populations. Finally, drug courts held considerable appeal to public defenders and to advocates of less punitive drug policies who wished to support credible alternatives to incarceration.

Buoyed by such collective support, drug courts have also fostered more expansive aspirations for correctional system reform. However, drug courts, like many other social service innovations, face familiar challenges associated with serving (or monitoring) severely disadvantaged or criminally active populations. For one, these aspirations are seldom fully matched by expanded organizational capacities or by suitable infusions of external resources. As with Aid to Families with Dependent Children (AFDC) and later Temporary Assistance to Needy Families (TANF), drug courts face especially complex challenges in serving a highly varied population of new (and returning) entrants into the criminal justice system. Moreover, as with job training and substance abuse treatment, drug courts face incentives to cream-skim clients, thereby avoiding individuals who pose the greatest risks. This presents a complex challenge for high-level policymakers who seek to sponsor and regulate drug courts in addressing broader crime and correctional problems.

Finally, although coercion exists in other social service contexts (e.g., drug testing welfare recipients), drug courts uniquely straddle boundaries between coercive criminal justice and social service interventions. This combination makes it especially pertinent that drug courts avoid the pitfalls inherent in each of these service areas. Drug courts offer greater opportunities for therapeutic interventions than are found among purely coercive criminal justice interventions. Drug courts also elicit greater compliance from clients and may provide greater public safety benefits than is possible in wholly voluntary interventions for criminally active populations. At the same time, drug courts raise broader normative concerns in that they may actually increase intrusive monitoring and confinement relative to conventional probation or parole, especially when applied to low-level offenders. In such cases, therapeutic jurisprudence may provide rhetorical cover for coercive policies. Mark Kleiman’s (2009) evocative term, “outpatient incarceration,” encapsulates well both the hopes and the fears of the contending parties.

Empirical research conducted over the past two decades indicates that, on balance, drug courts are more effective than conventional correctional options at reducing the drug use and criminal activity of drug-involved offenders (Belenko 2001; Brown 2010; Drake, Aos, and Miller 2009; Government Accountability Office 2005; Lowenkamp, Holsinger, and Latessa 2005; Rossman et al. 2011; Shaffer 2006; Wilson, Mitchell, and MacKenzie 2006; Mitchell et al. 2012; Shaffer 2011). The National Institute of Justice (NIJ)—sponsored Multi-Site Adult Drug Court Evaluation (MADCE), for example, found that drug court participants relapsed significantly less often and, among those that did, reported significantly fewer days of drug consumption than a comparison group of offenders at an 18-month follow-up (Rossman et al. 2011). Likewise, meta-analyses
confirm that drug courts reduce recidivism rates by 8 to 14 percent over other
criminal justice interventions (Drake, Aos, and Miller 2009; Shaffer 2006;

While drug courts may effectively reduce drug use and recidivism among
individual offenders, there has been considerable debate about the ability of drug
courts to reduce aggregate prison and jail populations, that is, to effectively serve
as an alternative to incarceration at the population level (Drug Policy Alliance
2011; Fluellen and Trone 2000; Huddleston and Marlowe 2011; Justice Policy
Institute 2011; Miller 2004). Some observers credit drug courts with helping to
“bend the curve” of incarceration downward (Huddleston and Marlowe 2011, 16);
others suggest drug courts and similar programs have a “low ceiling of possible
impact on correctional populations” (Clear and Schrantz 2011, 151S). Still others
claim that drug courts “may ultimately serve not as an alternative but as an
adjunct to incarceration” (Drug Policy Alliance 2011, 14).

There are four components to this critique. First, resource constraints limit
the ability of drug courts to reach all drug-involved offenders; the demand for
services simply outstrips available court resources and treatment slots. Second,
most drug courts have restrictive eligibility criteria that routinely exclude high-
risk offenders, many of whom are likely to end up behind bars. Third, for those
fortunate enough to gain access to drug courts, the legal consequences of pro-
gram failure can be severe, and the criminal justice system often loses any initial
savings in custodial resources due to high rates of program failure. Finally, many
drug-involved offenders are precluded from drug courts because of overriding
sentencing laws, including sentencing guidelines, mandatory minimums, habitual
offender laws, and other sentence enhancements.

In light of the racial disparities inherent in the criminal justice system, the
articulated concerns have particular salience for minority populations. Arrests for
drug offenses remain highly concentrated in urban African American and
Hispanic communities beset with high poverty rates and other forms of concen-
trated disadvantage. With incarceration rates for drug offenses even more dispa-
rate than those for other crimes, the success or failure of drug courts has
important implications for these populations and neighborhoods.

To date, relatively little empirical research has investigated these various con-
cerns. In an earlier article that focused on several broader questions (Pollack,
Reuter, and Sevigny 2011), we examined why drug courts might not serve as an
effective alternative to incarceration from the single perspective of restrictive
eligibility criteria. In expanding upon this earlier work, the present study esti-
mates the size of the drug-involved incarcerated population likely to have been
excluded from drug courts because of several factors: capacity constraints,
restrictive eligibility criteria, client failure in program, and overriding sentencing
laws. Specifically, we use data from the 2002 Survey of Inmates in Local Jails
(SILJ) and the 2004 Survey of Inmates in State Correctional Facilities (SISCF)
to examine why recently incarcerated offenders at risk of drug abuse or depend-
ence might have ended up behind bars rather than being diverted into community-
based drug treatment courts.
We begin by reviewing the available evidence on the diversionary impact of drug courts. Then, we present our empirical analysis of the inmate survey data, which reveals that, even if they were brought to scale, drug courts are unlikely to substantially affect incarceration levels under current drug court eligibility rules and existing sentencing laws. This finding is consistent with our earlier work; the present expanded analysis provides more robust support for this conclusion. We end by discussing the policy implications of these findings.

Drug Courts and Diversion

In this section, we review the available empirical evidence on the four factors identified above—capacity constraints, eligibility criteria, legal consequences, and sentencing laws—that limit the potential for drug courts to conserve aggregate prison and jail space by serving as a true alternative to incarceration.

**Drug court capacity constraints**

The most proximate factor impeding the diversionary impact of drug courts is their limited capacity to fully serve the population of drug-abusing offenders who enter the criminal justice system. More than half (52 percent) of adult drug courts surveyed in 2004, for instance, could not accept eligible clients due to resource constraints (Zweig et al. 2011), and four in five (80 percent) state drug court coordinators reported in 2008 that inadequate funding was the primary obstacle to further expansion (Huddleston and Marlowe 2011). Importantly, nearly every state coordinator acknowledged that drug court capacity could be “appreciably expanded.”

Although the national daily population of drug court enrollees more than quadrupled (from 26,465 to 116,300) between 1996 and 2008 (General Accounting Office 1997; Huddleston and Marlowe 2011), overall capacity is still only a small fraction of the overall number of drug-abusing offenders entering the criminal justice system. Nationally, Bhati, Roman, and Chalfin (2008) estimated that there were 55,365 adult drug court participants in 2005 relative to the 1.47 million arrestees who were at risk of drug abuse or dependence, or about 27 at-risk arrestees per drug court slot. In short, the apparent demand for drug court services greatly outpaces the available supply, resulting in a smaller diversionary impact—hence, the calls for “taking drug courts to scale” (Huddleston and Marlowe 2011; National Association of Drug Court Professionals 2009).

**Restrictive eligibility criteria**

Drug courts screen defendants and limit participation based on specific legal and clinical criteria (Government Accountability Office 2005; Knight, Flynn, and Simpson 2008; Zweig et al. 2011). These criteria stem from two primary sources: federal funding requirements, and local needs and political realities. Federal law
requires courts receiving funds from the Drug Court Discretionary Grant Program to exclude offenders with a current or prior violent offense (Franco 2010; Government Accountability Office 2005; Saum and Hiller 2008). The scope of this statutory restriction is potentially quite large, as one study found that 78 percent of active drug courts in 1996 had received federal funding (General Accounting Office 1997).¹

National surveys of drug court operations confirm that the vast majority of programs exclude offenders with a current or prior violent offense (General Accounting Office 1997; Zweig et al. 2011). These surveys also reveal that drug courts commonly restrict access based on the type of charge, criminal history, the severity of the drug problem, prior treatment history, lack of motivation for treatment, severe medical conditions or mental disorders, gang membership, and citizenship status. For example, the Hamilton County (Ohio) Drug Court maintains the following set of eligibility criteria: criminal behavior that is drug-driven, no history of violent behavior, no active mental illness, no acute health conditions, and demonstrated readiness for treatment (Listwan et al. 2003).

A consequence of these restrictive eligibility criteria is that many offenders are denied access to drug court programming (Rossman et al. 2011; Saum and Hiller 2008). Bhati, Roman, and Chalfin (2008) estimate that of the 1.47 million U.S. arrestees at risk of drug abuse or dependence in 2005, just 109,921 (7.5 percent) were drug court–eligible. Moreover, in Florida, 74 percent of the 1,653 nonviolent probationers who tested positive for drugs in FY2010 were ineligible for the state’s expansion drug courts because they had additional technical violations, contributing to the programs running under expected capacity (Office of Program Policy Analysis and Government Accountability 2010). Findings such as these have spurred recent state efforts to expand drug court eligibility—especially to a higher-risk population of otherwise prison- and jail-bound offenders (New Jersey Administrative Office of the Courts 2010).

**Legal consequences of program failure**

The diversionary impact of drug courts also rests on their ability to successfully retain and graduate enrolled offenders. Unfortunately, research on drug courts reveals that a large share of program participants end up being terminated unsuccessfully (General Accounting Office 1997; Government Accountability Office 2005; Hepburn and Harvey 2007; Rempel et al. 2003). Rempel et al.’s (2003) evaluation of eleven drug courts in New York State, for example, revealed a three-year failure rate of 50 percent across all programs.²

High rates of program failure, in turn, tend to offset any initial savings in custodial resources, because the noncompliant offenders are saddled with lengthy terms of confinement that equal, and sometimes exceed, the incarceration times of conventionally sentenced defendants (Gottfredson, Najaka, and Kearley 2003; Gottfredson et al. 2006; Rempel et al. 2003; Rossman et al. 2011). Gottfredson, Najaka, and Kearley (2003) examined two-year outcomes for the Baltimore City Drug Treatment Court and found that program participants served significantly
fewer incarceration days on average than the controls on both the predisposition commitment and original sentence, but significantly more days due to noncompliance. As a consequence, there was no significant difference between the two groups in overall time served.

Rossman et al. (2011) also examined two-year outcomes from the MADCE and found that drug court graduates were incarcerated for significantly fewer days on average than drug court failures (25 vs. 273). Consequently, Rossman et al. (2011, 80) concluded that “drug courts nearly eliminate custodial time among those who graduate, but those benefits are counterbalanced by the high sentences imposed on those who fail the program.” Whether the overall number of individual-level failures across drug court programs is sizable enough to affect aggregate prison and jail populations remains an open question.

**Overriding impact of sentencing laws**

Drug laws, mandatory sentencing, habitual offender statutes, and other laws often put drug courts out of reach of many drug-abusing offenders. Simply put, drug courts are often “barred from enrolling prison-bound people because the laws forbid it” (Weissman 2009, 247). This has led some observers to conclude that sentencing reform is the only sure way of reducing prison and jail populations (Clear and Austin 2009). However, few empirical studies have directly investigated the role of mandatory sentencing laws on drug court operations. One study analyzed 8,443 Florida prison admissions in 2007; it found that 1,972 (or about 23 percent) were nonviolent offenders with recognized drug treatment needs but who were nevertheless excluded from drug courts because their sentencing guideline scores required a mandatory prison term (Office of Program Policy Analysis and Government Accountability 2009). Another study found that many recently incarcerated heavy drug users had extensive criminal records that not only excluded them from drug courts, but also exposed them to punitive habitual offender laws (Pollack, Reuter, and Sevigny 2011).

**The Current Study**

We reviewed four key factors that potentially limit the ability of drug courts to conserve custodial resources—capacity constraints, restrictive eligibility criteria, consequences of program failure, and overriding sentencing laws. The current study uses data from the 2002 SILJ and the 2004 SISCF to estimate the number of recently incarcerated at-risk inmates who might have been excluded from drug courts for one or more of these reasons. With these estimates in hand, we provide an assessment of the annual flow of drug-abusing arrestees into other parts of the correctional system, including prisons, jails, drug courts, and probation. In performing these analyses, we aim to provide a systemic, national-level assessment of drug court outcomes.
Methods

Data and analytic sample

The 2002 SILJ (Bureau of Justice Statistics 2006) and 2004 SISCF (Bureau of Justice Statistics 2007) are nationally representative surveys that collected inmate self-report data on a wide array of topics, including conviction and sentencing information, offense characteristics, criminal history, and socioeconomic status. The 2002 SILJ completed 6,982 interviews for an 84 percent response rate, and the 2004 SISCF completed 14,499 interviews for an 89 percent response rate. Both surveys employed a stratified two-stage sampling design, first selecting facilities and then inmates within the selected facilities. All analyses accounted for these design features and were performed using Stata 12.0 (Stata Corporation 2011). In the presentation of our results and the discussion that follows, we report the weighted point estimates. For presentation purposes, we do not report the associated confidence intervals.

Table 1 shows the sample sizes and weighted estimates for the stock population of inmates and select subpopulations. The main analytic subsample of interest for the present study is the cohort of convicted and recently incarcerated inmates who were at risk of drug abuse or dependence. We focused on convicted inmates because unconvicted jail detainees were not asked many of the pertinent crime and drug use questions. We also focused on the cohort of recently incarcerated inmates—defined as those inmates who were admitted to prison or jail in the 12 months preceding the date of their interview—so that our analysis reflects contemporaneous sentencing practices and mitigates the potential bias toward more serious offenders inherent in cross-sectional samples. We further restricted our analysis to the subpopulation of offenders likely to be targeted for drug court interventions, that is, offenders who abused or were dependent on illegal drugs. We refer to this group as the population at risk of drug abuse or dependence, or simply the at-risk population.

As shown in Table 1, after applying these delimitations, we obtained analytic subsamples of 2,897 jail inmates and 3,333 prison inmates. All told, these numbers reflect a population estimate of more than a half million (N = 517,741) convicted and recently incarcerated inmates who were at-risk of drug abuse or dependence.

Measures

As described in Table 2, we operationalized key measures of drug court eligibility, program failure, and mandatory sentencing laws. To identify common drug court eligibility criteria, we relied on the results reported from the MADCE project (Zweig et al. 2011). The MADCE project, which sought to provide a national picture of drug court operations, identified and surveyed all 593 adult drug courts that had been in operation for at least one year as of February 2004, receiving responses from 380 (for a 64 percent response rate). Using the
TABLE 1
Study Sample Sizes and Population Counts

<table>
<thead>
<tr>
<th></th>
<th>2002 Jail Inmates</th>
<th>2004 Prison Inmates</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Stock population of inmates</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Sample n</td>
<td>6,982</td>
<td>14,499</td>
<td>21,481</td>
</tr>
<tr>
<td>Population N</td>
<td>631,241</td>
<td>1,226,171</td>
<td>1,857,412</td>
</tr>
<tr>
<td>Cohort of convicted and</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>recently incarcerated inmates</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Sample n</td>
<td>4,582</td>
<td>5,052</td>
<td>9,634</td>
</tr>
<tr>
<td>Population N</td>
<td>415,354</td>
<td>397,188</td>
<td>812,542</td>
</tr>
<tr>
<td>Cohort of convicted and</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>recently incarcerated inmates</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>at-risk of drug abuse or</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>dependence</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Sample n</td>
<td>2,897</td>
<td>3,333</td>
<td>6,230</td>
</tr>
<tr>
<td>Population N</td>
<td>258,192</td>
<td>259,549</td>
<td>517,741</td>
</tr>
</tbody>
</table>


MADCE results as a guide, we operationalized a core set of twelve drug court eligibility criteria that could be measured using the inmate survey data.

Drug courts typically base eligibility on a clinical assessment of the nature and extent of the offender’s drug problem. Accordingly, we measured drug problem intensity to differentiate drug dependence from drug abuse in the population of at-risk offenders. Some drug courts also exclude lower-risk offenders; thus, we also measured whether offenders reported marijuana-only abuse. Virtually all drug courts also base eligibility on the offender’s current charges and prior record. We operationalized five such measures: controlling offense, major drug trafficking, active criminal justice status, prior violent conviction, and number of prior convictions. Drug courts also commonly refuse entry to offenders who previously failed or are not currently invested in treatment. Accordingly, we operationalized measures of prior offender-based treatment and lack of treatment motivation. Finally, drug courts commonly exclude offenders for other specified criteria. We measured three common factors: noncitizenship and the presence of a severe mental disorder or severe medical condition.

We measured program failure in two ways. First, failed drug diversion program indicates whether offenders were in alcohol or drug diversion counseling prior to incarceration. Since this item was asked only of jail inmates, we also created a measure of failed probation drug treatment, which indicates whether offenders were incarcerated for a technical violation (but not a new arrest or conviction) while serving a probation term that included alcohol or drug treatment as part of the sentence.

We measured the impact of overriding sentencing laws with four variables. First, mandatory/presumptive sentence indicates whether the judge was required by law or sentencing guidelines to impose the offender’s sentence. This item was
## TABLE 2
### Description of Study Measures

<table>
<thead>
<tr>
<th>Measure</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Drug court eligibility criteria</strong></td>
<td></td>
</tr>
<tr>
<td><strong>Drug problem intensity</strong></td>
<td><em>Drug dependence</em> if experienced at least three of seven risk factors in the year before admission as outlined in the <em>Diagnostic and Statistical Manual of Mental Disorders</em>, 4th edition (DSM-IV). <em>Drug abuse</em> if not dependent and (1) experienced at least one of four DSM-IV risk factors for drug abuse in the year prior to admission, (2) committed the precipitating offense for money to buy drugs, (3) used illegal drugs daily or near-daily in the month prior to arrest, or (4) under the influence of illegal drugs at the time of the offense.</td>
</tr>
<tr>
<td><strong>Marijuana-only abuse</strong></td>
<td>Used marijuana, but no other illegal drugs, in the month before the arrest or at the time of the offense.</td>
</tr>
<tr>
<td><strong>Controlling offense</strong></td>
<td>Primary conviction offense (i.e., violent, property, drug, other).</td>
</tr>
<tr>
<td><strong>Major drug trafficking</strong></td>
<td>Engaged in importing or growing/producing drugs, or money laundering when arrested, or was a leader or middle man in a drug organization in the year prior to arrest.</td>
</tr>
<tr>
<td><strong>Active criminal justice status</strong></td>
<td>On escape or under community supervision (e.g., probation, parole, electronic monitoring) when arrested.</td>
</tr>
<tr>
<td><strong>Prior violent conviction</strong></td>
<td>Prior sentence to probation or incarceration for a violent offense.</td>
</tr>
<tr>
<td><strong>Number of prior convictions</strong></td>
<td>Number of prior sentences to probation or incarceration (maximum of three).</td>
</tr>
<tr>
<td><strong>Prior offender-based treatment</strong></td>
<td>Previously admitted to a substance abuse detoxification, inpatient, outpatient, or maintenance program while incarcerated or on probation or parole.</td>
</tr>
<tr>
<td><strong>Lack of treatment motivation</strong></td>
<td>Parole or probation revoked for failing to report for substance abuse treatment.</td>
</tr>
<tr>
<td><strong>Severe mental disorder</strong></td>
<td>Admitted to a mental hospital in year before arrest, or had a diagnosis within past year of depression, bipolar disorder, schizophrenia, post-traumatic stress disorder, or anxiety disorder.</td>
</tr>
<tr>
<td><strong>Severe medical condition</strong></td>
<td>Currently suffers from cancer, stroke or brain injury, diabetes, heart disease, kidney disease, or liver disease.</td>
</tr>
<tr>
<td><strong>Noncitizen</strong></td>
<td>Not a legal U.S. resident.</td>
</tr>
<tr>
<td><strong>Program failure</strong></td>
<td></td>
</tr>
<tr>
<td><strong>Failed drug diversion program</strong> a</td>
<td>In alcohol or drug diversion counseling when arrested.</td>
</tr>
<tr>
<td><strong>Failed probation drug treatment</strong></td>
<td>Probation revoked for technical violation while in mandated alcohol or drug treatment program.</td>
</tr>
<tr>
<td><strong>Sentencing laws</strong></td>
<td></td>
</tr>
<tr>
<td><strong>Mandatory/presumptive sentence</strong> b</td>
<td>Judge required by law or sentencing guidelines to give imposed sentence.</td>
</tr>
<tr>
<td><strong>Firearm sentence enhancement</strong></td>
<td>Received sentence increase because of a firearms violation.</td>
</tr>
<tr>
<td><strong>Habitual offender enhancement</strong></td>
<td>Received sentence increase as habitual offender, or because of a second or third strike.</td>
</tr>
<tr>
<td><strong>Drug law enhancement</strong></td>
<td>Received sentence increase because of the type of drug offense.</td>
</tr>
</tbody>
</table>

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a. This item is only measured in the jail survey.
b. This item is only measured in the prison survey.
asked only in the prison survey. The other three variables capture the effect of various sentence enhancements: firearm sentence enhancement, habitual offender enhancement, and drug law enhancement. For this last measure, the survey does not indicate the specific type of drug law violation, but we suspect drug-free school zone ordinances, laws against selling to minors, and the like are captured by this category.

Findings

We report three sets of findings. First, we calculate the probability of drug court eligibility for each inmate based on the specified eligibility criteria. Second, we estimate how many recently incarcerated at-risk inmates were likely to have been excluded from drug courts due to eligibility restrictions, program noncompliance, sentencing laws, and capacity constraints. Finally, we rely on both our estimates and other estimates in the literature to describe the flow of drug-abusing arrestees into the criminal justice system.

Estimating the drug court eligibility of recently incarcerated at-risk inmates

In this section, we estimate the probability of drug court eligibility for recently incarcerated at-risk inmates. As the basis for these calculations, Table 3 shows the number and percentage of inmates with respect to key drug court eligibility criteria, as well as the expected likelihood of eligibility for offenders with these indicated characteristics. Specifically, the first through fourth columns present the distributions of the jail and prison cohorts across these eligibility criteria (based on the SILJ and SISCF), and the fifth shows the corresponding eligibility probabilities (based on the MADCE), reflecting the percentage of U.S. drug courts that accept these types of offenders (Bhati, Roman, and Chalfin 2008, 28–30; Zweig et al. 2011, 25–32). According to the MADCE, for instance, drug courts universally accept offenders with a drug dependence diagnosis (P = 1.00) and less than two-thirds enroll those experiencing less severe drug abuse (P = .62), whereas most drug courts also admit offenders who only abuse marijuana (P = .88).

To account for differing assumptions regarding the independence of these eligibility criteria, we derive inmate-specific estimates of eligibility using two approaches. First, assuming independence, we calculated the joint probability of eligibility for each inmate, using the marginal probabilities reported in column 5 (for an analogous approach, see Bhati and Roman 2010). For example, we derive an estimated eligibility probability of .45 for individuals with the following characteristics: dependence (1.00) on heroin (1.00), a controlling property offense (.94), no trafficking involvement (1.00), not on active criminal justice status (1.00), no prior violent convictions (1.00), three or more prior convictions (.93), prior offender–based treatment (.51), motivated for treatment (1.00), no severe mental (1.00) or physical (1.00) disorders, and U.S. citizenship (1.00). Second, because the assumption of independence is strong (e.g., the likely correlation
between a drug court’s acceptance of offenders with a current and prior violent behavior), we took the minimum reported eligibility probability as a sensitivity check. Continuing with the preceding example, we would obtain an eligibility probability of .51.9 Thus, we would expect an inmate with this profile to have had a probability of drug court eligibility between .45 and .51 prior to entering prison or jail.10 Overall, the median joint and minimum eligibility probabilities ranged, respectively, between .15 and .50 for the jail cohort and .17 and .37 for the prison
cohort, suggesting that the typical recently incarcerated at-risk offender faces considerable obstacles to drug court entry.

**Estimating the size of the at-risk population excluded from drug courts**

In this section, we attempt to parse out in greater detail the likely reasons why recently incarcerated at-risk inmates were excluded from drug courts. The results are presented in Table 4, both separately and combined for the jail and prison cohorts.

Panels A through C present our initial set of findings regarding the exclusionary impact of restrictive eligibility criteria, prior treatment program failure, and overriding sentencing laws, respectively. Panel D focuses on those offenders not restricted by program failure or sentencing laws to assess the unique contribution of eligibility rules on drug court accessibility.

Panel A shows our first set of results, which suggests that overall 83 to 89 percent of the roughly half million \( N = 517,741 \) recently incarcerated at-risk inmates were excluded from drug courts due to restrictive eligibility criteria. As discussed above, this bounded estimate is based on differing assumptions regarding the independence of drug court eligibility criteria. In addition, in generating these estimates, we adopted an eligibility probability threshold of .50, where we defined inmates with a calculated eligibility of \( P \leq .50 \) as being excluded from drug courts due to strict entry criteria. \(^{11}\) Thus, based on these assumptions, our results suggest that restrictive drug court eligibility criteria barred program access for upwards of eight in ten drug-abusing offenders who ultimately ended up being sentenced to prison or jail.

The legal consequences of program failure are examined in panel B. These data show that about 7 percent of the combined cohort was incarcerated consequent to failing drug diversion counseling or some other probation treatment program. Given our focus on drug courts, there are two caveats regarding this figure. On one hand, it is probably an underestimate of drug court failure because the question about drug diversion programming was not asked in the prison survey. On the other hand, it is probably an overestimate because the offenders on probation treatment were not necessarily enrolled in drug courts. Either way, it appears that drug court failures contribute relatively little to aggregate prison and jail populations. Indeed, just 3 percent of inmates in the jail cohort were admitted to incarceration directly from a drug diversion program. That said, those 8,244 jail inmates represent 15 percent of the estimated 55,365 drug court entrants nationally (Bhati, Roman, and Chalfin 2008). Thus, due to differences in scale, these findings suggest at once that drug court failures contribute sizably to incarceration from the level of the individual program but only minimally from the level of the aggregate incarcerated population.

The effect of overriding sentencing laws on drug court diversion is examined in panel C. Overall, these laws affected nearly one in three (31 percent) at-risk offenders. More than one in six (18 percent) received a mandatory or guideline
TABLE 4
Estimating the Size of the At-Risk Population Excluded from Drug Courts for Various Reasons

<table>
<thead>
<tr>
<th></th>
<th>2002 Jail Cohort</th>
<th>2004 Prison Cohort</th>
<th>Combined Cohort</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>N</td>
<td>%</td>
<td>N</td>
</tr>
<tr>
<td>Total at-risk population</td>
<td>258,192</td>
<td>100</td>
<td>259,549</td>
</tr>
<tr>
<td>Panel A</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Ineligible due to restrictive entry criteria</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Joint probability(a)</td>
<td>233,654</td>
<td>90.5</td>
<td>229,002</td>
</tr>
<tr>
<td>Minimum probability(a)</td>
<td>222,027</td>
<td>86.0</td>
<td>205,718</td>
</tr>
<tr>
<td>Panel B</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Revoked for program failure</td>
<td>28,695</td>
<td>11.1</td>
<td>8,351</td>
</tr>
<tr>
<td>Failed drug diversion program</td>
<td>8,244</td>
<td>3.2</td>
<td>—</td>
</tr>
<tr>
<td>Failed probation drug treatment</td>
<td>22,504</td>
<td>8.7</td>
<td>8,351</td>
</tr>
<tr>
<td>Panel C</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Subject to overriding sentencing laws</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Mandatory/presumptive sentence</td>
<td>—</td>
<td>—</td>
<td>94,447</td>
</tr>
<tr>
<td>Firearm sentence enhancement</td>
<td>4,231</td>
<td>1.6</td>
<td>13,139</td>
</tr>
<tr>
<td>Habitual offender enhancement</td>
<td>15,141</td>
<td>5.9</td>
<td>37,984</td>
</tr>
<tr>
<td>Drug law enhancement</td>
<td>9,535</td>
<td>3.7</td>
<td>28,672</td>
</tr>
<tr>
<td>Panel D</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Drug court–eligibles not restricted</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>by program failure or sentencing laws</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Joint probability(a)</td>
<td>22,671</td>
<td>8.8</td>
<td>14,384</td>
</tr>
<tr>
<td>Minimum probability(a)</td>
<td>32,424</td>
<td>12.6</td>
<td>26,151</td>
</tr>
<tr>
<td>Drug court–ineligibles not restricted</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>by program failure or sentencing laws</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Joint probability(a)</td>
<td>182,751</td>
<td>70.8</td>
<td>106,592</td>
</tr>
<tr>
<td>Minimum probability(a)</td>
<td>172,997</td>
<td>67.0</td>
<td>94,825</td>
</tr>
</tbody>
</table>

\(a\) Estimates are based on a threshold of \(p \leq .50\) defining ineligibility.

sentence (despite this question not being asked of the jail inmates), and one in ten were incarcerated as a result of a habitual offender law involving a second or third strike. Smaller percentages were subject to drug law (7 percent) or firearm (3 percent) sentence enhancements. The collective effect of these various sentencing laws was to keep drug courts beyond the reach of almost one-third of recently incarcerated at-risk offenders—most of whom (\(N = 133,644\), or 84 percent) were sentenced to state prison.
The last part of this analysis, presented in panel D, estimates the number of at-risk inmates, stratified by drug court eligibility, whose drug court access was not restricted by program failure or sentencing laws. By focusing on this latter subgroup of at-risk offenders, we can better assess the unique contribution of eligibility rules on drug court accessibility. As shown in the first part of panel D, between 7 and 11 percent of the combined cohort consisted of drug court-eligible inmates who were not recent program failures or mandatorily sentenced to a period of custody. This represents an incarcerated population that appears uniquely suitable for drug court diversion. That they were not diverted suggests that these inmates might have been incarcerated because of drug court capacity constraints. That is, we suspect they were incarcerated not because they failed to fit the drug court profile but because no drug court alternative was available to them. Diverting this group of offenders might require nothing more than a corresponding expansion of drug court capacity and utilization. The last part of panel D presents information on the group of drug court–ineligible offenders who were not also restricted by program failure or sentencing laws. Within the constraints of program capacity, this group represents a large subset of at-risk offenders (52–56 percent) who could readily be targeted for drug courts simply by expanding current eligibility rules.

To summarize, we examined several reasons why recently incarcerated at-risk offenders might have ended up behind bars rather than being diverted to a drug court. Our findings suggest that the majority (52–56 percent) of these offenders were likely excluded from drug courts due to restrictive eligibility criteria, and that a smaller subset (7–11 percent) possibly ended up behind bars because of insufficient drug court capacity. Our findings also indicate that drug court access was blocked for many recently incarcerated at-risk inmates because they recently failed similar offender-based treatment programs (7 percent) and/or were subject to overriding sentencing laws that precluded drug court entry (31 percent).

Estimating the flow of at-risk arrestees through the criminal justice system

As a final analysis, we provide a simple accounting of how at-risk offenders flow through the criminal justice system. As shown in Table 5, we begin with Bhati, Roman, and Chalfin’s (2008) estimate of 1.47 million arrestees who were “probably guilty” and at risk of drug abuse or dependence. Drawing on our previous analyses, we estimate that 17.5 percent of these at-risk arrestees were admitted to local jails, with another 17.6 percent admitted to state prisons. Then, drawing on annual enrollment figures reported in the MADCE (Zweig et al. 2011, 24), we estimate a flow of 52,777 annual new drug court entrants—equal to about 3.6 percent of at-risk arrestees.

Most of the remaining 900,820 (61.2 percent) at-risk offenders likely ended up on probation. These at-risk probationers represent about 40 percent of the 2.2 million state probation entries in 2003. One implication of this analysis is that there is a serious possibility of net-widening in “taking drug courts to scale” if the expansion courts target these lower-risk probationers rather than the otherwise prison- and jail-bound offenders.
Net-widening refers to the unintended consequence of criminal justice reforms that are aimed at reducing levels of punishment to instead expand the number who receive some punishment. This has, for example, been noted as a subversive influence of marijuana decriminalization. If marijuana possession becomes a civil infraction rather than a criminal misdemeanor, the burden on the individual police officer of making an arrest is reduced. Studies have repeatedly found that police respond to this alleviation by making more arrests (e.g., Christie and Ali 2000). Our concern here is that if drug courts permit the criminal justice system to cheaply impose more severe punishments on those who currently receive only probation, a large-scale expansion of drug courts will increase rather than reduce the extent of punishment handed out.

**Discussion and Conclusions**

Diverting drug-involved offenders into treatment instead of jail or prison has long been a major goal of the criminal justice system. The drug court movement has been a prominent and important innovation in this regard, almost universally praised by policymakers and practitioners alike. As a result, the number of drug courts has increased exponentially over the past two decades to become the standard model of therapeutic jurisprudence in the United States.

Attitudes toward drug courts, which have also been adopted in other countries such as Australia and Britain, have been strongly positive. Hence, it is surprising that these efforts still reach a very small share of the potentially eligible population. We can only speculate as to why there has not been more growth.

Many factors may be important, ranging from the mundane (a limited number of judges want to take on the task of hands-on offender supervision that is so
different from normal judicial duties) to the complex systemic (drug courts require the challenging coordination of social service and criminal justice agencies). Drug court advocates may also seek to keep the eligibility requirements tight because these increase the likelihood of successful evaluations. Moreover, drug courts, whatever the long-term gains from reduced offending, require upfront budgetary outlays that are relatively more costly than are the status quo supervision strategies. Many of these outlays are required for administrative infrastructure that yields no obvious or immediate benefits for public safety. All this means that expanding drug courts substantially to include higher-risk offenders will be a difficult challenge, and one that poses political and organizational challenges throughout the criminal justice system.

Our study shows that drug courts, as currently designed and operated, have only modest potential to reduce incarcerated populations, primarily because so few offenders entering jail or prison clearly meet existing eligibility requirements. Just 11 to 17 percent of recently incarcerated offenders at risk of drug abuse or dependence had better than a 50/50 chance of being eligible for drug court. On top of this, strict sentencing laws—mandatory minimums, sentencing guidelines, three-strikes laws, zero-tolerance drug zones, firearm sentence enhancements, and the like—precluded upwards of three in ten at-risk offenders from drug courts regardless of their eligibility. Drug court failures and limited drug court capacity (in the absence of other restrictions) also impeded diversion from prison and jail, albeit to a much lesser extent.

A key policy-relevant insight to follow from our analysis is that expanding access to drug courts could markedly increase their reach and, in turn, help to reduce incarcerated populations. This could, of course, be achieved in various ways and to different degrees. Straightaway, guaranteeing drug court access to the pool of eligible offenders who are incarcerated because of insufficient capacity is attractive, not because it would drastically cut prison and jail admissions but because its implementation would not require a great policy shift. We estimated there were roughly 37,000 to 59,000 such offenders in prison and jail, which represents an additional two-thirds increase to a doubling of adult drug court capacity (circa 2004). Given that resource limitations have been the main obstacle to drug court expansion (Huddleston and Marlowe 2011; Zweig et al. 2011), a concerted influx of federal and state dollars could viably begin to fill this treatment gap.

Increasing access to drug courts by expanding eligibility criteria has a much greater potential to reduce incarceration levels. We estimated that more than half the recently incarcerated offenders who were at risk of drug abuse or dependence—upwards of one-quarter million individuals—were excluded from drug courts solely because of restrictive eligibility criteria. Given the size of this population, a pragmatic first question for drug court planners pursuing expansion is which eligibility criteria can be relaxed. A number of observers, for instance, have argued that drug courts can safely enroll many drug-involved violent offenders without undue public safety risks (National Center on Addiction and
Substance Abuse 1998; Rossman et al. 2011; Saum and Hiller 2008; Saum, Scarpitti, and Robbins 2001). In particular, there are many aging drug-involved offenders whose violent crimes are long past and who are at little risk of such offenses in the foreseeable future (Pollack, Reuter, and Sevigny 2011). In this instance, the key to drug court expansion is for Congress to amend the authorizing legislation of the Drug Court Discretionary Grant Program to allow funded programs to accept violent offenders (Franco 2010; Saum and Hiller 2008).

Whatever specific criteria are targeted, expanding drug court eligibility would have a relatively greater effect on jail than prison populations because nearly two-thirds of drug court–ineligibles were housed in local jails. To obtain more meaningful reductions in state prison populations, any restructuring of drug court eligibility criteria would have to be accompanied by sentencing reform, as 84 percent of at-risk offenders subject to strict sentencing laws were incarcerated in state prisons. Florida adopted this strategy in 2009 when it raised the maximum allowable sentencing guidelines score for drug court admittance from 44 to 52 as part of the state’s effort to enroll more prison-bound offenders (Office of Program Policy Analysis and Government Accountability 2010).

We have to this point avoided one critical issue: Diverting even a portion of the half million recently incarcerated at-risk offenders into drug courts by lessening restrictions on eligibility or by mitigating the exclusionary effects of strict sentencing laws would require a massive increase in current drug court capacity. Our analyses suggest that annual drug court enrollments stand at about one-tenth the annual number of at-risk offenders admitted to prison and jail. Bhati, Roman, and Chalfin (2008) estimated that it would cost $13.7 billion to expand drug courts to fully meet this demand, and the National Association of Drug Court Professionals (NADCP) suggested it would take an investment of $1.5 billion over six years to make drug courts available to every nonviolent, drug-addicted offender (NADCP 2009).

One potentially viable approach to increase the reach of drug courts in tight fiscal times is to merge drug courts with other more scalable and less costly alternative-to-incarceration programs (Fluellen and Trone 2000). California’s Substance Abuse and Crime Prevention Act, otherwise known as “Prop 36,” provides one possible example. Prop 36 mandates treatment referral rather than a standard criminal justice disposition for all those arrested for the first or second time for a drug possession offense, providing the arrestee does not have a conviction for another serious crime. With Prop 36 annually enrolling seventeen times as many offenders as California’s drug courts, one recent study concluded that the two programs might function on a continuum whereby “Prop 36 is tried first, as a kind of ‘drug court-lite’ experience for offenders with a lower severity level, and only the more severe drug offenders, identified by program noncompliance, are moved into drug court” (Evans et al. 2010, 21).

A similar triaged approach would merge drug courts and coerced abstinence programs, such as in the case of the Hawaii Opportunity Probation with Enforcement (HOPE) initiative (Hawken and Kleiman 2009; Kleiman 2009; Kleiman and Hawken 2008). Although the HOPE model does not uniformly
require drug treatment for all offenders, it promises a swift and certain response toward those who use drugs or otherwise violate the conditions of their probation. In this scenario, only the high-risk, chronically addicted offenders who cannot remain abstinent would be referred to drug court.

A necessary caution that needs to be part of this discussion is that “taking drug courts to scale” greatly increases the risk of net-widening. We estimated that 61 percent of at-risk arrestees were sentenced to probation. As noted above, if expansion drug courts draw from this sizable noncustodial population rather than the population of at-risk offenders likely to end up in prison or jail, drug courts will have little impact on incarcerated populations while increasing the overall number of offenders supervised by the criminal justice system. Avoiding this pitfall will likely require careful program oversight and review alongside any expansion (Miller 2004; Roberts and Indermaur 2006).

Our findings should be interpreted in light of several limitations. First, our results are based on the self-reports of criminal offenders serving time in prison or jail. Offender self-reports are not only subject to the universal biases of recall and social desirability, but also to the sensitive nature of the questions typically asked of offenders. Nevertheless, the self-report methodology in criminological research has proven to be a valuable data collection approach that provides acceptable levels of reliability and validity (Junger-Tas and Marshall 1999).

Second, because relatively more serious offenders are captured in “one-day” samples of inmates, our reported estimates are likely to be undercounts of the total number of offenders who could be diverted into drug courts from prisons and, especially, jails. That is, the stock population of inmates is “sentence-length biased” relative to the annual admission population. Our focus on recently incarcerated cohorts should mitigate this effect.

Third, although we based our analyses on the most recently available inmate surveys, these data are now 8 to 10 years old. The number of drug courts has increased considerably in this time, and the populations served and eligibility rules employed are likely to have changed in cross-cutting ways. Replication of these results is therefore warranted with more recent data sources, including the next release of the Bureau of Justice Statistics inmate survey data.

Despite these limitations, our results provide the first systematic account of the various reasons recently incarcerated at-risk offenders were likely to have been excluded from drug courts. Recognizing that there are both humanitarian and policy reasons for reducing the number of drug-involved offenders held behind bars, we highlighted various courses of action policymakers could consider to increase the diversionary impact of drug courts.

We conclude by noting that, even without our analysis, it was obvious that drug courts were capable of serving only a tiny fraction of all drug-involved offenders. Proponents have been understandably concerned with ensuring that drug court clients have a high probability of success, and tight eligibility requirements help in that respect. Relaxing those requirements to admit populations that are at higher risk of recidivism will surely lead to higher failure rates. However, if drug courts are to achieve their full potential, and in particular help to deal with the nation’s
massive incarceration problem, there must be a willingness to experiment with broader eligibility requirements for certain currently excluded client groups.

Notes

1. Although other federal grant programs do not carry this violent offender restriction (e.g., the Center for Substance Abuse Treatment’s [CSAT’s] Drug Treatment Court Initiative), the majority of congressional appropriations continue to pass through the Drug Court Discretionary Grant Program (Franco 2010; Huddleston and Marlowe 2011).

2. Authors’ calculation based on the reported number of program enrollees (range: 107 to 1,837) and failure rates (range: 18 to 69 percent) across the eleven programs.

3. These are the most recent state prison and local jail inmate surveys in a series periodically fielded by the Bureau of Justice Statistics (BJS). We do not focus on federal inmates because drug courts are primarily state- and local-led initiatives.

4. Perhaps the survey designers did not think these questions would be answered truthfully by offenders still awaiting the disposition of their cases.

5. Our operationalization of drug abuse and dependence is discussed in the section on drug court eligibility criteria.

6. It was not possible to create direct measures of drug court capacity using the inmate survey data. However, in our analyses, we attempt to indirectly estimate the contribution of limited drug court capacity to prison and jail populations.

7. Note that the 593 drug courts reported here differs from the earlier cited number of 2,459 for several reasons, including a different reference year (2004 vs. 2009); the latter figure’s inclusion of juvenile, family, and other types of drug courts; and the former’s focus on mature drug courts (i.e., operational for at least one year).

8. \[ 1.00 \times 1.00 \times .94 \times 1.00 \times 1.00 \times .93 \times .51 \times 1.00 \times 1.00 \times 1.00 = .45. \]

9. Min (1.00, 1.00, .94, 1.00, 1.00, .93, .51, 1.00, 1.00, 1.00, 1.00) = .51.

10. Our use of the MADCE survey assumes the data are representative of the universe of adult drug courts circa 2004. According to Rossman et al. (2011), the MADCE survey obtained a representative sample based on the region of the country; however, slight variation occurred by the size of the metropolitan area, with urban areas somewhat more represented than suburban and rural areas. We suspect, however, that the MADCE’s overweighting of urban settings is consistent with the inmate populations.

11. Although we believe the point at which offenders are more likely than not to be excluded from drug court is a reasonable threshold, our results are sensitive to this choice. For example, using an eligibility cut point of \( P \leq .40 \) lowers our estimates of drug court ineligibility to 49 to 78 percent (based respectively on the minimum and joint probabilities). Conversely, using a cut point of \( P \leq .60 \) raises our estimates of drug court ineligibility to 89 to 93 percent.

12. Specifically, courts responding to the MADCE survey reported a mean of eighty-nine new entrants in 2003. We multiplied this figure by the overall number of adult drug courts (\( N = 593 \)) to obtain our estimate of 52,777.

13. There were 52,982 federal prison admissions in 2004. Even if all these offenders abused illegal drugs (which is certainly not the case), probation would still be the outcome for 57.6 percent of at-risk arrestees.

14. With about 9 million unique annual admissions, local jails admit about thirteen times as many inmates as state prisons every year (Beck 2006).

References


